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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–29336; Directorate Identifier 2007–NM–143–AD; Amendment 39–15373; AD 2008–04–01]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300, A310, and A300–600 Series Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated 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:

* * * accidents which occurred to in-service aircraft caused by the violent opening of the passenger door related to excessive residual pressure in the cabin.

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective March 19, 2008.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Tom Stafford, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1622; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on September 28, 2007 (72 FR 55124). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> The present AD requires the flight crew to follow the instructions of the ''emergency procedure check of delta P = 0'' of the Aircraft Flight Manual (AFM) at the latest revision date.
>
> This AD falls within the scope of a set of corrective measures developed by AIRBUS subsequent to accidents which occurred to in-service aircraft caused by the violent opening of the passenger door related to excessive residual pressure in the cabin.
>
> * * *

The corrective action is revising the Emergency Procedures sections of the AFMs to advise the flightcrew of new procedures for emergency evacuation. You may obtain further information by examining the MCAI in the AD docket.

Comments

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

Conclusion

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

Differences Between This 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 required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a **Note** within the AD.

Costs of Compliance

We estimate that this AD will affect about 238 products of U.S. registry. We also estimate that it will take about 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $19,040, or $80 per product.

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

For the reasons discussed above, I certify this AD:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008–04–01 Airbus: Amendment 39–15373. Docket No. FAA–2007–29336; Directorate Identifier 2007–NM–143–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective March 19, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A300, A310, and A300–600 series airplanes, certificated in any category, all certified models and all serial numbers.

Subject

(d) Air Transport Association (ATA) of America Code 21: Air conditioning.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

The present AD requires the flight crew to follow the instructions of the ''emergency procedure check of delta P = 0'' of the Aircraft Flight Manual (AFM) at the latest revision date.

This AD falls within the scope of a set of corrective measures developed by AIRBUS subsequent to accidents which occurred to in-service aircraft caused by the violent opening of the passenger door related to excessive residual pressure in the cabin.

* * *

The corrective action is revising the Emergency Procedures sections of the AFMs to advise the flightcrew of new procedures for emergency evacuation.

Actions and Compliance

(f) Within 30 days after the effective date of this AD, unless already done, do the following actions.

(1) For Model A300 series airplanes without modification 10002 installed, revise the Emergency Procedures sections of the AFM to include the following statement. This may be done by inserting a copy of this AD into the AFM.

''EMERGENCY EVACUATION

AIRCRAFT/PARKING BRAKE	Stop/Set.
ATC (VHF 1)	Notify.
Cabin crew	Notify.
EMER EXIT LT	ON.
BOTH FUEL LEVERS	OFF.
FIRE handles (ENG and APU)	Pull.
AGENTS (ENG and APU)	as rqrd.
RAM AIR INLET	Open.
Before opening doors:.	
ΔP (DIFF PRESS)	Check zero.
• If evacuation required:	
Evacuation	Initiate.
• If evacuation not required:	
CABIN CREW and PASSENGERS	Notify''.

(2) For Model A300 series airplanes on which modification 10002 is installed, revise the Emergency Procedures sections of the AFM to include the following statement. This may be done by inserting a copy of this AD into the AFM.

''EMERGENCY EVACUATION (Mod 10002)

AIRCRAFT/PARKING BRAKE	Stop/Set.
ATC (VHF 1)	Notify.
Cabin crew	Notify.
EMER EXIT LT	ON.
CL LT	ON.
BOTH FUEL LEVERS	OFF.
FIRE handles (ENG and APU)	Pull.
AGENTS (ENG and APU)	as rqrd.
RAM AIR INLET	Open.
Before opening doors:.	
ΔP (DIFF PRESS)	Check zero.
• If evacuation required:	
Evacuation	Initiate.
• If evacuation not required:	
CABIN CREW and PASSENGERS	Notify''.

(3) For Model A310 and A300–600 series airplanes, revise the Emergency Procedures sections of the AFM to include the following information. This may be done by inserting a copy of this AD into the AFM.

''Before opening doors:

• IF DEPRESS VALVE selected in MAN mode:	
—DEPRESS VALVE MAN CLT	Full Open.
—ΔP (Diff press)	Check zero.
• If evacuation required:	
—Evacuation	Initiate.
—BAT (before leaving A/C)	OFF/R.
• If evacuation not required:	
—CABIN CREW and PASSENGERS	Notify''.

Note 1: When the information described in paragraphs (f)(1), (f)(2), or (f)(3) has been included in the general revisions of the AFM, the general revisions may be inserted in the applicable AFM, and the copy of the AD may be removed from that AFM.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Stafford, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1622; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(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, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2007–0093 R1, dated April 17, 2007, for related information.

Material Incorporated by Reference

(i) None.

Issued in Renton, Washington, on February 4, 2008.

Kevin Hull,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–2587 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0167; Directorate Identifier 2008–NM–029–AD; Amendment 39–15374; AD 2008–04–02]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model DHC–8–400 Series Airplanes

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Bombardier Model DHC–8–400 series airplanes. This AD requires inspecting all barrel nuts to determine if the barrel nuts have a certain marking, inspecting affected bolts to determine if the bolts are pre-loaded correctly, and replacing all hardware if the pre-load is incorrect. For airplanes on which the pre-load is correct, this AD requires doing repetitive visual inspections for cracking of the barrel nuts and cradles and replacing all hardware for all cracked barrel nuts. This AD also requires replacement of all hardware for certain affected barrel nuts that do not have cracking, which would end the repetitive inspections for those airplanes. This AD also provides an optional replacement for all affected barrel nuts. This AD results from reports of cracking in the barrel nuts at the four primary front spar wing-to-fuselage attachment joints. We are issuing this AD to detect and correct cracking of the barrel nuts at the wing front spar wing-to-fuselage joints, which could result in reduced structural integrity of the wing-to-fuselage attachments and consequent detachment of the wing.

DATES: This AD becomes effective February 13, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of February 13, 2008.

We must receive comments on this AD by March 14, 2008.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Bombardier, Inc., Bombardier Regional Aircraft Division, 123 Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.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 AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Pong Lee, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7324; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

Transport Canada Civil Aviation (TCCA), which is the airworthiness authority for Canada, notified us that an unsafe condition may exist on certain Bombardier Model DHC–8–400 series airplanes. TCCA advises that during scheduled maintenance, an operator found cracks in the barrel nut at one of the four primary front spar wing-to-fuselage attachment joints. Investigation

determined that the cracks were due to hydrogen embrittlement and that the problem is likely restricted to a batch of 166 barrel nuts from one supplier. In addition, another operator has reported finding cracked barrel nuts at three of the four wing front spar wing-to-fuselage joints on one aircraft. All three barrel nuts were from the suspect batch. Cracking of the barrel nuts, if not detected and corrected, could result in reduced structural integrity of the wing-to-fuselage attachments and consequent detachment of the wing.

Relevant Service Information

Bombardier has issued Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008. The service bulletin describes the following procedures:

- Determining whether the inboard and outboard bolts are correctly pre-loaded.
- Replacing all hardware at locations where the pre-load is incorrect.
- Doing a visual inspection of the barrel nut and cradle for cracking.
- Replacing cracked barrel nuts with all new hardware.
- Doing an inspection for certain markings of the barrel nuts.
- Replacing barrel nuts having the affected markings.

TCCA mandated the service bulletin and issued Canadian emergency airworthiness directive CF–2008–11, dated February 5, 2008, to ensure the continued airworthiness of these airplanes in Canada.

FAA's Determination and Requirements of This AD

These airplanes are manufactured in Canada 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, TCCA has kept the FAA informed of the situation described above. We have examined TCCA's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are issuing this AD to detect and correct cracking of the barrel nuts at the wing front spar wing-to-fuselage joints, which could result in reduced structural integrity of the wing-to-fuselage attachments and consequent detachment of the wing.

This AD requires the following actions:

- Inspecting all barrel nuts to determine if the barrel nuts have a marking of LH7940T SPS 01 (all barrel nuts with this marking will also have a yellow dot identifier).
- Inspecting (repetitively) affected bolts to determine if the bolts are pre-loaded correctly.
- Replacing all hardware if the pre-load is incorrect.
- Doing repetitive visual inspections for cracking of the barrel nuts and cradles for airplanes on which the pre-load is correct.
- Replacing all hardware for all cracked barrel nuts.
- Replacing all hardware for certain affected barrel nuts that do not have cracking, which would end the repetitive inspections for those airplanes. This AD also provides an optional replacement for all affected barrel nuts.

Differences Between the AD and Canadian Emergency Airworthiness Directive

The Canadian emergency airworthiness directive recommends accomplishing the inspection of the barrel nuts within 100 flight hours. We have determined, however, that the inspection must be done within 50 flight hours to adequately address the unsafe condition. In developing an appropriate compliance time for all airplanes that are affected by this AD, we considered not only the manufacturer's recommendation, but the degree of urgency associated with addressing the subject unsafe condition, the average utilization of the affected fleet, and the time necessary to perform the required inspections. We have coordinated this difference with TCCA.

We consider this AD interim action. We are currently considering requiring the replacement of all hardware for all barrel nuts identified with a marking of LH7940T SPS 01, as required by the Canadian emergency airworthiness directive. However, the planned compliance time for the replacement would allow enough time to provide notice and opportunity for prior public comment on the merits of the modification. In order to ensure continued operational safety in the interim, this AD requires repetitive inspections for cracking of the suspect barrel nuts every 100 flight hours until the replacement is done.

FAA's Justification and Determination of the Effective Date

Cracking of the barrel nuts at the wing front spar wing-to-fuselage joints could result in reduced structural integrity of the wing-to-fuselage attachments and consequent detachment of the wing. Because of our requirement to promote safe flight of civil aircraft and thus, the critical need to assure the structural integrity of the front spar wing-to-fuselage attachment joints and the short compliance time involved with this action, this AD must be issued immediately.

Because an unsafe condition exists that requires the immediate adoption of this AD, we find that notice and opportunity for prior public comment hereon are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0167; Directorate Identifier 2008–NM–029–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008–04–02 BOMBARDIER, INC. (FORMERLY DE HAVILLAND, INC.): Amendment 39–15374. Docket No. FAA–2008–0167; Directorate Identifier 2008–NM–029–AD.

Effective Date

(a) This AD becomes effective February 13, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier Model DHC–8–400, DHC–8–401, and DHC–8–402 airplanes, certificated in any category; serial numbers 4001 and 4003 through 4176 inclusive.

Unsafe Condition

(d) This AD results from reports of cracking in the barrel nuts at the four primary front spar wing-to-fuselage attachment joints. We are issuing this AD to detect and correct cracking of the barrel nuts at the wing front spar wing-to-fuselage joints, which could result in reduced structural integrity of the wing-to-fuselage attachments and consequent detachment of the wing.

Compliance

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

Inspections and Corrective Actions

(f) Within 50 flight hours after the effective date of this AD, inspect all barrel nuts, part number DSC228–16, to determine if the barrel nuts are identified with a marking of LH7940T SPS 01. Inspect in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008.

(1) If no barrel nuts are identified with a marking of LH7940T SPS 01, no further actions are required by this paragraph.

(2) If any barrel nut is found that is identified with a marking of LH7940T SPS 01, before further flight, inspect the inboard and outboard bolts to determine if the bolts are pre-loaded correctly. Inspect in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008.

(i) If the pre-load is incorrect (i.e., the ring can be rotated), before further flight, replace all hardware at that location in accordance with the Accomplishment Instructions of the alert service bulletin.

(ii) If the preload is correct, before further flight, do a visual inspection for cracking of the barrel nuts and cradles in accordance with the Accomplishment Instructions of the alert service bulletin.

(A) If no cracking of the barrel nut and cradle is found, do the applicable action required by paragraph (g) of this AD.

(B) If no cracking of the barrel nut is found and only cracking of the cradle is found, no action is required by this paragraph provided that the applicable corrective action specified in paragraph (g) of this AD is done.

(C) If any cracking of the barrel nut is found, before next flight, replace all hardware only at that location in accordance with the Accomplishment Instructions of the alert service bulletin.

(g) For any barrel nuts on which no cracking of the barrel nut was found during the inspection required by paragraph (f)(2)(ii) of this AD, do the applicable corrective action specified in paragraph (g)(1), (g)(2), (g)(3), (g)(4), or (g)(5) of this AD at the compliance time specified in the applicable paragraph.

(1) If four barrel nuts having no cracking are found, do the actions specified in paragraphs (g)(1)(i), (g)(1)(ii), and (g)(1)(iii) of this AD.

(i) Within 50 flight hours after doing the inspection required by paragraph (f)(2)(ii) of this AD, repeat the inspection specified in paragraph (f)(2) of this AD. Thereafter, repeat the inspection at intervals not to exceed 50 flight hours until the replacement specified in paragraph (g)(1)(ii) of this AD is done.

(ii) Within 100 flight hours after doing the inspection required by paragraph (f)(2)(ii) of this AD, replace all hardware at the left-hand outboard location and the right-hand outboard location in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008. Replacing the barrel nuts on the outboard locations terminates the requirement to do the repetitive inspections specified in paragraph (g)(1)(i) of this AD.

(iii) Within 100 flight hours after doing the replacement required by paragraph (g)(1)(ii) of this AD, repeat the inspection specified in paragraph (f)(2) of this AD for the remaining barrel nuts identified with a marking of LH7940T SPS 01. Thereafter, repeat the inspection at intervals not to exceed 100 flight hours until the replacement of all hardware at those locations is done. Do the inspection and replacement in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008.

(2) If three barrel nuts having no cracking are found, do the actions specified in paragraphs (g)(2)(i), (g)(2)(ii), and (g)(2)(iii) of this AD.

(i) Within 50 flight hours after doing the inspection required by paragraph (f)(2)(ii) of this AD, repeat the inspection specified in paragraph (f)(2) of this AD. Thereafter, repeat the inspection at intervals not to exceed 50 flight hours until the replacement specified in paragraph (g)(2)(ii) of this AD is done.

(ii) Within 100 flight hours after doing the inspection required by paragraph (f)(2)(ii) of this AD, replace all hardware for one affected barrel nut at the outboard location, on the side with two affected barrel nuts, in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008. Replacing the barrel nut on the outboard location terminates the requirement to do the repetitive inspections specified in paragraph (g)(2)(i) of this AD.

(iii) Within 100 flight hours after doing the replacement required by paragraph (g)(2)(ii) of this AD, repeat the inspection specified in paragraph (f)(2) of this AD for the remaining barrel nuts identified with a marking of LH7940T SPS 01. Thereafter, repeat the inspection at intervals not to exceed 100 flight hours until the replacement of all hardware at those locations is done. Do the inspection and replacement in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008.

(3) If two barrel nuts having no cracking are found and both nuts are on the same side, do the actions specified in paragraphs (g)(3)(i), (g)(3)(ii), and (g)(3)(iii) of this AD.

(i) Within 100 flight hours after doing the inspection required by paragraph (f)(2)(ii) of this AD, repeat the inspection specified in paragraph (f)(2) of this AD. Thereafter, repeat the inspection at intervals not to exceed 100 flight hours until the replacement specified in paragraph (g)(3)(ii) of this AD is done.

(ii) Within 500 flight hours after doing the inspection required by paragraph (f)(2)(ii) of this AD, replace all hardware for one affected barrel nut at the outboard location that has two affected barrel nuts in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008. Replacing the barrel nut on the outboard location terminates the requirement to do the repetitive inspections specified in paragraph (g)(3)(i) of this AD.

(iii) Within 100 flight hours after doing the replacement required by paragraph (g)(3)(ii) of this AD, repeat the inspection specified in paragraph (f)(2) of this AD for the remaining barrel nut identified with a marking of LH7940T SPS 01. Thereafter, repeat the inspection at intervals not to exceed 100 flight hours until the replacement of all hardware at that location is done. Do the inspection and replacement in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008.

(4) If two barrel nuts having no cracking are found and are on opposite sides, within 100 flight hours after doing the inspection required by paragraph (f)(2)(ii) of this AD, repeat the inspection specified in paragraph (f)(2) of this AD. Thereafter, repeat the inspection at intervals not to exceed 100 flight hours until the replacement of all hardware at those locations is done. Do the inspection and replacement in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008.

(5) If one barrel nut having no cracking is found, within 100 flight hours after doing the inspection required by paragraph (f)(2)(ii) of this AD, repeat the inspection specified in paragraph (f)(2) of this AD. Thereafter, repeat the inspection at intervals not to exceed 100 flight hours until the replacement of all hardware at that location is done. Do the inspection and replacement in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008.

Optional Replacement

(h) Replacement of all hardware for all barrel nuts, part number DSC228–16, identified with a marking of LH7940T SPS 01, constitutes terminating action for this AD. Replacement must be done in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008.

Actions Accomplished According to Previous Issue of Alert Service Bulletin

(i) Actions accomplished before the effective date of this AD in accordance with Bombardier Alert Service Bulletin A84–57–19, dated February 1, 2008, are acceptable for compliance with the corresponding actions specified in this AD.

Actions Accomplished According to Bombardier Alert Service Bulletin A84–57–18

(j) For airplanes on which the actions specified in Bombardier Alert Service Bulletin A84–57–18, dated January 16, 2008, were accomplished before the effective date of this AD and on which no barrel nuts were found that were identified with a marking of LH7940T SPS 01: No further action is required by this AD.

Parts Installation

(k) As of the effective date of this AD, no person may install a barrel nut, part number DSC228–16, identified with a marking of LH7940T SPS 01, on any airplane.

Special Flight Permit

(l) Special flight permits, as described in Section 21.197 and Section 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199), may be issued to operate the airplane to a location where the requirements of this AD can be accomplished but concurrence by the Manager, New York Aircraft Certification Office, FAA, is required prior to issuance of the special flight permit. Before using any approved special flight permits, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO. Special flight permits may be permitted provided that the conditions specified in paragraph (l)(1), (l)(2), (l)(3), (l)(4), and (l)(5) of this AD are met.

(1) Both the right-hand side and left-hand side of the airplane must have at least one barrel nut that is not within the suspect batch (i.e., barrel nut is not identified with a marking of LH7940T SPS 01). The barrel nuts that are not within the suspect batch must be in good working condition (i.e., no cracking of the barrel nut).

(2) No passengers and no cargo are onboard.

(3) Airplane must operate in fair weather conditions with a low risk of turbulence.

(4) Airplane must operate with reduced airspeed. For further information, contact Bombardier, Q Series 24 Hour Service Customer Response Center, at: Tel: 1–416–375–4000; Fax: 1–416–375–4539; E-mail: *thd.qseries@aero.bombardier.com*.

(5) All of the conditions specified in paragraphs (l)(1), (l)(2), (l)(3), and (l)(4) of this AD are on a case-by-case basis. Contact your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO, for assistance.

Alternative Methods of Compliance (AMOCs)

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

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Related Information

(n) Canadian emergency airworthiness directive CF–2008–11, dated February 5, 2008.

Material Incorporated by Reference

(o) You must use Bombardier Alert Service Bulletin A84–57–19, Revision A, dated February 6, 2008, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Bombardier, Inc., Bombardier Regional Aircraft Division, 123 Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada, for a copy of this service information. You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on February 7, 2008.

Kevin Hull,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–2747 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 157

[Docket No. RM81–19–000]

Natural Gas Pipelines; Project Cost and Annual Limits

February 5, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

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

DATES: This final rule is effective February 13, 2008 and establishes cost limits applicable from January 1, 2008 through December 31, 2008.

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

Publication of Project Cost Limits Under Blanket Certificates

Order of the Director, OEP

February 5, 2008

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

Pursuant to § 375.308(x)(1) of the Commission's Regulations, the authority for the publication of such cost limits, as adjusted for inflation, is delegated to the Director of the Office of Energy Projects. The cost limits for calendar year 2008, as published in Table I of § 157.208(d) and Table II of § 157.215(a), are hereby issued.

List of Subjects in 18 CFR Part 157

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

J. Mark Robinson,

Director, Office of Energy Projects.

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

PART 157—[AMENDED]

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

Authority: 15 U.S.C. 717–717w.

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

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

* * * * *

(d) * * *

TABLE I

Year	Limit	
	Auto. proj. cost	Prior notice
1982	$4,200,000	$12,000,000
1983	4,500,000	12,800,000
1984	4,700,000	13,300,000
1985	4,900,000	13,800,000

TABLE I—Continued

Year	Limit	
	Auto. proj. cost	Prior notice
1986	5,100,000	14,300,000
1987	5,200,000	14,700,000
1988	5,400,000	15,100,000
1989	5,600,000	15,600,000
1990	5,800,000	16,000,000
1991	6,000,000	16,700,000
1992	6,200,000	17,300,000
1993	6,400,000	17,700,000
1994	6,600,000	18,100,000
1995	6,700,000	18,400,000
1996	6,900,000	18,800,000
1997	7,000,000	19,200,000
1998	7,100,000	19,600,000
1999	7,200,000	19,800,000
2000	7,300,000	20,200,000
2001	7,400,000	20,600,000
2002	7,500,000	21,000,000
2003	7,600,000	21,200,000
2004	7,800,000	21,600,000
2005	8,000,000	22,000,000
2006	9,600,000	27,400,000
2007	9,900,000	28,200,000
2008	10,200,000	29,000,000

* * * * *

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

§ 157.215 Underground storage testing and development.

(a) * * *

(5) * * *

TABLE II

Year	Limit
1982	$2,700,000
1983	2,900,000
1984	3,000,000
1985	3,100,000
1986	3,200,000
1987	3,300,000
1988	3,400,000
1989	3,500,000
1990	3,600,000
1991	3,800,000
1992	3,900,000
1993	4,000,000
1994	4,100,000
1995	4,200,000
1996	4,300,000
1997	4,400,000
1998	4,500,000
1999	4,550,000
2000	4,650,000
2001	4,750,000
2002	4,850,000
2003	4,900,000
2004	5,000,000
2005	5,100,000
2006	5,250,000
2007	5,400,000
2008	5,550,000

* * * * *

[FR Doc. E8–2531 Filed 2–12–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510 and 522

New Animal Drugs; Change of Sponsor; Ketamine

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor for an abbreviated new animal drug application (ANADA) for ketamine hydrochloride injectable solution from Veterinary Research Associates, Inc., to Putney, Inc.

DATES: This rule is effective February 13, 2008.

FOR FURTHER INFORMATION CONTACT: David R. Newkirk, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8307, e-mail: *david.newkirk@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Veterinary Research Associates, Inc., 2817 West Country Rd., 54G, Fort Collins, CO 80524, has informed FDA that it has transferred ownership of, and all rights and interest in, ANADA 200–073 for Ketamine Hydrochloride Injection, USP, to Putney, Inc., 400 Congress St., suite 200, Portland, ME 04101. Accordingly, the regulations are amended in 21 CFR 522.1222a to reflect this change of sponsorship.

Following these changes of sponsorship, Veterinary Research Associates, Inc., is no longer the sponsor of an approved application. In addition, Putney, Inc., is not currently listed in the animal drug regulations as a sponsor of an approved application. Accordingly, 21 CFR 510.600(c) is being amended to remove the entries for Veterinary Research Associates, Inc., and to add entries for Putney, Inc.

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 522

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 522 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) remove the entry for ''Veterinary Research Associates, Inc.'' and alphabetically add a new entry for ''Putney, Inc.''; and in the table in paragraph (c)(2) remove the entry for ''064408'' and numerically add an entry for ''026637'' 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
* * * *	*
Putney, Inc., 400 Congress St., suite 200, Portland, ME 04101	026637
* * * *	*

(2) * * *

Drug labeler code	Firm name and address
* * * *	*
026637	Putney, Inc., 400 Congress St., suite 200, Portland, ME 04101
* * * *	*

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

■ 3. The authority citation for 21 CFR part 522 continues to read as follows:

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

§ 522.1222a [Amended]

■ 4. In § 522.1222a, revise paragraph (b) by removing ''064408'' and numerically adding ''026637''.

Dated: January 31, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8–2607 Filed 2–12–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Phenylbutazone Tablets

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 two supplemental new animal drug applications (NADAs) filed by IVX Animal Health, Inc. The supplemental NADAs provide revised labeling for phenylbutazone tablets used in horses and dogs.

DATES: This rule is effective February 13, 2008.

FOR FURTHER INFORMATION CONTACT: Melanie R. Berson, Center for Veterinary Medicine (HFV–110), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8337, e-mail: *melanie.berson@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: IVX Animal Health, Inc., 3915 South 48th Street Ter., St. Joseph, MO 64503, filed supplements to NADA 91–818 and NADA 94–170 for Phenylbutazone Tablets. The supplemental applications provide for revisions to warning statements on product labeling. The supplemental NADAs are approved as of January 17, 2008, and 21 CFR 520.1720a is amended to reflect the approval.

Approval of these supplemental NADAs did not require review of additional safety or effectiveness data or information. Therefore, a freedom of information summary is not required.

The agency has determined under 21 CFR 25.33(a)(1) that these actions are of a type that do not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

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 in 21 CFR Part 520

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 part 520 is amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

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

■ 2. Revise § 520.1720a to read as follows:

§ 520.1720a Phenylbutazone tablets and boluses.

(a) *Specifications*. Each tablet contains 100, 200, or 400 milligrams (mg), or 1 gram (g) phenylbutazone. Each bolus contains 2 or 4 g phenylbutazone.

(b) *Sponsors*. See sponsor numbers in § 510.600(c) of this chapter, as follows:

(1) No. 000061 for use of 100- or 400-mg or 1-g tablets, or 2- or 4-g boluses, in dogs and horses.

(2) Nos. 000010 and 059130 for use of 100- or 200-mg or 1-g tablets in dogs and horses.

(3) Nos. 000856, 058829, and 061623 for use of 100-mg or 1-g tablets in dogs and horses.

(4) No. 055246 for use of 100-mg tablets in dogs.

(5) No. 000143 for use of 1-g tablets in horses.

(c) *Conditions of use*—(1) *Dogs*—(i) *Amount*. 20 mg per pound of body weight daily.

(ii) *Indications for use*. For the relief of inflammatory conditions associated with the musculoskeletal system.

(iii) *Limitations*. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

(2) *Horses*—(i) *Amount*. 1 to 2 g per 500 pounds of body weight daily.

(ii) *Indications for use*. For the relief of inflammatory conditions associated with the musculoskeletal system.

(iii) *Limitations*. Do not use in horses intended for human consumption. Federal law prohibits the use of this drug in female dairy cattle 20 months of age or older. Federal law restricts this drug to use by or on the order of a licensed veterinarian.

Dated: January 31, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8–2608 Filed 2–12–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9375]

RIN 1545–BA96

Guidance Necessary To Facilitate Electronic Tax Administration—Updating of Section 7216 Regulations; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations; correction.

SUMMARY: This document contains corrections to final regulations (TD 9375) that were published in the **Federal Register** on Monday, January 7, 2008 (73 FR 1058) regarding the disclosure and use of their tax return information by tax return preparers.

DATES: The correction is effective February 13, 2008.

FOR FURTHER INFORMATION CONTACT: Lawrence Mack, (202) 622–4940 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9375) that are the subject of the correction are under Section 7216 of the Internal Revenue Code.

Need for Correction

As published, final regulations (TD 9375) contain errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the final regulations (TD 9375), which were the subject of FR Doc. 08–1, is corrected as follows:

1. On page 1058, column 3, in the preamble, under the paragraph heading ''Background'', seventh line of the fifth paragraph of the column, the language ''2005–52 I.R.B. 1204 (December 07,'' is corrected to read ''2005–52 I.R.B. 1204 (December 7,''.

2. On page 1062, column 1, in the preamble, under the paragraph heading ''D. Disclosures to Other Tax Return Preparers'', thirteenth line of the column, the language ''Service provider. The commentator's'' is corrected to read ''service provider. The commentator's''.

3. On page 1066, column 3, in the preamble, under the paragraph heading ''H. Multiple Disclosures or Multiple Uses Within a Single Consent Form'', fifteenth line of the second paragraph, the language ''Section 301–7216–3(c)(1) of the final'' is corrected to read ''Section 301.7216–3(c)(1) of the final''.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. E8–2597 Filed 2–12–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2008–0063 Formerly CGD11–08–003]

Drawbridge Operation Regulations; Sacramento River, Sacramento, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eleventh Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Tower Drawbridge across the Sacramento River, mile 59.0, at Sacramento, CA. The deviation is necessary to allow the public to cross the bridge to participate in the scheduled Shamrock Half Marathon Footrace, a community event. This deviation allows the bridge to remain in the closed-to-navigation position during the race.

DATES: This deviation is effective from 7:45 a.m. through 9:45 a.m. on March 16, 2008.

ADDRESSES: Materials referred to in this document are available for inspection or copying at Commander (dpw), Eleventh Coast Guard District, Building 50–2, Coast Guard Island, Alameda, CA 94501–5100, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The telephone number is (510) 437–3516. The Eleventh Coast Guard District maintains the public docket for this temporary deviation.

FOR FURTHER INFORMATION CONTACT: David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District, telephone (510) 437–3516.

SUPPLEMENTARY INFORMATION: The California Department of Transportation requested a temporary change to the operation of the Tower Drawbridge, mile 59.0, over the Sacramento River, at Sacramento, CA. The Tower Drawbridge navigation span provides a vertical clearance of 30 feet above Mean High Water in the closed-to-navigation position. The draw opens on signal as required by 33 CFR 117.5. Navigation on the waterway is commercial and recreational.

The drawspan will be secured in the closed-to-navigation position 7:45 a.m. through 9:45 a.m. on March 16, 2008 to allow participants in the Shamrock Half Marathon Footrace to cross the bridge during the event. This temporary deviation has been coordinated with waterway users. There are no scheduled river boat cruises or anticipated levee maintenance during this deviation period. No objections to the temporary deviation were raised.

Vessels that can transit the bridge, while in the closed-to-navigation position, may continue to do so at any time.

In the event of an emergency the drawspan can be opened with 30 minutes advance notice.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: January 29, 2008.

C.E. Bone,

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

[FR Doc. E8–2690 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2008–0062 Formerly CGD11–08–002]

Drawbridge Operation Regulations; Sacramento River, Sacramento, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eleventh Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Tower Drawbridge across the Sacramento River, mile 59.0, at Sacramento, CA. The deviation is necessary to allow the public to cross the bridge to participate in the scheduled Tour of California Bicycle Race, a community event. This deviation allows the bridge to remain in the closed-to-navigation position during the race.

DATES: This deviation is effective from 1:45 p.m. through 2:45 p.m. on February 19, 2008.

ADDRESSES: Materials referred to in this document are available for inspection or copying at Commander (dpw), Eleventh Coast Guard District, Building 50–2, Coast Guard Island, Alameda, CA 94501–5100, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The telephone number is (510) 437–3516. The Eleventh Coast Guard District maintains the public docket for this temporary deviation.

FOR FURTHER INFORMATION CONTACT: David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District, telephone (510) 437–3516.

SUPPLEMENTARY INFORMATION: The California Department of Transportation requested a temporary change to the operation of the Tower Drawbridge, mile 59.0, over the Sacramento River, at Sacramento, CA. The Tower Drawbridge navigation span provides a vertical clearance of 30 feet above Mean High Water in the closed-to-navigation position. The draw opens on signal as required by 33 CFR 117.5. Navigation on the waterway is commercial and recreational.

The drawspan will be secured in the closed-to-navigation position 1:45 p.m. through 2:45 p.m. on February 19, 2008 to allow participants in the Tour of California Bicycle Race to cross the bridge during the event. This temporary deviation has been coordinated with waterway users. There are no scheduled river boat cruises or anticipated levee maintenance during this deviation period. No objections to the temporary deviation were raised.

Vessels that can transit the bridge, while in the closed-to-navigation position, may continue to do so at any time.

In the event of an emergency the drawspan can be opened with 30 minutes advance notice.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: January 29, 2008.

C.E. Bone,

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

[FR Doc. E8–2689 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–1002; FRL–8521–5]

Approval and Promulgation of Air Quality Implementation Plans; State of Colorado; Regulation No. 7, Section XII, Volatile Organic Compounds From Oil and Gas Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a State Implementation Plan (SIP) revision submitted by the State of Colorado. On August 3, 2007, the Governor's designee submitted revisions to Colorado's Regulation No. 7, ''Emissions of Volatile Organic Compounds,'' Section XII, ''Volatile Organic Compounds (VOC) From Oil and Gas Operations.'' EPA is approving the revisions to Regulation No. 7, Section XII. This action is being taken under Section 110 of the Clean Air Act.

DATES: This direct final rule is effective on April 14, 2008 without further notice, unless EPA receives adverse comment by March 14, 2008. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket Number EPA–R08–OAR–2007–1002, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: videtich.callie@epa.gov* and *fiedler.kerri@epa.gov*.
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Mail:* Callie A. Videtich, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Callie A. Videtich, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2007–1002. EPA's policy is that all comments received will be included in the public docket without change and may be made available at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://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. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR**

FURTHER INFORMATION CONTACT section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kerri Fiedler, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, phone (303) 312–6493, and e-mail at: *fiedler.kerri@epa.gov*.

SUPPLEMENTARY INFORMATION:

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I. General Information
II. What is the purpose of this action?
III. What is the State's process to submit these materials to EPA?
IV. EPA's Evaluation of the Regulation No. 7, Section XII, Revisions
V. Consideration of Section 110(l) of the CAA
VI. Final Action
VII. Statutory and Executive Order Reviews

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *NAAQS* mean National Ambient Air Quality Standard.

(iv) The initials *SIP* mean or refer to State Implementation Plan.

(v) The word *State* means the State of Colorado, unless the context indicates otherwise.

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *http://regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

I. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

II. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

III. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

IV. Describe any assumptions and provide any technical information and/or data that you used.

V. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

VI. Provide specific examples to illustrate your concerns, and suggest alternatives.

VII. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

VIII. Make sure to submit your comments by the comment period deadline identified.

II. What is the purpose of this action?

In this action, we are approving revisions to Regulation No. 7, Section XII, for the control of VOC emissions from oil and gas operations. James B. Martin, the Executive Director of the Colorado Department of Public Health and Environment, submitted these revisions to us on August 3, 2007.

We previously approved Regulation No. 7, Section XII, on August 19, 2005 (see 70 FR 48652) as part of Denver's Early Action Compact (EAC) SIP for the 8-hour ozone standard. The purpose of the EAC SIP is to prevent exceedances of the 8-hour ozone standard in the Denver EAC area.[1] Due to unanticipated growth of condensate tank emissions in the oil and gas sector, the State determined that the version of Regulation No. 7, Section XII, that we approved in 2005 needed to be revised. The version of Regulation No. 7, Section XII, submitted August 3, 2007 requires a greater level of control of condensate tank emissions in the 8-hour ozone non-attainment area.

[1] In April 2004, EPA designated the Denver area (Adams, Arapahoe, Boulder, Broomfield, Denver, Douglas, Jefferson, and parts of Larimer and Weld counties) as non-attainment for the 8-hour ozone standard, but deferred the effective date of the designation based on a commitment from the State of Colorado, the Regional Air Quality Council and others to implement ozone control measures sooner than required by the Clean Air Act. This commitment was contained in the Denver Early Action Compact (EAC). The non-attainment designation for the area became effective November 20, 2007, as a result of a violation for 2005–2007, which triggers requirements for future revisions to the attainment demonstration SIP for the Denver EAC area.

III. What is the State's process to submit these materials to EPA?

Section 110(k) of the CAA addresses our actions on submissions of SIP revisions. The CAA requires States to observe certain procedural requirements in developing SIP revisions. Section 110(a)(2) of the CAA requires that each SIP revision be adopted by a State after reasonable notice and public hearing. This must occur before a State submits the revision to us.

The Colorado Air Quality Control Commission (AQCC) held public hearings for the revisions to Regulation No. 7, Section XII, on November 17, 2006, November 18, 2006, and December 17, 2006. The AQCC adopted the revisions on January 5, 2007. The revisions became State effective on March 4, 2007.

We have evaluated the revisions to Regulation No. 7, Section XII, and have determined that the State met the requirements for reasonable notice and public hearing under section 110(a)(2) of the CAA.

IV. EPA's Evaluation of the Regulation No. 7, Section XII, Revisions

Colorado's Regulation No. 7, Section XII, ''Volatile Organic Compound Emissions From Oil And Gas Operations,'' imposes emission control requirements on oil and gas condensate tanks located in the Denver EAC area, with the majority of affected facilities being located in southern Weld County. Among other things, Regulation No. 7, Section XII, includes definitions; required emission reductions for the high ozone season and rest of the year; numerous recordkeeping requirements for a spreadsheet to determine weekly and other periodic compliance; emission factors used to demonstrate compliance; reporting requirements for certain equipment if a construction or Title V permit is issued by the State; a methodology for approval of alternative emissions control equipment; requirements for gas-processing plants; requirements for controlling emissions from dehydration units; and a methodology for approval to develop testing methods and revised emission factors.

The condensate tank requirements, along with other requirements applicable to oil and gas operations and natural gas fired reciprocating internal combustion engines, were initially promulgated in March 2004, and later

revised in December 2004. Colorado submitted these requirements to us as a SIP revision, which we approved on August 19, 2005 (see 70 FR 48652). Colorado designed the emission limits in the 2004 revision of Regulation No. 7, Section XII, to achieve total condensate tank VOC emissions in the Denver EAC area during the summer ozone season of no more than 91.3 tons per day (tpd) as of May 1, 2007, and 100.9 tpd as of May 1, 2012. These daily values were relied on to demonstrate attainment of the 8-hour ozone standard in the modeling analysis, as part of the EAC SIP. However, because of unanticipated growth of condensate tank emissions, the State later determined that the emission limits in the 2004 version of Regulation No. 7 would be insufficient to meet these daily emission numbers. The 2007 revisions require a greater level of control of condensate tank emissions within the 8-hour ozone non-attainment area boundary. The State's goal remains to achieve the same daily emission targets for condensate tank VOC emissions.

We note that the VOC emission reductions that are required by Regulation No. 7, Section XII, are achieved not by specific requirements on each condensate tank, but instead by overall or system-wide emission reductions for each affected company's operations. As stated in Regulation No. 7, Section XII, the requirement to control emissions applies to owners or operators of condensate tanks with a cumulative total of 30 tons per year or more of VOC emissions. In practice, industry has controlled the condensate tank VOC emissions with flares or vapor recovery units, and Regulation No. 7, Section XII, requires these types of emission control devices to achieve 95% control efficiency.

Revised Regulation No. 7, Section XII, raises the system-wide control requirements for the ozone season from the 47.5% VOC reduction requirement that applied from May 1, 2006, through September 30, 2006, to 75% from May 1 through September 30 of each year from 2007 through 2011. For the period from May 1 through September 30 of each year, beginning with 2012, VOC emissions from condensate tanks must be reduced by 78% from uncontrolled actual emissions. Determination of compliance during the ozone season will be on a weekly basis. For the non-ozone season, the State revised the required reduction of condensate tank VOC emissions from 38% to 60% in 2007, and beginning in 2008, and each year thereafter, VOC emissions between October 1 and April 30 must be reduced by 70% from uncontrolled actual emissions. Emission reductions during the non-ozone season must be calculated as an average of the emission reductions achieved during this seven-month period.

In addition to the changes to the system-wide reduction requirements, the State adopted significant changes to the monitoring, recordkeeping, and reporting requirements. Owners or operators of any condensate storage tank that is being controlled under Regulation No. 7, Section XII, must inspect or monitor the control equipment at least weekly. Types of equipment include combustion devices, vapor recovery units, valves, and thief hatches. As noted above, the record-keeping provisions require owners or operators to maintain a spreadsheet to track emission reductions on a weekly basis during the ozone season (May 1 through September 30). In addition to the spreadsheet, owners or operators are required to maintain records of monitoring and inspection activities. The reporting provisions require owners or operators to submit an annual report by April 30 of each year, and also a semi-annual report by November 30 of each year, detailing emission reductions during the preceding year and ozone season, respectively. Finally, provisions have been added to require owners or operators subject to the condensate storage tank reduction requirements to submit a list of all their controlled tanks on April 30 of each year; to notify the State monthly during the ozone season of any change to the list of controlled tanks; and to notify the State monthly of any instance where the air pollution control equipment was not properly functioning and the steps taken to correct the problem. We have reviewed and are approving the revisions to Regulation No. 7, Section XII, ''Volatile Organic Compounds From Oil and Gas Operations'' because they require greater reductions in emissions and meet the requirements of section 110 of the CAA.

V. Consideration of Section 110(l) of the CAA

Section 110(l) of the CAA states that a SIP revision cannot be approved if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress towards attainment of a NAAQS, or any other applicable requirement of the CAA. The revisions to Regulation No. 7, Section XII, will not interfere with attainment, reasonable further progress, or any other applicable requirement of the CAA.

VI. Final Action

In this action, EPA is approving the revisions to Regulation No. 7, Section XII, that were submitted on August 3, 2007. The version of Section XII we are approving supersedes and replaces the prior version we approved at 70 FR 48652 (August 19, 2005). EPA is publishing this rule without prior proposal because the Agency views this as a non-controversial amendment and anticipates no adverse comments. However, in the ''Proposed Rules'' section of today's **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective April 14, 2008 without further notice unless the Agency receives adverse comments by March 14, 2008. If the EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

VII. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and, therefore, is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small

governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *April 14, 2008.* Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 et seq.

Dated: January 15, 2008.

Robert E. Roberts,

Regional Administrator, Region VIII.

■ 40 CFR part 52 is amended to read as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart G—Colorado

■ 2. Section 52.320 is amended by adding paragraph (c)(112) to read as follows:

§ 52.320 Identification of plan.

* * * * *

(c) * * *

(112) On August 3, 2007, the Governor of Colorado submitted revisions to the Colorado's Regulation No. 7 ''Emissions of Volatile Organic Compounds'' that made several changes and additions to Section XII, ''Volatile Organic Compound Emissions From Oil and Gas Operations.''

(i) Incorporation by reference.

(A) Regulation No. 7 ''Emissions of Volatile Organic Compounds,'' 5 CCR 1001–9, Section XII, ''Volatile Organic Compound Emissions From Oil and Gas Operations,'' effective on March 4, 2007.

[FR Doc. E8–2512 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2006–0976; FRL–8526–8]

Approval and Promulgation of Air Quality Implementation Plans; Ohio; Oxides of Nitrogen Budget Trading Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is granting final approval to Ohio's request for the retirement and withdrawal of 240 oxides of nitrogen (NO_X) allowances from the State's 2005 new source set aside. Retiring 240 new source set aside allowances will provide surplus emission reductions to help compensate for the discontinuation of Ohio's motor vehicle inspection and maintenance program (known as ''E-Check'') in the Cincinnati and Dayton areas for the year 2006. (Ohio is in the process of seeking approval of the removal of E-Check as an active program from the State Implementation Plan (SIP), which will be addressed in a separate action.) EPA received adverse comments and one positive comment on our proposed rulemaking on the allowance retirement. These comments are addressed in this notice. As a result of this action, 240 NO_X allowances from the State's 2005 new source set aside will be withheld and permanently retired.

DATES: This final rule is effective on March 14, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2006–0976. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago,

Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Anthony Maietta, Life Scientist, at (312) 353–8777 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Anthony Maietta, Life Scientist, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8777, *maietta.anthony@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This **SUPPLEMENTARY INFORMATION** section is arranged as follows:

I. What did EPA propose?
II. What is EPA's response to comments?
III. What action is EPA taking today?
IV. Statutory and Executive Order Reviews

I. What did EPA propose?

On October 6, 2006, Ohio submitted revisions to Ohio Administrative Code (OAC) Chapters 3745–72–01 and 3745–14–05. These rules provide a revised start date for the use of low-volatility gasoline and provide the necessary quantity of interim, surplus NO_X emission reductions through the permanent retirement of new source set aside allowances from the State's NO_X budget trading program. Revisions to OAC 3745–72–01 were addressed in a separate rulemaking published on May 25, 2007, at 72 FR 29269.

On September 13, 2007 (at 72 FR 52320), EPA proposed to approve the revisions to OAC 3745–14–05. The revision to OAC 3745–14–05 permanently withholds and retires 240 NO_X allowances from Ohio's 2005 new source set aside.

By retiring these new source set aside allowances, Ohio guarantees that these allowances will not be reallocated to participating Ohio NO_X SIP Call utilities and boilers the following year. This action allows EPA to consider the corresponding reduction of 240 tons of emissions of NO_X to be surplus. These 240 tons of surplus NO_X emission reductions, corresponding to reductions resulting from emission control devices installed on electrical generation units in the Cincinnati and Dayton areas before 2006, can be considered to provide 240 tons of NO_X emission reduction in compensation for the equivalent emission increase resulting from discontinuation of the E-Check program in those areas in 2006.

II. What is EPA's response to comments?

EPA received both supportive and adverse comments in response to our proposed rulemaking on OAC 3745–14–05. EPA received comments from the Regional Air Pollution Control Agency (RAPCA) in support of our proposed action on October 18, 2007.

Adverse comments were sent dated January 12, February 15, March 13, and October 15, 2007, from Shumaker, Loop, and Kendrick, LLP, a law firm representing the Ohio Electric Utility Institute as well as various utilities in the State (hereafter described as ''the Utilities''). Despite some comments being sent even before EPA had published the proposed rulemaking, we are treating the early comments as pertaining to today's action, and we address them in this action.

Comment: The Utilities believe that withholding and permanently retiring 240 NO_X allowances has not and will not create emissions reductions in the Cincinnati and Dayton areas, specifically because:

(a) NO_X allowances are not emissions reductions;

(b) If an Ohio source wanted to emit more, it could purchase allowances from outside the state, or it could transfer allowances from a facility it owns in another state;

(c) If no Ohio sources needed the withheld allowances for the purposes of compliance, then withholding and retiring the 240 allowances will not result in decreased emissions in the Ohio or Cincinnati/Dayton areas; and,

(d) No evidence exists to support that withholding these allowances resulted in reductions in the Cincinnati/Dayton areas.

Response: Under the cap and trade program known as the NO_X SIP Call, EPA issues a finite number of allowances and allows each subject source an amount of emissions based on the quantity of allowances the source holds. The quantity of allowances thus corresponds to the total emissions allowed across the area covered by the NO_X SIP Call. Consequently, by retiring 240 allowances, Ohio has unquestionably reduced the total allowable emissions across the NO_X SIP Call area by 240 tons of NO_X emissions. Ohio may use utility NO_X emission reductions to compensate for discontinuing E-Check only if the reductions are surplus relative to existing requirements, and the retirement of 240 allowances provides 240 tons of NO_X emission reductions that are surplus to the reductions mandated by the existing NO_X SIP Call.

EPA further believes that Ohio can reasonably claim that the 240 tons of surplus NO_X emission reduction that they have mandated compensates for 240 tons of NO_X emission increase (or the equivalent quantity of increase in volatile organic compound emissions) resulting from discontinuation of E-Check. As stated in our notice of proposed rulemaking, ''substantial emission reductions have occurred in the Cincinnati/Dayton area,'' and ''EPA believes that Ohio has latitude to attribute 240 tons of the 2006 NO_X emission reductions in the Cincinnati/Dayton area to its retirement of 240 allowances.''

The comments do not directly address the rationale for these views that EPA provided in its notice of proposed rulemaking. The following responds more directly to the submitted comments:

(a) Retirement of NO_X allowances does mandate a net emission reduction.

(b) Purchasing or transferring allowances from another location reduces allowable emissions at that other location, retaining the net emission reduction.

(c) EPA is concluding that 240 tons of the emission reductions that are known to have occurred in the Cincinnati and Dayton areas can be attributed to Ohio's retirement of 240 allowances. Ohio sources will not need these allowances precisely because they have implemented emission reductions mandated by the limited availability of allowances.

(d) Ohio provided for 240 tons of emission reduction, and Ohio can reasonably attribute this reduction to a small fraction of the over 10,000 tons of NO_X reductions that have occurred in the Cincinnati and Dayton areas.[1] The commenter seeks evidence of a causal link between the allowance retirement and specific emission reductions, which would presumably require that Ohio or EPA examine the motivations underlying utility control decisions. EPA believes that such a survey is unnecessary, and believes that Ohio has adequate basis for associating the surplus reductions created by the rule revision with 240 tons of reductions that

[1] In a letter dated February 23, 2007, Ohio supplemented its submittal with information regarding NO_X emission reductions that have occurred in the Cincinnati/Dayton area. This letter identifies several actions that substantially reduced NO_X emissions starting from before the 2006 ozone season, which include installation of selective catalytic reduction controls at 3 units and installation of low NO_X burners at 9 other units. Ohio estimates that the total emission reduction from these actions is over 10,000 tons per ozone season.

have occurred in the Cincinnati and Dayton areas.

Comment: The Utilities commented that Ohio's October 6, 2006, submittal should be considered 'incomplete' because it does not meet the requirements of 40 CFR part 51, Appendix V, section 2.2, paragraphs (c), (d), and (e). For each section, the Utilities comment that statements by Ohio EPA personnel (provided in an appendix to the comments) support their view.

40 CFR part 51, Appendix V section 2.2(c) requires ''Quantification of the changes to the plan of allowable emissions from the affected sources, estimates of changes in current actual emissions from affected sources, or, where appropriate, quantification of changes in actual emissions from affected sources through calculations of the differences between certain baseline levels and allowable emissions anticipated as a result of the revision.'' The Utilities comment that Ohio only submitted the number of NO_X allowances it plans to retire (240). Further, the Utilities state that Ohio's submittal does not quantify the ''allowable emissions'' from the Utilities under OAC 5745–14–05(C)(7) because the retired allowances do not limit utilities' allowable emissions. The Utilities in fact believe that it is impossible for Ohio to calculate the allowable emissions from Ohio utilities.

40 CFR part 51, Appendix V 2.2(d) requires ''The State's demonstration that the National Ambient Air Quality Standards (NAAQS), prevention of significant deterioration increments, reasonable further progress demonstration, and visibility, as applicable, are protected if the plan is approved and implemented.'' The Utilities comment that Ohio's calculation of 240 allowances cannot, by itself, show that the NAAQS are protected by OAC 3745–14–05(C)(7), despite anti-backsliding being the impetus for Ohio's submittal.

40 CFR part 51, Appendix V 2.2(e) requires ''Modeling information required to support the proposed revision, including input data, output data, models used, justification of model selections, ambient monitoring data used, meteorological data used, justification for use of offsite data (where used), modes of models used, assumptions, and other information relevant to the determination of adequacy of the modeling analysis.'' The Utilities comment that Ohio's submittal does not contain an equivalency demonstration or a modeling demonstration, and that modeling is necessary when reductions are made from sources outside the area. The Utilities believe Ohio EPA should have conducted modeling to support their submittal yet did not.

Response: EPA disagrees with the Utilities' comments on both substantive and process grounds. For the substance of 40 CFR part 51, Appendix V section 2.2(c), Ohio has specified that the rule provides 240 tons of NO_X emission reduction. This number is completely specific and is precisely the type of information that EPA seeks under this section of Appendix V. EPA believes that sections 2.2(d) and 2.2(e) are not relevant to this submittal. EPA uses Appendix V to judge the completeness of a variety of submittals, and EPA must apply only those criteria that are germane to EPA's ultimate decision regarding approvability of the submittal. States routinely submit rules that address control requirements (e.g., to provide reasonably available control technology or, as here, to provide emission reductions to avoid backsliding) which are judged independently of whether the applicable areas are progressing satisfactorily toward attainment or whether modeling has been done to estimate the ambient impact. The factual statements by Ohio EPA personnel that were attached to the Utilities' comments (e.g., that no modeling was performed in support of the submittal) do not alter EPA's views that the submittal was complete.

Furthermore, in absence of a completeness determination by EPA within 6 months of receiving the submittal, Ohio's October 6, 2006, submittal became complete 6 months thereafter, pursuant to section 110(k)(1)(B) of the Clean Air Act. EPA does not have the discretion now to find the submittal incomplete.

Comment: The Utilities comment that Ohio's proposed revision to OAC 3745–14–05 does not meet the anti-backsliding requirements of 40 CFR 51.900–51.905. The Utilities state that Ohio did not provide photochemical modeling. They also state that Ohio did not sufficiently demonstrate a benefit to the Cincinnati and Dayton areas, nor can Ohio demonstrate actual reductions in those areas. The Utilities state that EPA Region 5 sent a letter to Ohio on September 20, 2005, in which EPA said that Ohio could claim reductions outside the Cincinnati and Dayton areas so long as they ''demonstrate'' that the reductions benefit the Cincinnati and Dayton areas.

Response: EPA is satisfied with Ohio's demonstration that retiring 240 NO_X allowances will make surplus 240 of the roughly 10,000 tons of NO_X reductions made from Cincinnati and Dayton area utilities by 2006, which clearly provides benefit to the Cincinnati and Dayton areas. EPA does not require modeling to know that creating 240 surplus allowances will allow the State to credit 240 of the more than 10,000 tons of NO_X emission reductions toward compensation for loss of E-Check in 2006. Based on the information that Ohio EPA has provided, EPA is satisfied that the retirement of 240 NO_X allowances from the 2005 control period will benefit the Cincinnati and Dayton areas.

Comment: The Utilities comment that today's action will undermine the Utilities' pollution control strategies and confidence in the NO_X SIP Call rule. The Utilities state that ''random confiscation'' of allowances undermines the market system in a way similar to counterfeiting money.

Response: EPA believes that removing 240 allowances out of a pool of about half a million allowances will not have an appreciable negative effect on the functioning of the NO_X SIP Call. The deliberate process that Ohio and EPA have followed in retiring allowances that had been set aside and not issued to any source provided utilities ample opportunity to plan for not receiving any of these allowances.

III. What action is EPA taking today?

EPA is approving OAC 3745–14–05(C) as submitted by Ohio on October 6, 2006. EPA is approving the withdrawal and permanent retirement of 240 NO_X new source set aside allowances from the 2005 control period. This action adds a new paragraph (C)(7) to OAC 3745–14–05, and re-orders the existing paragraphs from (C)(7) through (C)(9) to (C)(8) through (C)(10).

IV. Statutory and Executive Order Reviews

Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget.

Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Because it is not a ''significant regulatory action'' under Executive Order 12866 or a ''significant regulatory action,'' this action is also not subject to Executive Order 13211, Actions Concerning Regulations That Significantly ''Affect Energy Supply,

Distribution, or Use'' (66 FR 28355, May 22, 2001).

Regulatory Flexibility Act

This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Unfunded Mandates Reform Act

Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 13132: Federalism

This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal Standard.

National Technology Transfer Advancement Act

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under Section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 14, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* Section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Oxides of nitrogen, Oxides of nitrogen budget trading program.

Dated: January 30, 2008.

Bharat Mathur,

Acting Regional Administrator, Region 5.

■ For the reasons stated in the preamble, part 52, chapter I, of title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart KK—Ohio

■ 2. Section 52.1870 is amended by adding paragraph (c)(141) to read as follows:

§ 52.1870 Identification of plan.

* * * * *

(c) * * *

(142) On October 6, 2006, Ohio submitted revisions to Ohio Administrative Code (OAC) Chapter 3745–14–05 to permanently retire 240 new source set aside allowances from the State's oxides of nitrogen budget trading program.

(i) *Incorporation by reference.*

(A) Ohio Administrative Code Rule 3745–14–05 ''NO_X Allowance Allocations,'' effective July 17, 2006.

[FR Doc. E8–2506 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Docket No. EPA–R02–OAR–2006–0920, FRL–8522–3]

Approval and Promulgation of Implementation Plans; New Jersey; Zero-Emission Vehicle Component of the Low Emission Vehicle Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is approving, through model year 2011, the portion of New Jersey's low emission vehicle program related to the manufacture and sale of zero-emission vehicles, consistent with California's current low emission vehicle regulations. EPA previously approved New Jersey's low emission vehicle program, but did not take action on the zero-emission vehicle provisions. The intended effect of this action is to approve, as consistent with section

110(a)(2) of the Clean Air Act, a control strategy that will help New Jersey achieve attainment of the National Ambient Air Quality Standard for ozone.

DATES: *Effective Date:* This rule will be effective March 14, 2008.

ADDRESSES: Copies of the State submittals are available at the following addresses for inspection during normal business hours: Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866. New Jersey Department of Environmental Protection, Public Access Center, 401 East State Street, 1st Floor, Trenton, New Jersey 08625.

FOR FURTHER INFORMATION CONTACT: Matthew Laurita, *laurita.matthew@epa.gov* at the Environmental Protection Agency, Region 2 Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, NY 10007–1866, telephone number (212) 637–3895, fax number (212) 637–3901.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Description of the SIP Revision
II. Comments on the Proposed Rulemaking
III. Final EPA Action
IV. Statutory and Executive Order Reviews

I. Description of the SIP Revision

Section 209(a) of the Clean Air Act (CAA or the Act) prohibits states from adopting or enforcing standards relating to the control of emissions from new motor vehicles or new motor vehicle engines. However, under section 209(b) of the CAA, EPA will grant a waiver of the section 209(a) prohibition to the State of California, thereby allowing California to adopt its own motor vehicle emissions standards, if California determines that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. EPA will not grant a section 209(b) waiver if it makes the specific findings listed in that section.

Section 177 of the CAA allows other states to adopt and enforce California's standards relating to the control of emissions from new motor vehicles, provided that, among other things, such state standards are identical to the California standards for which a waiver has been granted under CAA section 209(b). In addition to the identicality requirement, the state must adopt such standards at least two years prior to the commencement of the model year to which the standards will apply. All state implementation plan (SIP) revisions submitted to EPA for approval must also meet the requirements of CAA section 110.

In January 2004, the New Jersey Legislature passed legislation requiring the New Jersey Department of Environmental Protection (NJDEP) to adopt the California low emission vehicle (LEV) program, known as the LEV II program. Pursuant to this legislation, New Jersey promulgated regulations to adopt a LEV program identical to California's LEV II program. New Jersey's regulations were adopted on November 28, 2005 and became effective on January 17, 2006. New Jersey's LEV program will affect light-duty motor vehicles manufactured in model year 2009 and later.

On June 2, 2006, New Jersey submitted a SIP revision to EPA, seeking federal approval of its LEV regulations. EPA approved New Jersey's LEV program on August 27, 2007 (72 FR 48936), but did not take action on the zero-emission vehicle (ZEV) provisions of the program. New Jersey commented on EPA's March 21, 2007, Proposed Rulemaking (72 FR 13227), and requested that EPA approve the ZEV provisions of New Jersey's LEV program, consistent with EPA's section 209(b) waiver that allows California to enforce the ZEV sales requirement through model year 2011. On September 4, 2007 (72 FR 50650), EPA proposed to approve the ZEV provisions of New Jersey's LEV program through the 2011 model year. EPA's approval of the ZEV component of New Jersey's LEV program makes it Federally-enforceable. For further information on New Jersey's LEV program see the March 21, 2007, Proposed Rulemaking (72 FR 13227), the August 27, 2007, Final Rulemaking (72 FR 48936) and the September 4, 2007, ZEV Proposed Rulemaking (72 FR 50650).

II. Comments on the Proposed Rulemaking

EPA received no comments on the Proposed Rulemaking, published in the September 4, 2007, **Federal Register** (72 FR 50650).

III. Final EPA Action

EPA is approving the zero-emission vehicle component of New Jersey's LEV program through the 2011 model year, which is identical to the zero-emission vehicle portion of California's LEV II program for which EPA has issued a section 209(b) waiver of pre-emption. Approval of this component of New Jersey's LEV program further ensures that planned emissions reductions attributable to this program will be achieved. The New Jersey LEV program was adopted on November 28, 2005, published in the New Jersey State Register on January 17, 2006 with an effective date of January 17, 2006, and is codified in Title 7, Chapter 27, Subchapter 29 of the New Jersey Administrative Code.

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

The Congressional Review Act, 5 U.S.C. section 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 14, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and record keeping requirements, Volatile organic compounds.

Dated: January 14, 2008.

Alan J. Steinberg,

Regional Administrator, Region 2.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart FF—New Jersey

■ 2. Section 52.1570 is amended by adding paragraph (c)(84) to read as follows:

§ 52.1570 Identification of plan.

* * * * *

(c) * * *

* * * * *

(84) Revisions to the State Implementation Plan submitted on June 2, 2006, by the New Jersey Department of Environmental Protection which consists of the adoption of California's Zero Emission Vehicle (ZEV) provisions.

(i) Incorporation by reference:

(A) Regulation Subchapter 29 of Title 7, Chapter 27 of the New Jersey Administrative Code, entitled ''Low Emission Vehicle (LEV) Program,'' sections 29.6, 29.7, and the incorporation of California Section 1962, ''Zero Emission Vehicle Standards for 2005 and Subsequent Model Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles,'' within section 29.13(g), effective on January 17, 2006.

■ 3. Section 52.1605 is amended by revising the entry for Subchapter 29 under Title 7, Chapter 27 to read as follows:

§ 52.1605 EPA-approved New Jersey regulations.

State regulation	State effective date	EPA approved date	Comments
* *	*	*	* *
Title 7, Chapter 27			
* *	*	*	* *
Subchapter 29, ''Low Emission Vehicle (LEV) Program''.	January 17, 2006	February 13, 2008, *[Insert Federal Register page citation]*.	In Section 29.13(g), Title 13, Chapter 1, Article 2, Section 1961.1 of the California Code of Regulations relating to greenhouse gas emission standards, is not incorporated into the SIP.
* *	*	*	* *

[FR Doc. E8–2553 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2007–0002; FRL–8529–2]

Approval of Louisiana's Petition To Relax the Summer Gasoline Volatility Standard for the Grant Parish Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action approving the State of Louisiana's request to relax the federal Reid Vapor Pressure (RVP) standard applicable to gasoline introduced into commerce in Grant Parish, Louisiana, (Grant Parish) during the summer ozone control season—June 1 to September 15 of each year. Grant Parish is a designated attainment area under the 8-hour ozone National Ambient Air Quality Standard (''NAAQS'') and is a redesignated attainment area under the

1-hour ozone NAAQS. This action amends our regulations to change the summertime RVP standard for Grant Parish from 7.8 pounds per square inch (psi) to 9.0 psi. EPA has determined that this change to our federal RVP regulations is consistent with the applicable provisions of the Clean Air Act. Louisiana's request is supported by evidence that Grant Parish can implement the 9.0 psi RVP standard and maintain the 8-hour ozone NAAQS and that relaxation of the applicable RVP standard to 9.0 psi will provide economic benefits. This action is being taken without prior proposal because EPA believes that this final rulemaking is noncontroversial, for the reasons set forth in this preamble, and due to the limited scope of this action.

DATES: This rule is effective on April 14, 2008 without further notice, unless EPA receives adverse comments by March 14, 2008. If EPA receives adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2007–0002, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-Docket@epa.gov*
- *Fax:* Air and Radiation Docket—(202) 566–9744
- *Mail:* Environmental Protection Agency, EPA Docket Center (EPA/DC), Air and Radiation Docket, Mail Code 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–OAR–2007–0002.
- *Hand Delivery:* Public Reading Room, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004. Such deliveries are only accepted during the Docket Office's normal hours of operations, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2007–0002. EPA's policy is that all comments received will be included in the public docket without change 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.

Docket: 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. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Public Reading Room, 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 Air and Radiation Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Sean Hillson, Office of Transportation and Air Quality, Transportation and Regional Programs Division, Mailcode AASMCG, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214–4789; fax number: (734) 214–4052; e-mail address: *Hillson.Sean@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, whenever ''we'', ''us'', or ''our'' is used, we mean EPA.

EPA is publishing this rule without a prior proposal because we view this action as noncontroversial and anticipate no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, we are publishing a separate document that will serve as the proposal to relax the applicable volatility standard in Grant Parish if adverse comments are received on this direct final rule. We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We would address all public comments in a subsequent final rule based on the proposed rule.

Regulated Entities: Entities potentially affected by this rule are fuel producers and distributors who do business in Grant Parish. Regulated entities include:

Examples of potentially regulated entities	NAICS codes [a]
Petroleum Refineries	324110
Gasoline Marketers and Distributors	424710
	424720
Gasoline Retail Stations	447110
Gasoline Transporters	484220
	484230

[a] North American Industry Classification System (NAICS).

This table provides only a guide for readers regarding entities likely to be regulated by this action. You should carefully examine the amended regulations in 40 CFR 80.27 to determine whether your facility is impacted. If you have further questions, call the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Outline

I. Introduction
II. What Is the History of Gasoline Volatility Regulation?
III. What Are the EPA Rulemaking Actions Addressing the Transition From the 1-Hour to 8-Hour Ozone NAAQS?
IV. What Is the EPA Policy Regarding Relaxation of Volatility Standards in Ozone Nonattainment Areas That Are Redesignated as Attainment Areas?
A. What Is the General Volatility Relaxation Policy?
B. How Is the General Volatility Relaxation Policy Applied to Grant Parish?
V. What Information Supports the Relaxation of Federal RVP Requirements in Grant Parish?
A. History
B. Louisiana's RVP Relaxation Request and Initial EPA Response
C. EPA Approval of the Grant Parish 8-Hour Maintenance Plan
D. What Are the Section 110(l) Requirements?
VI. Final Action and Rationale
VII. Statutory and Executive Order Reviews

I. Introduction

This rulemaking describes our final action to approve Louisiana's request to relax the federal RVP standard from 7.8 psi to 9.0 psi in Grant Parish during the summer ozone control season—June 1 to September 15. In 1995, EPA redesignated Grant Parish to a 1-hour ozone NAAQS attainment area. Currently, Grant Parish is a designated attainment area for the 8-hour ozone NAAQS (the 1-hour and 8-hour ozone NAAQS will also be called the 1-hour and 8-hour ozone standards).

This preamble is hereafter organized into five parts. Section II provides the history of federal gasoline volatility regulation. Section III describes EPA's rulemaking actions to transition from the 1-hour to the 8-hour ozone standard. Section IV provides the Agency's policy regarding relaxation of volatility standards in former ozone nonattainment areas that have been redesignated to attainment, and how this policy is applied to Grant Parish while taking into account the requirements under the 8-hour ozone standard. Section V reviews the available information to determine if relaxation of the RVP standard in Grant Parish is warranted: Louisiana's history of federal RVP requirements; EPA's redesignation and designation of Grant Parish as attainment of the 1-hour and 8-hour ozone NAAQS, respectively; Louisiana's relaxation request prompting this action; and the 8-hour maintenance plan approval to support the request. Finally, Section VI presents EPA's final action in response to the request and our rationale.

II. What is the History of Gasoline Volatility Regulation?

In 1987, EPA determined that gasoline nationwide had become increasingly volatile, causing an increase in evaporative emissions from gasoline-powered vehicles and equipment.[1] Evaporative emissions from gasoline, referred to as volatile organic compounds (VOCs), are precursors to the formation of tropospheric ozone and contribute to the nation's ground-level ozone problem. Exposure to ground-level ozone can reduce lung function (thereby aggravating asthma or other respiratory conditions), increase susceptibility to respiratory infection, and may contribute to premature death in people with heart and lung disease.

The most common measure of fuel volatility that is useful in evaluating gasoline evaporative emissions is the Reid Vapor Pressure (RVP). Under section 211(c) of the Clean Air Act (CAA or ''the Act''), we promulgated regulations on March 22, 1989, that set maximum limits for the RVP of gasoline sold during the summer ozone control season—June 1 to September 15. These regulations were referred to as Phase I of a two-phase nationwide [2] program, which was designed to reduce the volatility of commercial gasoline during the summer ozone control season.[3] On June 11, 1990, EPA promulgated more stringent volatility controls under Phase II of the volatility control program.[4] These requirements established maximum RVP standards of 9.0 psi or 7.8 psi (depending on the State, the month, and the area's initial ozone attainment designation with respect to the 1-hour ozone National Ambient Air Quality Standard or ''NAAQS'') during the ozone control season.

The 1990 CAA Amendments established a new section, 211(h), to address fuel volatility. Section 211(h) requires EPA to promulgate regulations making it unlawful to sell, offer for sale, dispense, supply, offer for supply, transport, or introduce into commerce gasoline with an RVP level in excess of 9.0 psi during the ozone control season. It further requires EPA to establish more stringent RVP standards in nonattainment areas if we find such standards ''necessary to generally achieve comparable evaporative emissions (on a per vehicle basis) in nonattainment areas, taking into consideration the enforceability of such standards, the need of an area for emission control, and economic factors.'' Section 211(h) prohibits EPA from establishing a volatility standard more stringent than 9.0 psi in an attainment area, except that we may impose a lower (more stringent) standard in any former ozone nonattainment area redesignated to attainment.

On December 12, 1991, EPA modified the Phase II volatility regulations to be consistent with section 211(h) of the CAA.[5] The modified regulations prohibited the sale of gasoline with an RVP above 9.0 psi in all areas designated attainment for ozone, beginning in 1992. For areas designated as nonattainment, the regulations retained the original Phase II standards published in 1990.[6]

As stated in the preamble to the Phase II volatility controls,[7] and reiterated in the proposed change to the volatility standards published in 1991,[8] we will rely on States to initiate changes to our volatility program that they believe will enhance local air quality and/or increase the economic efficiency of the program within the statutory limits.[9] In those rulemakings, we explained that the Governor of a State may petition the Agency to set a volatility standard less stringent than 7.8 psi for some month or months in a nonattainment area. The petition must demonstrate such a change is appropriate because of a particular local economic impact and that sufficient alternative programs are available to achieve attainment and maintenance of the 1-hour ozone NAAQS.

III. What are the EPA Rulemaking Actions Addressing the Transition from the 1-Hour to 8-Hour Ozone NAAQS?

In July 1997, EPA promulgated a revised ozone standard which would be measured over an 8-hour period, i.e., the 8-hour ozone NAAQS or standard.[10] The 8-hour Ozone NAAQS rule was challenged by numerous litigants and in May 1999, the U.S. Court of Appeals for the D.C. Circuit issued a decision remanding, but not vacating, the 8-hour ozone standard. In February 2001, the Supreme Court upheld our authority to set the ozone NAAQS and remanded the case to the D.C. Circuit Court for disposition of issues the Court did not address in its initial decision.[11] The Court of Appeals addressed these remaining issues and upheld the 8-hour ozone NAAQS.[12] In April 2004, EPA designated and classified areas for the 8-hour ozone standard.[13]

Also in April 2004, we promulgated the Phase 1 Ozone Implementation rule that addressed the revocation of the 1-hour ozone NAAQS and identified the 1-hour requirements that would remain applicable after revocation (i.e., the ''anti-backsliding provisions'').[14] These requirements varied based on areas'

[1] 52 FR 31274 (Aug. 19, 1987).

[2] Hawaii, Alaska and U.S. territories were excepted.

[3] 54 FR 11868 (Mar. 22, 1989).

[4] 55 FR 23658 (June 11, 1990).

[5] 56 FR 64704 (Dec. 12, 1991).

[6] See 55 FR 23658 (June 11, 1990).

[7] See 55 FR 23660 (June 11, 1990) for a discussion on procedures by which States could petition EPA for more or less stringent volatility standards.

[8] See 56 FR 24242 (May 29, 1991) and 56 FR 64706 (Dec. 12, 1991).

[9] See CAA section 211(h)(1) (allowing EPA to set a volatility standard more stringent than 9.0 psi as necessary to achieve comparable emissions in nonattainment areas considering enforceability, the need of an area for emissions control and economic factors).

[10] 62 FR 38856 (July 18, 1997).

[11] *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

[12] *American Trucking Assoc.* v. *EPA*, 195 F.3d 4 (D.C. Cir., 1999).

[13] 69 FR 23857 (Apr. 30, 2004).

[14] 69 FR 23951 (Apr. 30, 2004).

designation for the 1-hour standard and such areas' designation for the 8-hour NAAQS. As part of these anti-backsliding provisions, EPA required areas that had been redesignated from nonattainment to attainment for the 1-hour standard (i.e., 1-hour ozone ''maintenance'' areas) and that were designated attainment for the 8-hour standard to submit a new maintenance plan under section 110(a)(1) that would provide for maintenance of the 8-hour standard.[15] After such a plan was approved, anti-backsliding provisions provided relief for such areas from certain 1-hour maintenance plan requirements. Although the Phase 1 Ozone implementation rule was challenged in court and portions of the rule were vacated, the vacated portions of the rule are not relevant to today's Grant Parish volatility relaxation rulemaking.[16]

In November 2005, EPA promulgated the Phase 2 Ozone Implementation rule that addressed various control and planning obligations that are applicable to areas designated nonattainment for the 8-hour ozone NAAQS.[17] This rule has been challenged and EPA is currently awaiting argument and a decision.[18] No part of the Phase 2 Ozone implementation rule is relevant for today's Grant Parish volatility relaxation rulemaking.

IV. What is the EPA Policy Regarding Relaxation of Volatility Standards in Nonattainment Areas that are Redesignated as Attainment Areas?

A. What is the General Volatility Relaxation Policy?

Under the amended Phase II volatility regulations, any change in the volatility standard for a nonattainment area that was subsequently redesignated as an attainment area must be accomplished through a separate rulemaking that revises the applicable standard for that area.[19] Thus, for former 1-hour nonattainment areas where EPA mandated a Phase II volatility standard of 7.8 psi RVP in the December 12, 1991 rulemaking, the 7.8 psi RVP standard will remain in effect, even after such an area is redesignated as being in attainment, until a separate rulemaking is completed that revises the RVP standard in that area from 7.8 psi to 9.0 psi.[20]

As explained in the December 12, 1991 rulemaking, the Agency believes that relaxation of an applicable RVP standard is best accomplished in conjunction with the redesignation process. In order for an ozone nonattainment area to be redesignated as an attainment area, section 107(d)(3) of the Act requires the State to make a showing, pursuant to section 175A of the Act, that the area is capable of maintaining attainment for the ozone NAAQS for ten years. Depending on the area's circumstances, this maintenance plan will either demonstrate that the area is capable of maintaining attainment for ten years without the more stringent volatility standard or that the more stringent volatility standard may be necessary for the area to maintain its attainment with the ozone NAAQS. Therefore, in the context of a request for redesignation, the Agency will not relax the volatility standard unless the State requests a relaxation and the maintenance plan demonstrates, to the satisfaction of the Agency, that the area will maintain attainment for ten years without the need for the more stringent volatility standard.

B. How Is the General Volatility Relaxation Policy Applied to Grant Parish?

Under the Phase 1 Ozone implementation rule, 1-hour ozone maintenance areas that are designated 8-hour ozone attainment areas, such as Grant Parish, are required to develop and submit to EPA a maintenance plan under section 110(a)(1) of the Act.[21] In today's rulemaking, we are determining that 1-hour ozone maintenance areas that are designated 8-hour ozone attainment areas may rely on the section 110(a)(1) maintenance plan, rather than a section 175A maintenance plan as explained above, for purposes of requesting relaxation of the more stringent volatility standard. We come to the conclusion that a section 110(a)(1) maintenance plan can be used to make a relaxation demonstration for the following reasons: (1) Section 110(a)(1) maintenance plans contain analogous information and meet similar criteria as section 175A maintenance plans, namely a demonstration of continued maintenance of the ozone standard for at least 10 years using the less stringent volatility standard and that the plan contains contingency measures; (2) Although the EPA general volatility relaxation policy calls for an approved 175A maintenance plan, the requirement to submit a section 175A maintenance plan for the 8-hour standard does not apply to areas initially designated attainment for that standard; and (3) Development of a section 110(a)(1) maintenance plan is consistent with the Phase 1 Ozone Implementation rule requirements, specifically 40 CFR 51.905(a)(4), which is applicable to Grant Parish, and thus use of an approved section 110(a)(1) maintenance plan for the purpose of relaxing the applicable RVP standard follows logically. Therefore, in today's rulemaking, EPA is allowing Grant Parish to rely on its section 110(a)(1) maintenance plan and the accompanying analysis set forth below in demonstrating the approvability of the State's relaxation request of the applicable RVP standard in Grant Parish.

V. What Information Supports the Relaxation of Federal RVP Requirements in Grant Parish?

A. History

In the summer of 1989, the Phase I gasoline volatility control program was implemented throughout the country. At that time, based on designations issued on September 11, 1978, Grant Parish was a designated ozone nonattainment area.[22] Under the Phase I volatility rule, gasoline volatility requirements throughout the entire State of Louisiana were uniform, although there was some variation by month.

On November 6, 1991, EPA issued ozone nonattainment designations for the 1-hour ozone NAAQS. Pursuant to section 107(d)(1)(C)(i) of the CAA, the nonattainment designation for Grant Parish issued in 1978 continued because Louisiana had not acquired the three years of ambient air quality data necessary to petition for redesignation to attainment.[23] In 1992, under Phase II of the volatility control program, the Grant Parish ozone nonattainment area

[15] See 69 FR 23955 (Apr. 30, 2004), section IV.C.2.c.v and IV.C.2.d; see also 40 CFR 51.905(a)(4).

[16] *S. Coast Air Quality Mgmt. Dist.* v. *EPA*, 472 F.3d 882 (D.C. Cir. 2006 reh'g denied *S. Coast Air Quality Mgmt. Dist.* v. *EPA*, 2007 U.S. App. Lexis 13751 (D.C. Cir. June 8, 2007).

[17] 70 FR 71612 (Nov. 29, 2005).

[18] *NRDC* v. *EPA*, No. 06–1045 (D.C. Cir.).

[19] 56 FR 64706 (Dec. 12, 1991).

[20] As stated in the preamble for the Agency's initial Phase II volatility standards (55 FR 23609), and in the preamble in the proposal to revise those standards (56 FR 24244), EPA may also promulgate a rule to revise the volatility standard in a particular nonattainment area in order to enhance local air quality and/or increase the economic efficiency of the program. The Governor of a state, or his designee, may petition EPA for a less stringent standard if such a standard is consistent with the requirements of the Act and if the state can document (1) particular local economic impact that makes the less stringent standard appropriate and (2) sufficient alternative programs to achieve attainment and maintenance of the NAAQS for ozone.

[21] See 69 FR 23955 (Apr. 30, 2004), section IV.C.2.c.v and IV.C.2.d; see also 40 CFR 51.905(a)(4).

[22] 43 FR 40412 (Sept. 11, 1978).

[23] 56 FR 56694 (Nov. 6, 1991).

(at the time) was required to use gasoline with an RVP of 7.8 psi. In 1995, EPA approved a request from the State of Louisiana to redesignate Grant Parish to attainment for the 1-hour ozone standard and approved a maintenance plan.[24] At that time, the State of Louisiana did not make a request for relaxation of the gasoline volatility standard at that time; therefore, Grant Parish continued to use gasoline with an RVP of 7.8 psi during the ozone control season through the summer of 2005. In 2004, we designated Grant Parish as an 8-hour ozone attainment area.[25]

B. Louisiana's RVP Relaxation Request and Initial EPA Response

In May of 2005, the State of Louisiana requested that the gasoline volatility standard for Grant Parish be relaxed and that enforcement discretion be granted in the interim between the request and the final rulemaking.[26] This petition from the State cited the fact that Grant Parish is a designated 8-hour ozone attainment area and a redesignated 1-hour ozone attainment area that has not measured a 1-hour exceedance in the 10 years since the 1995 maintenance plan became effective. Louisiana also stated the following justifications for the relaxation: First, Grant Parish is classified as rural, is not adjacent to any urban area, and has only seen about 7% population growth from 1990 to 2000 (17,526 to 18,698). Second, a review of vehicle miles traveled (VMT) statistics for Grant Parish show a downward trend from 1990 to 1999. There was a slight increase (2% per year) from 1999 through 2003, although Louisiana qualifies this by stating the increase could be a reflection of increases in population, but is more likely due to changes in VMT reporting in 2001. Third, air quality data shows a general decrease in emissions of ozone-forming pollutants, such as volatile organic compounds (VOCs) and nitrogen oxides (NO_X). Finally, Louisiana provides evidence that relaxation of the RVP requirement will result in economic benefit to Grant Parish. Outside of the ozone control season, bulk plant operators are able to acquire conventional gasoline from nearby terminals. During the ozone control season, however, bulk plant operators must purchase gasoline meeting the 7.8 psi RVP standard from facilities in Baton Rouge or Lake Charles, Louisiana. Each of these cities is approximately 145 miles from Grant Parish, resulting in a 290-mile roundtrip to deliver compliant fuel. This distance increases the transportation costs and can increase the price of gasoline by an estimated 2 cents per gallon.

In May of 2006, the Office of Enforcement and Compliance Assurance granted enforcement discretion to allow the use of gasoline having a volatility that is no higher than 9.0 psi during the ozone control seasons for Grant Parish from May 16, 2006, to September 16, 2007, or the effective date of the action set forth in this rulemaking, whichever is earlier.[27]

C. EPA Approval of the Grant Parish 8-Hour Maintenance Plan

On August 23, 2006, the State of Louisiana submitted a maintenance plan for Grant Parish to EPA Region 6 that ensures continued attainment of the 8-hour ozone standard through 2014, which is 10 years following designation under the 8-hour standard as required by 40 CFR 51.905(a)(4)(ii). EPA has determined that the maintenance plan also meets the other statutory and regulatory requirements and is consistent with EPA guidance; therefore, in November 2007, EPA published a direct final rule in the **Federal Register** that approved the 8-hour maintenance plan for Grant Parish.[28] No adverse comments were received, and the rule became effective on January 7, 2008. The State's maintenance plan submission, EPA's Technical Support Document, and approval rulemaking action are incorporated by reference in today's action.

EPA determined that the Grant Parish maintenance plan adequately addresses the components of a maintenance plan: a 2002 base year attainment inventory; projected emission inventories for the future years of 2008, 2011, and 2014 with a maintenance demonstration; verification of continued attainment with the use of either 7.8 or 9.0 psi gasoline; and contingency measures. Some of these components are presented in greater detail below.

The following table[29] provides VOC and NO_X emissions data for the 2002 base attainment year inventory, as well as projected VOC and NO_X emission inventory data for the major anthropogenic source categories developed using EPA-approved technologies and methodologies and keeping 7.8 psi RVP gasoline in place for the years 2008, 2011, and 2014.

GRANT PARISH.—VOC AND NO_X EMISSION INVENTORY BASELINE

Emissions source	2002 (tpd)	2008 (tpd)	2011 (tpd)	2014 (tpd)
Point Source VOCs	0.66	0.83	0.91	0.98
Point Source NO_X	1.85	1.96	2.01	2.06
Non-Point (Area) Source VOCs	1.57	1.62	1.63	1.66
Non-point (Area) Source NO_X	0.61	0.64	0.65	0.67
Nonroad VOCs	5.49	4.66	4.20	3.83
Nonroad NO_X	1.56	1.41	1.33	1.23
Onroad VOCs	1.27	0.80	0.63	0.52
Onroad NO_X	1.71	1.12	0.83	0.62
Total VOCs	8.99	7.91	7.37	6.99
Total NO_X	5.73	5.13	4.82	4.58

[24] 60 FR 43020 (Aug. 18, 1995).

[25] 69 FR 23857 (Apr. 30, 2004).

[26] Letter from Michael McDaniel, Secretary of the Louisiana Department of Environmental Quality, to Mayor Richard Greene, Administrator of U.S. EPA Region 6, titled ''Relaxation of the Summer Gasoline Volatility Standard for Grant Parish'' (May 24, 2005).

[27] Letter from Granta Nakayama, Assistant Administrator of the U.S. EPA Office of Enforcement and Compliance Assurance, to Michael McDaniel, Secretary of the Louisiana Department of Environmental Quality, titled ''Enforcement Discretion Regarding the Gasoline Volatility Standard for Grant Parish, Louisiana'' (May 16, 2006).

[28] 72 FR 62579 (November 6, 2007); Docket ID: EPA–R06–OAR–2006–0271.

[29] The ''Total VOCs'' values for 2008, 2011, and 2014 in this table differ from the values in the November 6, 2007, maintenance plan approval rulemaking. These differences were due to a typographical error by EPA in the ''Onroad VOCs'' row; those errors have been corrected here resulting in new ''Total VOCs'' values. The changes accurately reflect the data submitted by the state of Louisiana and yield lower ''Total VOCs'' values in all future years. Therefore the conclusion that Grant Parish has demonstrated maintenance of the 8-hour standard is still valid.

As shown in the table above, Louisiana has demonstrated that the future year 8-hour ozone emissions will be less than the 2002 base attainment year's emissions. Measures that will provide for additional 8-hour ozone emission reductions include: (1) Implementation of Federal VOC Emission Standards for Automobile Refinish Coatings, Consumer Products, and Architectural Coatings; (2) Federal Tier 2 Motor Vehicle Emission Standards, Heavy-Duty Engine and Vehicle Standards, and gasoline and highway diesel fuel sulfur control requirements; (3) Federal control of emissions from non-road diesel engines and fuels; and (4) implementation of the Federal Clean Air Interstate Rule (CAIR).[30]

In the Grant Parish maintenance plan's attainment inventory, Louisiana provided an analysis of VOC emissions from on-road mobile sources comparing 7.8 and 9.0 psi RVP gasoline for three projection years: 2008, 2011, and 2014.

GRANT PARISH.—RVP COMPARISON EFFECT ON VOC EMISSIONS

Year	7.8 psi RVP VOCs (tpd)	9.0 psi RVP VOCs (tpd)
2002	1.27	N/A
2008	0.80	0.90
2011	0.63	0.70
2014	0.52	0.57

Modeling results for this comparison show that the overall effect on VOC emissions from between 7.8 and 9.0 psi RVP gasoline was 0.1 tpd or less for each of the three projection years, and that each of the projected VOC emission inventories from 9.0 psi RVP gasoline is less than the VOC emission inventory from the 2002 attainment year inventory. Therefore, the Grant Parish 8-hour maintenance plan demonstrates that use of the less stringent 9.0 psi RVP gasoline will not interfere with 8-hour ozone maintenance. In its approval of the maintenance plan for Grant Parish, EPA concluded that ''the Grant Parish 8-hour maintenance plan demonstrates that the use of either 7.8 or 9.0 psi RVP gasoline in the parish will allow the area to continue to meet the 8-hour ozone NAAQS.''

D. What are the Section 110(l) Requirements?

Section 110(l) requires that a revision to the SIP not interfere with any applicable requirement concerning attainment and reasonable further progress (''RFP'') (as defined in section 171), or any other applicable requirement of the Act. The modeling in the maintenance plan showed a very small increase in VOC emissions with the relaxed RVP standard when comparing emissions from 7.8 and 9.0 psi RVP gasoline in future years, but the emissions projections for the future years using 9.0 psi RVP gasoline in Grant Parish still reflect a decrease in emissions from the 2002 baseline year and a downward trend in VOC and NO_X emissions through 2014. Therefore, and as discussed in more detail above, Louisiana has demonstrated that EPA's approval of the relaxed RVP standard in Grant Parish will not interfere with continued maintenance of the 8-hour ozone standard in that Parish.

VI. Final Action and Rationale

EPA is taking direct final action to approve Louisiana's request to relax the federal RVP standard applicable to summertime gasoline supplied to Grant Parish. This action changes the applicable RVP standard in Grant Parish from 7.8 psi to 9.0 psi in 40 CFR 80.27(a)(2). This action will become effective on April 14, 2008, unless adverse comment is received by March 14, 2008.

Relaxation of the applicable RVP standard for Grant Parish is based on the fact that Grant Parish is a redesignated 1-hour ozone attainment area and a designated 8-hour ozone attainment area that has an approved section 110(a)(1) 8-hr maintenance plan. This maintenance plan demonstrates that Grant Parish can maintain the 8-hour ozone standard for the duration of the plan while using 9.0 psi RVP gasoline. As also discussed earlier, this SIP revision meets the requirements of section 110(l) of the Act. Finally, relaxation of the applicable standard will result in economic benefits as increased transportation costs associated with the delivery of 7.8 psi RVP gasoline will be eliminated.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to OMB review.

B. Paperwork Reduction Act

This action does not impose any new information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., and therefore is not subject to these requirements.

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 Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (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; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This action will relax the federal RVP standard for gasoline sold in Grant Parish, Louisiana, during the ozone control season (June 1 to September 15), from 7.8 psi to 9.0 psi, and is therefore expected not to have a significant economic impact on a substantial number of small entities. The rule does not impose any requirements or create impacts on small entities beyond those, if any, already required by or resulting from the CAA Section 211(h) Volatility Control program.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public

[30] 70 FR 25162 (May 12, 2005).

Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule 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 one year. Today's rule merely relaxes the Federal RVP standard for gasoline in the Grant Parish area, and thus avoids imposing the costs that the existing Federal regulations would otherwise impose. Today's rule, therefore, is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. As discussed above, the rule relaxes an existing standard and affects only the gasoline industry.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255 August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications, as specified in Executive Order 13175. This rule would relax the applicable RVP standard in Grant Parish, LA, during the ozone control season (June 1st to September 15th) from 7.8 psi to 9.0 psi. It applies only to Grant Parish, LA. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, Apr. 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. As previously discussed, the Grant Parish area has continued to meet the 1-hour ozone standard since 1995 and has met the 8-hour ozone standard since initial designations were issued in 2004. The maintenance plan approved on November 6, 2007 shows maintenance of the 8-hour ozone NAAQS for the entire maintenance time period of 2002 through 2014 with the 9.0 psi RVP standard.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law No. 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent

practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the applicable 8-hour ozone NAAQS which establish the level of protection provided to human health or the environment. This rule will relax the applicable volatility standard of gasoline during the summer possibly resulting in slightly higher mobile source emissions. However, the State of Louisiana has demonstrated in a maintenance plan that this action will not interfere with attainment of the 8-hour ozone NAAQS and therefore disproportionately high and adverse human health or environmental effects on minority or low-income populations are not an anticipated result.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A ''major rule'' cannot take effect until 60 days after it is published in the **Federal Register**.

This action is not a ''major rule'' as defined by 5 U.S.C. 804(a). This rule will be effective April 14, 2008.

VIII. Legal Authority and Statutory Provisions

Authority for this action is in sections 211(h) and 301(a) of the Clean Air Act, 42 U.S.C. 7545(h) and 7601(a).

List of Subjects in 40 CFR Part 80

Environmental protection, Administrative practice and procedures, Air pollution control, Fuel additives, Gasoline, Incorporation by reference, Motor vehicle and motor vehicle engines, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: February 7, 2008.

Stephen L. Johnson,

Administrator.

■ Title 40, chapter I, part 80 of the Code of Federal Regulations is amended as follows:

PART 80—[AMENDED]

■ 1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7545 and 7601(a).

■ 2. In § 80.27(a)(2)(ii), the table is amended by revising the entry for Louisiana and adding a new footnote 4 to read as follows:

§ 80.27 Controls and prohibitions on gasoline volatility.

(a) * * *

(2) * * *

(ii) * * *

APPLICABLE STANDARDS[1] 1992 AND SUBSEQUENT YEARS

State	May	June	July	August	September
* * * * * * *					
Louisiana:					
Grant Parish[4]	9.0	9.0	9.0	9.0	9.0
All other volatility nonattainment areas	9.0	7.8	7.8	7.8	7.8
* * * * * * *					

[1] Standards are expressed in pounds per square inch (psi).

* * * * * * * * *

[4] The standard for Grant Parish from June 1 until September 15 in 1992 through 2007 was 7.8 psi.

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[FR Doc. E8–2702 Filed 2–12–08; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–R09–2007–OAR–1109; FRL–8528–4]

Determination of Nonattainment and Reclassification of the Imperial County, 8-Hour Ozone Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule finalizes EPA's finding of nonattainment and reclassification of the Imperial County 8-hour ozone nonattainment area (Imperial County). EPA finds that Imperial County has failed to attain the 8-hour ozone national ambient air quality standard (''NAAQS'' or ''standard'') by June 15, 2007, the attainment deadline set forth in the Clean Air Act (CAA) and Code of Federal Regulations (CFR) for marginal nonattainment areas. As a result, on the effective date of this rule, Imperial County will be reclassified by operation of law as a moderate 8-hour ozone nonattainment area. The moderate area attainment date for the reclassified Imperial County will be ''as expeditiously as practicable,'' but no later than June 15, 2010. Once reclassified, California must submit State Implementation Plan (SIP) revisions that meet the 8-hour ozone nonattainment requirements for moderate areas, as required by the CAA. EPA has determined that the State must submit these SIP revisions by December 31, 2008.

DATES: *Effective Date:* March 14, 2008.

ADDRESSES: EPA has established docket number EPA–R09–2007–OAR–1109 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901. While

documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Adrienne Priselac, EPA Region IX, (415) 972–3285, *priselac.adrienne@epa.gov*.

SUPPLEMENTARY INFORMATION:

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I. What is the background for this action?

On November 23, 2007, EPA published its proposed finding that Imperial County did not attain the 8-hour ozone NAAQS by June 15, 2007, the applicable attainment date (72 FR 65682). The proposed finding was based upon ambient air quality data from the years 2004, 2005, and 2006. In addition, as explained in the proposed rule, the area did not qualify for an attainment date extension under the provisions of CAA section 181(a)(5) and 40 CFR 51.907, because the 4th highest daily value in the attainment year was greater than 0.084 ppm. In the November 23, 2007, proposal, EPA proposed that the area would be reclassified by operation of law to ''moderate'' nonattainment, in accordance with CAA section 181(b)(2).

II. Response to Comments

EPA published its proposed rule on November 23, 2007, and provided an opportunity for public comment. The public comment period ended on December 24, 2007. EPA received no comments. No further opportunity for public comment will be provided.

III. What is the effect of this action?

A. Determination of Nonattainment, Reclassification of Imperial County and New Attainment Date

Pursuant to section 181(b)(2), EPA finds that Imperial County failed to attain the 8-hour ozone NAAQS by the June 15, 2007, attainment deadline prescribed under the CAA (69 FR 23858, April 30, 2004 and 40 CFR 51.903(a)) for marginal ozone nonattainment areas. When this finding becomes effective, Imperial County will be reclassified by operation of law from marginal nonattainment to moderate nonattainment. The reclassification to the next higher classification is mandated by section 181(b)(2)(A) of the CAA. (see the discussion in the proposal at 72 FR 65684) Moderate areas are required to attain the standard ''as expeditiously as practicable'' but no later than 6 years after designation or June 15, 2010. The ''as expeditiously as practicable'' attainment date will be determined as part of the action on the required SIP submittal demonstrating attainment of the 8-hour ozone standard. Also in this action, EPA is finalizing its proposal establishing a schedule by which California will submit the SIP revisions necessary to meet the requirements for areas reclassified to moderate nonattainment of the 8-hour ozone standard.

B. Date for Submitting a Revised SIP for the Imperial County Area

In its proposal, EPA addressed the schedule by which California is required to submit a revised SIP meeting the requirements for the Imperial County moderate nonattainment area. When an area is reclassified, EPA has the authority under section 182(i) of the CAA to adjust the CAA's submittal deadlines for any new SIP revisions that are required as a result of the reclassification.

Pursuant to 40 CFR 51.908(d), for each nonattainment area, a state must provide for implementation of all control measures needed for attainment no later than the beginning of the attainment year ozone season. The attainment year ozone season is the ozone season immediately preceding a nonattainment area's attainment date, in this case 2009 (40 CFR 51.900(g)). The ozone season is the ozone monitoring season as defined in 40 CFR Part 58, Appendix D, section 4.1, Table D–3 (71 FR 61236, October 17, 2006). For the purposes of this reclassification for Imperial County, January 1, 2009, is the beginning of the ozone monitoring season. As a result, EPA is finalizing its proposal requiring that the required SIP revisions be submitted by California as expeditiously as practicable, but no later than December 31, 2008. This timeline also calls for implementation of applicable controls no later than January 1, 2009.

The area was previously required to submit the requirements for marginal areas, and under section 182(b) remains required to meet them, and now must meet the requirements for moderate areas as well.

A revised SIP must include the following moderate area requirements: (1) An attainment demonstration (40 CFR 51.908), (2) provisions for reasonably available control technology and reasonably available control measures (40 CFR 51.912), (3) reasonable further progress reductions in emissions (40 CFR 51.910), (4) contingency measures to be implemented in the event of failure to meet a milestone or attain the standard (CAA 172(c)(9)), and (5) NO_X and VOC emission offsets of 1.15 to 1 for major source permits (40 CFR 51.165(a)). See also the requirements for moderate ozone nonattainment areas set forth in CAA section 182(b).[1]

IV. Final Action

Pursuant to CAA section 181(b)(2), EPA is making a final determination that the Imperial County ''marginal'' 8-hour ozone nonattainment area failed to attain the 8-hour ozone NAAQS by June 15, 2007. Upon the effective date of this rule, the Imperial County ''marginal'' 8-hour ozone nonattainment area will be reclassified by operation of law as a ''moderate'' 8-hour ozone nonattainment area. Pursuant to section 182(i) of the CAA, EPA is establishing the schedule for submittal of the SIP revisions required for moderate areas once the area is reclassified. The required SIP revision for California must be submitted as expeditiously as practicable, but no later than December 31, 2008.

V. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), entitled ''Regulatory Planning and Review'' and is therefore not subject to review under the EO. The Agency has determined that the finding of nonattainment would result in none of the effects identified in the Executive Order. Under Section 181(b)(2) of the CAA, determinations of nonattainment are based upon air quality considerations and the resulting reclassifications must occur by operation of law.

[1] A vehicle inspection and maintenance (I/M) program would normally be listed as a requirement for an ozone moderate or above nonattainment area. However, the Federal I/M Flexibility Amendments of 1995 determined that urbanized areas with populations less than 200,000 for 1990 are not mandated to participate in the I/M program (60 FR 48027, September 18, 1995).

B. Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities. Determinations of nonattainment and the resulting reclassification of nonattainment areas by operation of law under section 181(b)(2) of the CAA do not in and of themselves create any new requirements. Instead, this rulemaking makes a factual determination, and does not directly regulate any entities. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act'' or ''UMRA''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that this rulemaking action does not include a Federal mandate within the meaning of UMRA that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. Also, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments and therefore is not subject to the requirements of section 203. EPA believes that the finding of nonattainment is a factual determination based upon air quality considerations and that the resulting reclassification of the area must occur by operation of law. Therefore EPA believes that the finding does not constitute a Federal mandate, as defined in section 101 of the UMRA, because it does not impose an enforceable duty on any entity.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action merely determines that the Imperial County area has not attained by its applicable attainment date, reclassifies the Imperial County area as a moderate ozone nonattainment area, and adjusts applicable deadlines. It does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency. This action is not subject to Executive Order 13045 because it is not economically significant as defined in E.O. 12866, and because the Agency does not have reason to believe the environmental health risks or safety risks addressed by this rule present a disproportionate risk to children. This action merely determines that the Imperial Valley area has not attained the standard by the applicable attainment date, reclassifies the Imperial Valley area as a moderate ozone nonattainment area, and adjusts applicable deadlines.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66

FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS. This action merely determines that the Imperial County area has not attained by the applicable attainment date, reclassifies the Imperial County area as a moderate ozone nonattainment area, and adjusts applicable deadlines. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective March 14, 2008.

K. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 14, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, Incorporation by reference.

Authority: 42 U.S.C. 7401 et seq.

Dated: January 24, 2008.

Jane Diamond,

Acting Regional Administrator, Region IX.

■ Part 81 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 81—[AMENDED]

■ 1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. In § 81.305 the ''California-Ozone (8-Hour Standard)'' table is amended by revising the entry for ''Imperial County:'' to read as follows:

§ 81.305 California.

CALIFORNIA-OZONE

[8-hour standard]

Designated area	Designation		Classification	
	Date[1]	Type	Date	Classification
* * *	*	*	*	*
Imperial County, CA: Imperial County	.....	Nonattainment	3/14/08	Subpart 2/Moderate.
* * *	*	*	*	*

[1] This date is June 15, 2004, unless otherwise noted.

[FR Doc. E8–2698 Filed 2–12–08; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–0637; FRL–8345–1]

1,3-Dichloropropene and metabolites; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for combined residues of 1,3-dichloropropene and metabolites in or on grape. Dow AgroSciences, LLC requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective February 13, 2008. Objections and requests for hearings must be received on or before April 14, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0637. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–

4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Mary L. Waller, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9354; e-mail address: *waller.mary@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111), e.g., agricultural workers; greenhouse, nursery, and floriculture workers; farmers.
- Animal production (NAICS code 112), e.g., cattle ranchers and farmers, dairy cattle farmers, livestock farmers.
- Food manufacturing (NAICS code 311), e.g., agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.
- Pesticide manufacturing (NAICS code 32532), e.g., agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0637 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before April 14, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2007–0637, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of September 19, 2007 (72 FR 53575–53577) (FRL–8144–3), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 1F6253) by Dow AgroSciences, LLC, 9330 Zionsville Road, Indianapolis, IN 46268. The petition requested that 40 CFR part 180 be amended by establishing a tolerance for residues of the fungicide, 1,3-dichloropropene, in or on grape at 0.009 parts per million (ppm). That notice referenced a summary of the petition prepared by Dow AgroScience, LLC, the registrant, which is available to the public in the docket, at *http://www.regulations.gov*. There were no comments received in response to the notice of filing. Based upon review of the data supporting the petition, EPA has revised and raised the tolerance level to include the combined residues of the parent chemical, *cis*- and *trans*-1,3 dichloropropene, and the metabolites, *cis*- and *trans*-3-chloroacrylic acid and *cis*- and *trans*-3-chloroallyl alcohol which are considered to be of equal toxicity to the parent chemical.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue....'' These provisions were added to FFDCA by the Food Quality Protection Act (FQPA) of 1996.

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerance for the combined residues of *cis*- and *trans*-1,3-dichloropropene, *cis*- and *trans*-3-chloroacrylic acid, and *cis*- and *trans*-3-chloroallyl alcohol (1,3-dichloropropene and metabolites) on grape at 0.018 ppm. EPA's assessment of exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The toxicology database is considered to be adequate to support the proposed and existing uses of 1,3-dichloropropene. 1,3-Dichloropropene showed moderate acute toxicity by the oral and dermal exposure routes (Toxicity Category II), was moderately irritating to the eye and skin, and was a dermal sensitizer in guinea pigs. It is classified as Toxicity Category IV for acute inhalation toxicity and produced tremors, convulsions, salivation, lacrimation, diarrhea, lethargy and death at concentrations 647 ppm or higher.

Consistent with the irritant properties of 1,3-dichloropropene, there was evidence of degenerative changes in the nasal olfactory epithelium and histopathological changes of the respiratory epithelium in rats and mice after subchronic inhalation exposure. Following chronic inhalation exposure, the olfactory region of the nasal cavity appeared to be the target organ in rats while lung adenomas were induced in mice. Similarly, following oral exposure, 1,3-dichloropropene induced histopathological lesions in rats and/or mice including forestomach squamous cell papillomas and carcinomas, liver masses/neoplastic nodules, urinary bladder carcinomas, and alveolar/brochiolaradenomas. Increases in hematopoietic activity and decreased body weights were also noted in dogs and mice, respectively. Accordingly, 1,3-dichloropropene has been classified as ''likely to be carcinogenic to humans'' via both the oral and inhalation routes. As a result, cancer potency factors (Q1*) have been calculated for both routes of exposure.

Specific information on the studies received and the nature of the adverse effects caused by 1,3-dichloropropene and metabolites as well as the no-observed-adverse-effect-level (NOAEL) and the lowest observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov*. The risk assessment dated January 24, 2008 is available in the docket established by this action, which is described under **ADDRESSES**, and is identified as EPA–HQ–OPP–2007–0637 in that docket.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, the toxicological level of concern (LOC) is derived from the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the LOC to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic risks by comparing aggregate exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the LOC by all applicable UFs. Short-, intermediate-, and long-term risks are evaluated by comparing aggregate exposure to the LOC to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded.

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk and estimates risk in terms of the probability of occurrence of additional adverse cases. Generally, cancer risks are considered non-threshold. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/fedrgstr/EPA-PEST/1997/November/Day-26/p30948.htm*.

A summary of the toxicological endpoints for 1,3-dichloropropene and metabolites used for human risk assessment can be found at *http://www.regulations.gov* in the document titled 1,3-Dichloropropene: Proposed New Use for Drip Irrigation in Vineyards: HED Human Health Risk Assessment at page 21 in docket ID number EPA–HQ–OPP–2007–0637.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to 1,3-dichloropropene and metabolites, EPA considered exposure under the petitioned-for tolerance. There are no other tolerances for 1,3-dichloropropene and metabolites. EPA assessed dietary exposures from 1,3-dichloropropene and metabolites in food as follows:

i. *Acute exposure*. Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure.

No such effects were identified in the toxicological studies for 1,3-dichloropropene and metabolites; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996, or 1998 Continuing Survey of Food Intake by Individuals (CSFII). As to residue levels in food, EPA relied upon anticipated residues and assumed 100 percent crop treated (PCT). Residues of *cis*- and *trans*-1,3-dichloropropene and three of the four metabolites were assumed to be at one-half the limit of detection (0.001 ppm) since residues were non-detectable in all field trials at shorter pre-harvest intervals (PHI) than the proposed use pattern. Residues at the proposed PHI in one trial of one metabolite were at the limit of quantitation (0.003 ppm), so the LOQ was used. The metabolites were assumed to have equal toxicity to the parent compound, so the total anticipated residue used in the dietary assessment for the chronic analyses was 0.0055 ppm.

iii. *Cancer*. The cancer dietary exposure assessment utilized the same data and assumptions used in the chronic dietary exposure assessment. For dietary exposure to 1,3-dichloropropene, an oral cancer potency factor ($Q1^*$ of 1.22×10^{-1} $(mg/kg/day)^{-1}$) was used to assess cancer risk.

iv. *Anticipated residue and percent crop treated (PCT) information*. Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must pursuant to FFDCA section 408(f)(1) require that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of this tolerance.

2. *Dietary exposure from drinking water*. The Agency lacks sufficient surface water monitoring data to complete a comprehensive dietary exposure analysis and risk assessment for 1,3-dichloropropene and metabolites in drinking water. Because the Agency does not have comprehensive surface water monitoring data, drinking water concentration estimates from surface water sources are made by reliance on simulation or modeling taking into account data on the environmental fate characteristics of 1,3-dichloropropene and metabolites. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS), the estimated environmental concentrations (EECs) of 1,3-dichloropropene and metabolites for chronic exposures are estimated to be 16.2 parts per billion (ppb). The limited surface water monitoring data available from areas of high use did not show detectable residues of 1,3-dichloropropene in 123 samples.

There is sufficient data for tap water from groundwater wells available for 1,3-dichloropropene and metabolites. A total of 518 wells were selected in the Central Columbia Plateau, Upper Snake River Basin, North Platte River, Albermarle-Pamlico Sound, and the George/Florida basins. The wells were intended to be among the most vulnerable wells available for sampling in each region because they were in high use areas, were among the shallowest in each region, and were located in close proximity to fields that had received 1,3-dichloropropene applications in the recent past. 1,3-Dichloropropene and metabolites were not found above 0.145 ppb in 5,800 samples.1,3-Dichloropropene or its degradates were detected in 12% of the wells. Only three wells had two detections over the course of the study; no wells had more than two detections. Of the approximately 5,800 samples, only 68 detections were observed for either the parent compound or the metabolites.

Modeled surface water estimates of drinking water concentrations and the maximum ground water concentration from monitoring data were directly entered into the dietary exposure model. For chronic dietary risk assessment, the surface drinking water concentration value of 16.2 ppb was used and the ground drinking water concentration value of 0.14 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

1,3-Dichloropropene is not registered for use on any sites that would result in residential exposure. However, due to the volatility of 1,3-dichloropropene, residential bystander exposure may occur when 1,3-dichloropropene is applied to agricultural fields near residential areas. Residential bystander exposure may occur because of emissions from treated fields. These emissions can travel to non-target areas and are referred to as bystander exposure. Bystander exposure can occur as a result of being in contact with residues that are emitted from a known single source (e.g., a single application to an agricultural field near a residential area) and from multiple sources (e.g., applications to numerous agricultural fields) within a localized agricultural region (ambient air exposure).

i. *Inhalation exposure from a single source*. Acute exposures to bystanders from single post-plant agricultural field fumigation events and their associated risks were calculated using the distributional/probabilistic modeling method. Distributional modeling was done with the Probabilistic Exposure and Risk Model for Fumigants (PERFUM). Exposures were also analyzed using the actual field study data (i.e, the monitoring method). Additional information on the methods used to assess bystander risks are given in Section 6.1.1 from the Phase 5 Registration Eligibility Decision.: *Methods Used to Calculate Bystander Exposures and Risks From Known Sources* located at *http://www.regulations.gov* in docket ID number EPA–HQ–OPP–2005–0124-0052, page 27.

a. Acute exposure was estimated by using the maximum 24–hour time-weighted average (TWA) from each field volatility study.

b. Short-term exposure was estimated by using the highest 7–day average for each direction from each field volatility study.

c. Intermediate-term exposures (consecutive exposures lasting 30 days to several months) is expected to be less likely since 1,3-dichloropropene products are only used 1 to 2 times per field each year.

d. Chronic exposure is not expected since it is unlikely that bystanders will be continually exposed to significant concentrations of 1,3-dichloropropene for 6 consecutive months or longer. Chronic exposure from multiple (ambient air) sources is more likely and described in section 3 (ii)(c).

e. Cancer risks to 1,3-dichloropropene were estimated for multiple (ambient air) sources as that exposure scenario is more representative of a lifetime of exposure and are described in the following section 3(ii)(d).

ii. *Inhalation exposure from ambient air sources*. Exposure to 1,3-dichloropropene from ambient air was evaluated using monitoring data from California. These data reflect existing pre-plant fumigation uses that are applied at rates over 10 times the rate of the proposed post-plant fumigation use on grapes. These data consist of two basic types that include targeted monitoring that occurred in a high use area during the season of use. The other type of data was collected as part of the routine Toxic Air Contaminant (TAC) program and focus on background levels in urban environments.

a. Acute exposure was estimated by using the maximum 24–hour time-weighted average (TWA) from the monitoring data.

b. Short-term and intermediate-term exposures were estimated by comparing the mean of the weekly mean estimate from the monitoring data.

c. Chronic exposures were calculated using the targeted regional source ambient data. These calculations should be considered as rangefinder estimates of exposure only because of a lack of monitoring studies specifically designed for this purpose. Short- and intermediate-term estimates were amortized to reflect a potential for exposure of 180 days out of each calendar year in order to calculate chronic estimates of exposure. This was based on the approximate use patterns for 1,3-dichloropropene over a year in high use areas. Results based on all of these calculations, as indicated above, do not represent a risk concern to the Agency and in most cases risks were far below the target level of concern (e.g., by orders of magnitude). There were no ambient monitoring studies targeting areas of high use that collected air samples over an entire year that would be considered representative of a chronic exposure pattern. In these studies the focus was more on the actual season of use so these data were typically collected for only 9 weeks or so which represents the duration of the typical application season. However, in order to be able to evaluate the possibility of chronic exposures in high use areas the Agency utilized the seasonal mean of means from the high use areas and supposed that exposures could be maintained at this rate for a

sustained period of 6 months which is twice as long as a normal application season. This approach does have some uncertainty associated with it but the Agency believes that this approach does not underestimate exposure because monitoring data were collected in the season of use in areas of high use. Additionally, risks calculated based on this method, as indicated above, are typically well below the Agency's level of concern. In addition to using the targeted monitoring data, the Agency also used the urban background monitoring data to calculate chronic risks. In this case, the data were intentionally designed to be used to evaluate longer-term exposure levels. Many of the samples collected in this network did not even contain measurable residues over the course of the monitoring years in question but chronic risks were still evaluated as a precautionary measure.

d. For cancer risk assessment, the lifetime average daily exposure (LADE) was calculated using the mean of weekly means and assumed that exposure lasts the length of the longest monitoring period (9 weeks/63 days).

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to 1,3-dichloropropene and any other substances and 1,3-dichloropropene does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that 1,3-dichloropropene has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408 of FFDCA provides that EPA shall apply an additional (''10X'') tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor. In applying this provision, EPA either retains the default value of 10X when reliable data do not support the choice of a different factor, or, if reliable data are available, EPA uses a different additional FQPA safety factor value based on the use of traditional UFs and/or special FQPA safety factors, as appropriate.

2. *Prenatal and postnatal sensitivity*. There is no evidence (quantitative or qualitative) of susceptibility and no residual uncertainties with regard to pre- and/or post-natal toxicity following *in utero* exposure to rats or rabbits and pre- and/or post-natal exposures to rats.

3. *Conclusion*. EPA has determined that reliable data show that it would be safe for infants and children to reduce the FQPA safety factor to 1X. That decision is based on the following findings:

i. The toxicity database for 1,3-dichloropropene is complete.

ii. There is no indication that 1,3-dichloropropene is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence that 1,3-dichloropropene results in increased susceptibility following *in utero* and/or post-natal exposure in rats or rabbits in the prenatal developmental studies or in young rats in the 2–generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100% crop treated and average anticipated residues. Conservative surface water modeling estimates were used, and sufficient monitoring data were used to assess ground water concentrations. There are no residential uses of 1,3-dichloropropene and conservative modeling was used to estimate bystander exposure. These assessments will not underestimate the exposure and risks posed by 1,3-dichloropropene and metabolites.

E. Aggregate Risks and Determination of Safety

Safety is assessed for acute and chronic risks by comparing aggregate exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the LOC by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given aggregate exposure. Short-, intermediate-, and long-term risks are evaluated by comparing aggregate exposure to the LOC to ensure that the margin of expsure (MOE) called for by the product of all applicable UFs is not exceeded.

For the acute, short-, intermediate-, and long-term assessments, the toxicity endpoints selected for inhalation and dietary exposures should not be aggregated since no common endpoints were identified at the LOAEL in studies conducted via the oral or inhalation routes. 1,3-Dichloropropene has been classified as likely to be carcinogenic to humans via the oral and inhalation routes. However, the types of tumors observed in the inhalation and oral studies were different. Therefore, the oral and inhalation exposures were not aggregated.

1. *Acute risk*. An endpoint was not selected for acute dietary risk assessment because there were no effects attributable to a single dose (exposure) via the oral route. Therefore, 1,3-dichloropropene is not expected to pose an acute dietary risk.

For residential bystander acute inhalation risk resulting from exposure to a single source, the lowest acute MOE was 400 based on the application rate in the field volatility data and the lowest acute MOE was 160 based on the maximum label rate. The risk estimates did not exceed the level of concern using the PERFUM modeling method. For residential bystander acute inhalation risk resulting from exposure to ambient air sources, the lowest acute MOE was 2,700 based on California ambient air monitoring data. The MOEs do not exceed the Agency's level of concern of < 30.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to 1,3-dichloropropene and metabolites from food and water (ground water sources) will utilize < 1% of the cPAD for the most highly exposed population group (children 1 to 2 years old) and from food and water (surface water sources) will utilize < 5% of the cPAD for the most highly exposed population group, infants < 1 year old.

Residential bystander chronic inhalation exposure from a single source is not expected to occur and therefore, does not pose an inhalation risk. For residential bystander chronic inhalation risk resulting from exposure to ambient air sources, the lowest chronic MOE was 130 based on California ambient air monitoring data. The MOE does not

exceed the Agency's level of concern of < 30.

3. *Short-term risk*. For residential bystander short-term inhalation risk resulting from exposure to a single source, the lowest short-term MOE was 60 based on the application rate in the field volatility data and based on the maximum label rate. For residential bystander short-term inhalation risk resulting from exposure to ambient air sources, the lowest short-term MOE was 1,700 based on California ambient air monitoring data. The MOEs do not exceed the Agency's level of concern of < 30.

4. *Intermediate-term risk*. Residential bystander intermediate-term inhalation exposure from a single source is unlikely to occur and therefore, does not pose an inhalation risk. For residential bystander intermediate-term inhalation risk resulting from exposure to ambient air sources, the lowest intermediate-term MOE was 70 based on California ambient air monitoring data. The MOE does not exceed the Agency's level of concern of < 30.

5. *Aggregate cancer risk for U.S. population*. The aggregated food and water risk represent upper bound risks for a person living in agricultural areas where 1,3-dichloropropene is used extensively or where a person obtains drinking water from an aquifer that led directly from an area where 1,3-dichloropropene was used. The aggregate chronic dietary cancer risk estimates for the general U.S. population resulting from exposure to 1,3-dichloropropene and metabolites in food and water (ground water sources) is 7 X 10^{-7} and from exposure to 1,3-dichloropropene and metabolites in food and water (surface water sources) is 4 X 10^{-5}.

Although risk for drinking water from surface water sources for 1,3-dichloropropene exceeds the Agency's level of concern (risk estimates generally in the range of 1 in 1 million, interpreted as > 1 to 3 X 10^{-6}); it should be noted that concentrations of 1,3-dichloropropene in tap water from ground water wells were approximately 100 times lower than those found in the field ground water study and several orders of magnitude lower than modeled estimates of 1,3-dichloropropene in groundwater. Therefore, it is highly likely that actual drinking water concentrations of 1,3-dichloropropene from surface water sources would also be much lower. 1,3-Dichloropropene and its metabolites are highly volatile compounds, and the models used to generate surface water and ground water estimates are not designed for volatile chemicals. The limited surface water monitoring data available in areas of high use do not show any detections of 1,3-dichloropropene and its degradates. Therefore, the Agency does not have a concern for the aggregate cancer risk from oral exposures to 1,3-dichloropropene and its metabolites.

Cancer risk was estimated using 1,3-dichloropropene ambient air monitoring data collected from over 20 sites over multiple years to estimate exposure over a lifetime. These sites were in areas of high use and in urban environments. The cancer risk estimates for all but one monitoring site, in a high use area, ranged from 2 X 10^{-6} to 9 X 10^{-8}, which are below the Agency's level of concern. The monitoring data for the one site resulted in a risk estimate of 6 X 10^{-6}, which does exceed the Agency's level of concern. However, risks calculated using data from the same site in the following year was almost two orders of magnitude lower. Therefore, over a lifetime of exposure, the risk estimates would likely be below the level of concern. It should be noted that in more populated urban environments, air concentrations were below the analytical limit of detection in 21 of 28 sites/year combinations considered. In the remaining seven site/year combinations, values were measured but did not result in cancer risks of concern. Therefore, the Agency does not have a concern for the cancer risk from 1,3-dichloropropene.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to 1,3-dichloropropene and metabolites residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Dow AgroSciences, LLC submitted a gas chromatography/massspectroscopy (GC/MS) method, Method GRM 99.09.R1, for thedetermination of residues of *cis*- and *trans*-1,3-dichloropropene. The method was adequately validated using fortified samples of grape. Recoveries of *cis*-1,3-dichloropropene ranged from 70% to 114% and recoveries of *trans*-1,3-dichloropropene ranged from 77% to 113% from samples fortified at 0.003, 0.010, 0.050, and 0.50 ppm. The fortification levels used in method validation are adequate to bracket expected residue levels. Adequate independent laboratory validation (ILV) datawere submitted for Method GRM 99.09.R1 using samples of grape.

Dow AgroSciences, LLC submitted a GC/MS method, Method GRM99.18, for the determination of residues of 3-chloroallyl alcohol and 3-chloroacrylic acid. The validated LOQ is 0.003 ppm for each analytein grape. The method was adequately validated using fortified samplesof grape. Recoveries of *cis*-3-chloroallyl alcohol ranged from 74% to 90%, recoveries of *trans*-3-chloroallyl alcohol ranged from 82% to 95%, recoveries of *cis*-chloroacrylic acid ranged from 93% to 98%, and recoveries of *trans*-chloroacrylic acid ranged from 91% to 96% from samples fortified at 0.003, 0.006, and 0.030 ppm. The fortification levels used in method validation are adequate to bracket expected residue levels. The Agency has tentatively concluded that the metabolite method is suitable for enforcement.

Adequate enforcement methodology (GC/MS) is available to enforcethe tolerance expression. The method may be requested from: Chief,Analytical Chemistry Branch, Environmental Science Center, 701Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no Canadian or Codex Maximum Residue limits for residues of 1,3-dichloropropene for any commodity.

C. Conditions

1. An independent laboratory validation of Method GRM 99.18 andmulti-residue method testing will be required as confirmatory data.

2. In order to refine the exposure estimates from PRZM-EXAMS, the following data will be required: an aerobic soil metabolism study on additional soils (parent and metabolites); an aerobic aquatic metabolism study (parent and metabolites); an aqueous photolysis study (indirect and parent); a soil photolysis study (parent); and a photolysis/oxidation in air study (parent).

V. Conclusion

Therefore, the tolerance is established for combined residues of *cis*- and *trans*-1,3-dichloropropene, *cis*- and *trans*-3-chloroacrylic acid, and *cis*- and *trans*-3-chloroallyl alcohol, in or on grape at 0.018 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and

Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000) do not apply to this rule. In addition, This rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: February 1, 2008.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.636 is added to subpart C to read as follows:

§ 180.636 1,3-dichloropropene; tolerances for residues.

(a) *General.* Tolerances are established for the combined residues of the fungicide *cis*- and *trans*-1,3-dichloropropene and its metabolites *cis*- and *trans*-3-chloroacrylic acid, and *cis*- and *trans*-3-chloroallyl alcohol in or on the following commodities.

Commodity	Parts per million
Grape	0.018

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

[FR Doc. E8–2480 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–S

LEGAL SERVICES CORPORATION

45 CFR Part 1611

Income Level for Individuals Eligible for Assistance

AGENCY: Legal Services Corporation.

ACTION: Final rule—correction.

SUMMARY: The Legal Services Corporation (''Corporation'') is required by law to establish maximum income levels for individuals eligible for legal assistance. On January 30, 2008 the Corporation issued a document updating the specified income levels to reflect the annual amendments to the Federal Poverty Guidelines as issued by the Department of Health and Human Services. This notice corrects a typo appearing in the supplementary information, but does not affect the income levels set forth in the charts. Specifically, in the sentence in the last paragraph of the **SUPPLEMENTARY INFORMATION**, 73 FR 5458, Jan. 30, 2008, beginning ''These charts are for references purposes * * *,'' the first percentage referred to should be ''125%'' instead of ''200%.''

DATES: *Effective Date:* This rule is effective as of January 30, 2008.

FOR FURTHER INFORMATION CONTACT: Mattie Cohan, Senior Assistant General Counsel, Legal Services Corporation, 3333 K St., NW., Washington, DC 20007; (202) 295–1624; *mcohan@lsc.gov*.

SUPPLEMENTARY INFORMATION: Section 1007(a)(2) of the Legal Services Corporation Act (''Act''), 42 U.S.C. 2996f(a)(2), requires the Corporation to establish maximum income levels for individuals eligible for legal assistance, and the Act provides that other specified factors shall be taken into account along with income.

Section 1611.3(c) of the Corporation's regulations establishes a maximum income level equivalent to one hundred and twenty-five percent (125%) of the Federal Poverty Guidelines. Since 1982, the Department of Health and Human Services has been responsible for updating and issuing the Federal Poverty Guidelines. The revised figures for 2008 are equivalent to 125% of the current Federal Poverty Guidelines as published on January 23, 2008 (73 FR 3971).

LSC published the charts listing income levels that are 200% of the Federal Poverty Guidelines at 73 FR 5458, Jan. 30, 2008. These charts are for reference purposes only as an aid to grant recipients in assessing the financial eligibility of an applicant whose income is greater than 125% of the applicable Federal Poverty

Guidelines amount, but less than 200% of the applicable Federal Poverty Guidelines amount (and who may be found to be financially eligible under duly adopted exceptions to the annual income ceiling in accordance with sections 1611.3, 1611.4 and 1611.5).

Victor M. Fortuno,

Vice President for Legal Affairs, General Counsel & Corporate Secretary.

[FR Doc. E8–2427 Filed 2–12–08; 8:45 am]

BILLING CODE 7050–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 0612243163–7151–01]

RIN 0648–AU59

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Shrimp Fisheries of the Gulf of Mexico; Revisions to Bycatch Reduction Devices and Testing Protocols

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

ACTION: Final rule.

SUMMARY: In accordance with the framework procedures for adjusting management measures specified in regulations implementing the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico (Gulf FMP) and the Fishery Management Plan for the Shrimp Fishery of the South Atlantic Region (South Atlantic FMP), NMFS issues this final rule to consolidate and make modifications to the Bycatch Reduction Device Testing Manuals (Manual) for the Gulf of Mexico and the South Atlantic regions. This final rule also revises the bycatch reduction device (BRD) certification criterion for the western Gulf of Mexico and certifies additional BRDs. The intended effect of this final rule is to improve bycatch reduction in the shrimp fisheries and better meet the requirements of national standard 9.

DATES: This final rule is effective March 14, 2008.

ADDRESSES: Copies of the Final Regulatory Flexibility Analysis (FRFA) and the consolidated and revised Bycatch Reduction Device Testing Manual are available from the Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701; phone: 727–824–5305; fax: 727–824–5308.

Comments regarding the approved collection-of-information requirements contained in this final rule should be submitted in writing to Jason Rueter at the Southeast Regional Office address (above) and to David Rostker, Office of Management and Budget (OMB), by e-mail at David__Rostker@omb.eop.gov, or by fax to 202–395–7285.

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

SUPPLEMENTARY INFORMATION: The fisheries for shrimp in the exclusive economic zone (EEZ) of the Gulf of Mexico (Gulf) and the South Atlantic are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and regulations at 50 CFR part 622. The regulations implement the Gulf FMP prepared by the Gulf of Mexico Fishery Management Council (GMFMC) and the South Atlantic FMP prepared by the South Atlantic Fishery Management Council (SAFMC).

On October 12, 2007, NMFS published the proposed rule to revise the bycatch reduction device testing protocols for the Gulf and South Atlantic regions, revise the BRD certification criterion for the western Gulf, and certify additional BRDs (72 FR 58031). Public comment on the proposed rule was requested through November 13, 2007. The rationale for the measures contained in this final rule is provided in the preamble to the proposed rule and is not repeated here.

Comments and Responses

The following is a summary of the comments NMFS received on the proposed rule and NMFS' respective responses. Three comment letters were received during the comment period. In addition, a non-governmental organization submitted comments signed by 1,266 individuals in support of the proposed action.

Comment 1: NMFS should implement the proposed changes as part of a comprehensive plan to address the significant amount of bycatch associated with this fishery and help end overfishing and rebuild the red snapper stock.

Response: This rulemaking is part of a comprehensive plan addressing bycatch in the shrimp fishery and overfishing of the red snapper resource. This rulemaking to provide additional BRDs to the fishery will support additional actions taken by the GMFMC and NMFS. In 2006, the GMFMC recommended, and NMFS implemented, an individual fishing quota (IFQ) for the commercial Gulf red snapper fishery; in general, IFQs tend to help reduce fishing mortality. To better control overall effort in the shrimp fishery, the GMFMC recommended, and NMFS implemented, a moratorium on the issuance of Federal shrimp vessel permits. Approximately 2,000 vessels qualified for a moratorium permit; this is a substantial reduction from the number of vessels participating in the fishery in the past. In addition, the GMFMC recommended, and NMFS is currently considering several actions to end overfishing of red snapper by 2010 and rebuild the stock by 2032. The recommended actions include a substantial reduction in the total allowable catch for the directed commercial and recreational red snapper fishery, harvesting restrictions to restrain the recreational fishery to its quota, and possible time-area closures for the shrimp fishery to reduce bycatch mortality on juvenile red snapper.

Comment 2: The proposed changes to increase flexibility in the field testing procedures for experimental BRDs should substantially improve the practicability of the testing criteria and procedures that currently exist. Many of the changes will better allow research to be adapted to the real-world practical realities of shrimp trawling and, as a consequence, will encourage more fishermen to participate in testing new BRD designs and configurations.

Response: The procedures prescribed for testing BRDs in the field were rigorous in an attempt to reduce the statistical uncertainty of the results. However, these rigorous field sampling procedures and the inflexible statistical procedures hindered the successful certification of several BRD designs that showed promise at reducing substantial amounts of bycatch. This discourages innovative developments to improve BRDs.

Comment 3: Replacing the current tow time restrictions with a more realistic requirement for such adjustments to be reasonable will allow fishermen to adapt to local fishing conditions and successfully complete a test on an experimental BRD. However, the proposed rule indicated any tow time changes made during a field test would need to be approved by the Regional Administrator (RA) at the conclusion of the test, and the changes may be disapproved. There should be a more deliberate process for the applicant and NMFS to resolve what the acceptable limits will be on tow time adjustments. This should be done on a case-by-case basis before the testing begins and as part of the initial design

of the operations plan. This will avoid the situation of after-the-fact rejections of the tests by the RA and the resulting wasted time and resources.

Response: It is the responsibility of the applicant to make logical and reasonable proposals for tow times in the research plan submitted to the RA requesting a Letter of Authorization to conduct a test on an experimental BRD. The research plan should also include a ''contingency'' plan if any of the primary procedures have to be changed during a test. Changes to the tow time made during a test should follow a similar logical and reasonable rationale. Even under the best pre-planned event, there may be a need to make such a change during a test. For example, the total catch taken during a tow may be greater than what was anticipated in the applicant's proposal. Under such conditions, shorter tow times would produce manageable quantities of catch for sampling. Under the new procedures, when the final test results are submitted to NMFS for review, the applicant would simply need to document the need for such a change, and provide a good rationale for such change. The rationale for the change would be reviewed by the RA, in consultation with Southeast Fisheries Science Center staff, on a case-by-case basis.

Comment 4: The current requirement to rotate gear between the port and starboard sides every four to six tows (Gulf) or daily (South Atlantic) to eliminate net or side bias is highly impracticable and has presented a serious obstacle to participation in the testing program. The proposed change would allow the applicant to propose an acceptable rotational schedule that still ensures equal numbers of tows will be conducted with the BRD candidate on both sides. In the case of a quad-rig (4–net) vessel, NMFS should additionally allow the applicant to use the candidate BRD in one of the two nets on each side of the vessel, simultaneously, as an alternative means to eliminate bias that might result from testing on just one side of the vessel. This will help eliminate the numerous practical difficulties associated with rotating gear.

Response: BRD testing is conducted by comparing the differences in the catch and bycatch of two nets towed simultaneously by a single vessel, where one net contains an experimental BRD, the other net has no BRD. Assuming the two nets have equal or similar fishing efficiencies, the differences in catch and bycatch between the two nets can be attributed to the inclusion of the experimental BRD in one net. In reality, no two nets will have identical fishing efficiencies, nor will each net encounter exactly the same number of each species during a tow. Therefore, the paired tests will always have some, albeit minor, bias between nets. The requirement to rotate the experimental BRD from one net to another on a regular basis is intended to negate this bias. Additionally, there may be some differences in the catch between outboard and inboard nets in a quad-rig system, especially for the inboard net located behind the try net. Comparisons of the catch of an inboard net to the catch of an outboard net adds another variable for consideration. For this reason, to make the paired comparison as balanced as possible, the procedure has always designated the two outboard nets be used as experimental and control nets. Nevertheless, NMFS does not automatically exclude the proposed concept to place an experimental BRD in a net on both sides of the vessel, and compare the catch of those nets against the catch of the other two nets that do not contain a BRD. The revisions to the testing procedures are intended to provide the applicant with the flexibility to make a reasonable proposal for a scientifically and statistically valid experiment.

Classification

The Administrator, Southeast Region, NMFS, determined that this rule is necessary for the conservation and management of the shrimp fisheries in the Gulf and the South Atlantic regions and is consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be significant for purposes of Executive Order 12866.

A FRFA was prepared. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS responses to those comments, and a summary of the analyses completed to support the action. A copy of this analysis is available from NMFS (see **ADDRESSES**).

This final rule will modify the procedures for field testing BRD candidates for use in the Gulf and South Atlantic EEZ commercial shrimp fisheries, will modify the bycatch reduction criterion for certifying BRDs for use in the penaeid shrimp fishery in the Gulf EEZ west of Cape San Blas, Florida (western Gulf), and certify new BRDs for the fisheries.

The purpose of this final rule is to implement more practical field testing procedures for BRD certification candidates and to establish a realistic bycatch reduction threshold for the Gulf EEZ commercial shrimp fishery.

No significant issues were raised by public comments in response to the IRFA. Therefore, no changes were made in the final rule as a result of such comments.

The primary entities that are expected to apply for the BRD certification process are state government, academic, and not-for-profit entities. Independent commercial shrimping operations in either the Gulf or South Atlantic may also be included among applicants. In addition to being potential testing applicants, Gulf shrimp vessels are expected to be indirectly impacted by the modification to the bycatch reduction criterion. NMFS estimates up to 24 applicants will apply for the BRD certification process during the first year and a smaller number in following years. While the identity of entities that might pursue future BRD testing cannot be determined with any certainty, based on past applicants, BRD testing is expected to be undertaken by NMFS, the Texas Parks and Wildlife Department, the Florida Department of Environmental Protection, Texas A&M University, the University of Georgia, the Gulf and South Atlantic Fisheries Foundation, Inc., other institutions, and owners of shrimp vessels.

There are approximately 700 vessels permitted to operate in the South Atlantic EEZ commercial shrimp fishery. The most current assessment of the South Atlantic commercial shrimp fishery covers the period 2000–2002 and encompasses vessels that operated in both state and EEZ waters. While this assessment covered a larger universe of vessels, an average of approximately 1,900 vessels per year, and different economic conditions, it represents the best profile available at this time. Over this period, average gross revenue per vessel ranged from approximately $71,000 to approximately $81,000. The highest gross revenue per vessel from all commercial harvesting activities did not exceed $1.0 million.

For the Gulf EEZ, as of March 26, 2007, a moratorium permit is required to fish for shrimp. Based on the number of permits issued and number of applications being processed as of November 8, 2007, approximately 2,000 vessels are expected to be issued moratorium permits.

An evaluation of revenue distribution within the Gulf EEZ commercial shrimp fleet by vessel size indicates substantial differences in yearly average revenues between large (at least 60 ft (18.3 m) in length) and small vessels. For the large vessel group, average annual revenues per vessel in 2004 was approximately $140,000, while the comparable value for small vessels was approximately

$27,000. Across all vessels, the average annual gross revenue per vessel was approximately $110,000. Maximum yearly gross revenue reported by a qualifying vessel was approximately $1,046,000.

On average, small vessels are also smaller in regards to most of their physical attributes (e.g., they use smaller crews, fewer and smaller nets, have less engine horsepower and fuel capacity). Small vessels are also older on average. Large vessels tend to be steel-hulled, whereas fiberglass hulls are most prominent among small vessels, though steel and wood hulls are also common. Nearly two-thirds of large vessels have freezing capabilities while few small vessels have such equipment. Small vessels still rely on ice for refrigeration and storage, though more than one-third of large vessels also rely on ice. Some vessels are so small that they rely on live wells for storage.

An important difference between large and small Gulf EEZ commercial shrimp vessels is with respect to their dependency on the food shrimp fishery. The percentage of revenues arising from food shrimp landings is approximately 81 percent for large vessels, but only approximately 58 percent for small vessels. Thus, on average, large vessels are more dependent than their smaller counterparts on the food shrimp fishery. However, dependency on food shrimp is more variable within the small vessel sector than the large vessel sector. Many small vessels are quite dependent on food shrimp landings, while others illustrate little if any dependency.

Finally, according to recent projections, on average, both small and large Gulf EEZ commercial shrimp vessels are experiencing significant economic losses, ranging from a -27 percent rate of return (net revenues or total fixed and variable costs) in the small vessel sector to a -36 percent rate of return in the large vessel sector (-33 percent on average for the fishery as a whole).

The Small Business Administration (SBA) defines a small organization as any not-for-profit enterprise that is independently owned and operated and not dominant in its field of operation. This definition includes private educational institutions. The SBA also defines a small governmental jurisdiction as the government of cities, counties, towns, townships, villages, school districts, or special districts with a population less than 50,000. Finally, the SBA defines a small business in the commercial fishing activity as an entity that is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has average annual total receipts not in excess of $4.0 million annually (NAICS codes 114111 and 114112, finfish and shellfish fishing).

While the identity of entities that might pursue BRD testing cannot be determined with any certainty, based on past applicants, BRD testing is expected to be undertaken by NMFS, the Texas Parks and Wildlife Department, the Florida Department of Environmental Protection, Texas A&M University, the University of Georgia, the Gulf and South Atlantic Fisheries Foundation, Inc., other institutions, and owners of shrimp vessels. The state agencies are extensions of the respective state governments and, as such, clearly exceed the SBA population thresholds for small government entities. Similarly, both Texas A&M University and the University of Georgia are, as public universities, extensions of the respective state government educational systems, with staff being state employees, and, therefore, are similarly classified as large entities. Any private college or university, or non-profit organization that might apply for the BRD testing process is determined for the purpose of this analysis to be a small entity because private educational institutions and small non-profit organizations are generally understood to be smaller in terms of student population, staff, and operational budgets than public institutions. Based on the maximum annual revenue information for Gulf and South Atlantic commercial shrimping operations, vessels that may participate in the certification program are determined to be small business entities for the purpose of this analysis. It is unknown what portion of the estimated maximum 24 entities expected to apply for the certification program the first year, and fewer entities in subsequent years, would be small or large entities.

All entities that receive the Gulf EEZ commercial shrimp fishery moratorium permit may be indirectly affected by the Gulf bycatch reduction criterion. Based on the maximum revenue information for Gulf EEZ commercial shrimping operations, all such vessels are determined, for the purpose of this analysis, to be small business entities.

The measures in this final rule do not affect the reporting or record-keeping requirements for shrimp vessels. This final rule only modifies the performance standards used in BRD certification and does not require new record or report preparation.

The outcome of ''significant economic impact'' can be ascertained by examining two issues: disproportionality and profitability.

The disproportionality question is: do the final regulations place a substantial number of small entities at a significant competitive disadvantage to large entities? Revision to the Manual is not expected to result in any direct or indirect adverse economic impacts on any affected entities since the reporting burden per applicant will not increase and the revisions, in and of themselves, will not cause any BRDs to be certified, provisionally certified, or decertified in future actions. Therefore, the issue of disproportionate impacts does not apply to this component of the final rule.

Similarly, the change to the Gulf EEZ commercial shrimp fishery bycatch reduction criterion will not result in any direct adverse economic impacts on participants in the Gulf EEZ commercial shrimp fishery. However, the change in the bycatch reduction criterion is expected to generate indirect impacts on vessels in this fishery as a result of future certification, provisional certification, or decertification actions. All of these vessels have been determined to be small business entities. Thus, the issue of disproportionality does not apply to this component of the final rule.

The certifications and provisional certifications will affect all vessels in the Gulf EEZ commercial shrimp fishery, as well as some vessels in the South Atlantic EEZ commercial shrimp fishery. Because all of these entities are determined to be small entities, the issue of disproportionality does not apply to this component of the final rule.

The profitability question is: do the regulations significantly reduce profit for a substantial number of small entities?

The revision of the Manual will not directly affect fishery participation or harvest because it merely establishes procedures under which research and gear development may proceed. The bycatch reduction criterion for the Gulf EEZ commercial shrimp fishery will also not result in any direct adverse economic impacts on fishery participants because it is an administrative action.

In addition to the Modified Jones-Davis BRD, the bycatch reduction criterion will allow for the extended funnel BRD to be provisionally certified for use in the Gulf EEZ shrimp fishery, and the composite panel BRD to be provisionally certified for use in the Gulf and South Atlantic EEZ shrimp fisheries. However, these three BRDs are not presently certified for use by the fleet in the western Gulf, are more costly to purchase, and produce greater shrimp loss, on average, than the predominantly

used fisheye-type BRDs. As such, no shrimp vessel owners are expected to switch from their current BRDs to these BRDs and no direct impacts are expected to result from the certification or provisional certification of these BRDs.

The bycatch reduction criterion will, however, result in decertification of some currently used BRDs through subsequent regulatory action. Decertification of currently used BRDs will require the use of alternative certified or provisionally certified BRDs, with associated re-gearing costs. Among the BRDs currently in use, the maximum first-year re-gearing cost that could be incurred as a result of future decertification would be that associated with the Jones-Davis BRD, which is the most expensive remaining certified BRD, with an estimated cost of $425 per BRD, and would range from $2,550 per vessel for six BRDs to $4,250 per vessel for 10 BRDs, or between 2.3 percent and 3.8 percent of an average vessel's annual revenues. Lowest BRD replacement costs would be associated with a Modified Jones-Davis BRD, with an estimated cost of $300 per BRD, or $1,800 to $3,000 per vessel. Not all vessels would be required to acquire new BRDs, however, since not all current BRDs would be decertified, and the cheapest and currently most commonly used BRD, a fisheye-type BRD, could continue to be used in a different configuration. Although potential resultant shrimp loss would have to be figured into the decision, some fishermen may elect to retain but move the fisheye BRD as opposed to purchasing a different BRD, thus incurring no replacement costs for the gear itself.

Since different BRDs produce different rates of shrimp retention, the decision of which BRD to use impacts gross revenues as well as operational and gear costs. Depending upon the BRD type currently used and the BRD type that might be selected as a replacement, reductions in average annual gross revenues of up to 3 percent have been projected for small vessels and 2 percent for many large vessels. Actual performance would vary, however, as individual vessels adopt the BRD that best meets their skill and fishing behavior in order to minimize costs and maximize revenues. All associated costs will directly accrue, however, only to a subsequent rule and not to the current action.

This final rule will certify the Modified Jones-Davis BRD for the Gulf and South Atlantic EEZ shrimp fisheries, provisionally certify the extended funnel BRD to be used in the Gulf EEZ shrimp fishery, and provisionally certify the composite panel BRD to be used in the Gulf and South Atlantic EEZ shrimp fisheries. No direct adverse economic impacts will accrue to fishermen in either the Gulf or South Atlantic EEZ shrimp fisheries as a result of these changes because no vessels will be required to use these BRDs. The certification or provisional certification of these BRDs will increase the options available to vessels. Use of these BRDs will be at the discretion of individual fishermen and adoption of the gear would only be expected to occur where it was expected to result in improved economic outcomes.

Two alternatives, the final rule and the status quo, were considered for the action to modify the Manual. The status quo would continue overly restrictive and inflexible testing procedures and would not achieve NMFS' objectives.

Three alternatives, including the status quo, were considered for the change in the BRD bycatch reduction criterion. Two alternatives contained multiple options, resulting in eight effective alternatives. As previously discussed, changing the criterion is an administrative action and would not simultaneously decertify BRDs currently in use or require immediate replacement. Decertification, with attendant costs, however, will occur through subsequent action.

The first alternative to the final bycatch reduction criterion, the status quo, is a specific juvenile red snapper fishing mortality reduction. Maintaining the status quo will result in the decertification of all currently certified BRDs except the Jones-Davis BRD for use in the Gulf. Current data indicate these BRDs do not meet the status quo bycatch reduction criterion. Decertification of these BRDs under the status quo would induce greater industry-wide replacement costs than the bycatch reduction criterion of this final rule because the final rule will allow more BRD options than the single Jones-Davis BRD.

The second alternative to the final bycatch reduction criterion would continue to base the bycatch reduction target on juvenile red snapper, similar to the status quo, but would consider three different minimum thresholds in catch-per-unit-effort (CPUE). The two lower minimum thresholds, 12 percent and 20 percent reductions in juvenile red snapper CPUE, would be expected to allow continued use of the fisheye BRD, resulting in no direct or indirect adverse economic impacts. Neither threshold, however, would meet the objective of the Magnuson-Stevens Act requirement that bycatch be reduced to the extent practicable. The final rule alternative has been identified to improve overall finfish bycatch reduction including juvenile red snapper at rates higher than specified by these alternatives. The highest red snapper bycatch reduction minimum threshold, a 30 percent reduction in juvenile red snapper CPUE, would be expected to result in the same effects as the status quo, because it has not been demonstrated this goal is achievable, resulting in greater indirect adverse economic impacts than the bycatch reduction criterion of this final rule.

The third alternative to the final bycatch reduction criterion would base the bycatch reduction criterion on all finfish species and considered four minimum thresholds, ranging from 10 to 40 percent. The final rule will establish a 30–percent finfish bycatch reduction minimum threshold. The two lower finfish bycatch reduction minimum thresholds, 10 percent and 20 percent, would be expected to allow continued use of fisheye BRDs, resulting in no direct or indirect adverse economic impacts. However, neither threshold would meet the Magnuson-Stevens Act requirement of achieving bycatch reduction to the extent practicable because several available BRDs are already achieving a 30–percent reduction in finfish bycatch. The highest finfish bycatch reduction minimum threshold, 40 percent, would not be expected to result in any direct adverse economic impacts but would be expected to result in indirect increased gear costs equal to those of the status quo, resulting in greater indirect adverse economic impacts than the bycatch reduction criterion of this final rule. This alternative would also set an excessive standard that few BRD designs could achieve.

Copies of the FRFA are available from NMFS (see **ADDRESSES**).

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare an FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' As part of this rulemaking process, NMFS prepared a fishery bulletin, which also serves as a small entity compliance guide. The fishery bulletin will be sent to all vessel permit holders in the Gulf and South Atlantic shrimp fisheries.

This final rule contains approved collection-of-information requirements--namely, the BRD certification process, consisting of applications for pre-

certification or certification of a new BRD, pre-certification adjusting, the testing itself, the submission of the test results, application for observer position, and references for observers, subject to the Paperwork Reduction Act (PRA). These collection-of-information requirements have been approved by OMB under Control Number 0648–0345. The public reporting burden for this collection of information which includes the application, pre-certification phase, testing, and submission of results, is estimated to average 222 hours per test. The public reporting burden for applying for an observer position will average 1 hour per response, and the burden for obtaining references will average 1 hour per response. The collection consists of an Application Form, Vessel Information Form, Gear Specification Form, TED/BRD Specification Form, Station Sheet Form, Species Characterization Form, Length Frequency Form, and Condition and Fate Form. The average response time for each of these forms is 20 minutes, except for the Species Characterization Form which has a 2.8-hour response time and the Application Form which has a 2.3-hour response time. In addition, 4 hours will be needed to prepare the final report. These burden estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of the collection-of-information requirement, including suggestions for reducing the burden, to NMFS and to OMB (see **ADDRESSES**).

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: February 7, 2008.

Samuel D. Rauch III,

Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.41, paragraph (h) is removed and reserved and paragraph (g) is revised to read as follows:

§ 622.41 Species specific limitations.

* * * * *

(g) *BRD requirement for Gulf and South Atlantic shrimp.* On a shrimp trawler in the Gulf EEZ or South Atlantic EEZ, each net that is rigged for fishing must have a BRD installed that is listed in paragraph (g)(2) of this section and is certified or provisionally certified for the area in which the shrimp trawler is located, unless exempted as specified in paragraphs (g)(1)(i) through (iv) of this section. A trawl net is rigged for fishing if it is in the water, or if it is shackled, tied, or otherwise connected to a sled, door, or other device that spreads the net, or to a tow rope, cable, pole, or extension, either on board or attached to a shrimp trawler.

(1) *Exemptions from BRD requirement*—(i) *Royal red shrimp exemption.* A shrimp trawler is exempt from the requirement to have a certified or provisionally certified BRD installed in each net provided that at least 90 percent (by weight) of all shrimp on board or offloaded from such trawler are royal red shrimp.

(ii) *Try net exemption.* A shrimp trawler is exempt from the requirement to have a certified or provisionally certified BRD installed in a single try net with a headrope length of 16 ft (4.9 m) or less provided the single try net is either placed immediately in front of another net or is not connected to another net.

(iii) *Roller trawl exemption.* A shrimp trawler is exempt from the requirement to have a certified or provisionally certified BRD installed in up to two rigid-frame roller trawls that are 16 ft (4.9 m) or less in length used or possessed on board. A rigid-frame roller trawl is a trawl that has a mouth formed by a rigid frame and a grid of rigid vertical bars; has rollers on the lower horizontal part of the frame to allow the trawl to roll over the bottom and any obstruction while being towed; and has no doors, boards, or similar devices attached to keep the mouth of the trawl open.

(iv) *BRD certification testing exemption.* A shrimp trawler that is authorized by the RA to participate in the pre-certification testing phase or to test a BRD in the EEZ for possible certification, has such written authorization on board, and is conducting such test in accordance with the ''Bycatch Reduction Device Testing Manual'' is granted a limited exemption from the BRD requirement specified in this paragraph (g). The exemption from the BRD requirement is limited to those trawls that are being used in the certification trials. All other trawls rigged for fishing must be equipped with certified or provisionally certified BRDs.

(2) *Procedures for certification and decertification of BRDs.* The process for the certification of BRDs consists of two phases--an optional pre-certification phase and a required certification phase. The RA may also provisionally certify a BRD.

(i) *Pre-certification.* The pre-certification phase allows a person to test and evaluate a new BRD design for up to 60 days without being subject to the observer requirements and rigorous testing requirements specified for certification testing in the ''Bycatch Reduction Device Testing Manual.''

(A) A person who wants to conduct pre-certification phase testing must submit an application to the RA, as specified in the ''Bycatch Reduction Device Testing Manual.'' The ''Bycatch Reduction Device Testing Manual'', which is available from the RA, upon request, contains the application forms.

(B) After reviewing the application, the RA will determine whether to issue a letter of authorization (LOA) to conduct pre-certification trials upon the vessel specified in the application. If the RA authorizes pre-certification, the RA's LOA must be on board the vessel during any trip involving the BRD testing.

(ii) *Certification.* A person who proposes a BRD for certification for use in the Gulf EEZ or South Atlantic EEZ must submit an application to test such BRD, conduct the testing, and submit the results of the test in accordance with the ''Bycatch Reduction Device Testing Manual.'' The RA will issue a LOA to conduct certification trials upon the vessel specified in the application if the RA finds that: The operation plan submitted with the application meets the requirements of the ''Bycatch Reduction Device Testing Manual≥; the observer identified in the application is qualified; and the results of any pre-certification trials conducted have been reviewed and deemed to indicate a reasonable scientific basis for conducting certification testing. If authorization to conduct certification trials is denied, the RA will provide a letter of explanation to the applicant, together with relevant recommendations

to address the deficiencies resulting in the denial. To be certified for use in the fishery, the BRD candidate must successfully demonstrate a 30 percent reduction in total weight of finfish bycatch. In addition, the BRD candidate must satisfy the following conditions: There is at least a 50–percent probability the true reduction rate of the BRD candidate meets the bycatch reduction criterion and there is no more than a 10–percent probability the true reduction rate of the BRD candidate is more than 5 percentage points less than the bycatch reduction criterion. If a BRD meets both conditions, consistent with the ''Bycatch Reduction Device Testing Manual'', NMFS, through appropriate rulemaking procedures, will add the BRD to the list of certified BRDs in paragraph (g)(3) of this section; and provide the specifications for the newly certified BRD, including any special conditions deemed appropriate based on the certification testing results.

(iii) *Provisional certification*. Based on data provided consistent with the ''Bycatch Reduction Device Testing Manual'', the RA may provisionally certify a BRD if there is at least a 50–percent probability the true reduction rate of the BRD is no more than 5 percentage points less than the bycatch reduction criterion, i.e. 25 percent reduction in total weight of finfish bycatch. Through appropriate rulemaking procedures, NMFS will add the BRD to the list of provisionally certified BRDs in paragraph (g)(3) of this section; and provide the specifications for the BRD, including any special conditions deemed appropriate based on the certification testing results. A provisional certification is effective for 2 years from the date of publication of the notification in the **Federal Register** announcing the provisional certification.

(iv) *Decertification*. The RA will decertify a BRD if NMFS determines the BRD does not meet the requirements for certification or provisional certification. Before determining whether to decertify a BRD, the RA will notify the appropriate Fishery Management Council in writing, and the public will be provided an opportunity to comment on the advisability of any proposed decertification. The RA will consider any comments from the Council and public, and if the RA elects to decertify the BRD, the RA will proceed with decertification via appropriate rulemaking.

(3) *Certified and provisionally certified BRDs* —(i) *Certified BRDS*. The following BRDs are certified for use in the Gulf EEZ and South Atlantic EEZ unless indicated otherwise. Specifications of these certified BRDs are contained in Appendix D to this part.

(A) Fisheye.

(B) Gulf fisheye.

(C) Jones-Davis.

(D) Modified Jones-Davis.

(E) Expanded mesh.

(F) Extended funnel -South Atlantic EEZ only.

(ii) *Provisionally certified BRDs*. The following BRDs are provisionally certified for use in the areas and for the time periods indicated. Specifications of these provisionally certified BRDs are contained in Appendix D to this part.

(A) Extended funnel- Gulf EEZ only; through February 16, 2010.

(B) Composite panel -Gulf EEZ and South Atlantic EEZ; through February 16, 2010.

* * * * *

■ 3. In Appendix D to part 622, sections F and G are added to read as follows:

Appendix D to Part 622—Specifications for Certified BRDs

* * * * *

F. *Modified Jones-Davis.*

1. *Description*. The Modified Jones-Davis BRD is a variation to the alternative funnel construction method of the Jones-Davis BRD except the funnel is assembled by using depth-stretched and heat-set polyethylene webbing instead of the flaps formed from the extension webbing. In addition, no hoops are used to hold the BRD open.

2. *Minimum Construction and Installation Requirements*. The Modified Jones-Davis BRD must contain all of the following.

(a) *Webbing extension*. The webbing extension must be constructed from a single rectangular piece of 1 5/8–inch (4.1–cm) stretch mesh number 30 nylon with dimensions of 39 ½ meshes by 150 meshes. A tube is formed from the extension webbing by sewing the 39 ½–mesh-sides together.

(b) *Funnel*. The funnel must be constructed from two sections of 1 5/8–inch (4.1–cm) heat-set and depth-stretched polypropylene or polyethylene webbing. The two side sections must be rectangular in shape, 25 meshes on the leading edge by 21 meshes deep. The 25–mesh leading edge of each polyethylene webbing section must be sewn evenly two meshes in from the front of the extension webbing starting 25 meshes from the top center on each side. The 21–mesh edge must be sewn to the extension webbing on a 9–bar and 1–mesh angle in the top and bottom, forming a V-shape funnel.

(c) *Cutting the escape opening*. The leading edge of the escape openings must be located within 18 inches (45.7 cm) of the posterior edge of the turtle excluder device (TED) grid. The area of the escape opening must total at least 635 in2 (4,097 cm2). Two escape openings, 6 meshes wide by 12 meshes deep, must be cut 4 meshes apart in the extension webbing, starting at the top center extension seam, 7 meshes back from the leading edge, and 30 meshes to the left and to the right (total of four openings). The four escape openings must be double selvaged for strength.

(d) *Cone fish deflector*. The cone fish deflector is constructed of 2 pieces of 1 5/8–inch (4.1–cm) polypropylene or polyethylene webbing, 40 meshes wide by 20 meshes in length and cut on the bar on each side forming a triangle. Starting at the apex of the two triangles, the two pieces must be sewn together to form a cone of webbing. The apex of the cone fish deflector must be positioned within 12 inches (30.5 cm) of the posterior edge of the funnel.

(e) *11–inch (27.9–cm) cable hoop for cone deflector*. A single hoop must be constructed of 5/16–inch (0.79–cm) or 3/8–inch (0.95–cm) cable 34 ½ inches (87.6 cm) in length. The ends must be joined by a 3–inch (7.6–cm) piece of 3/8–inch (0.95–cm) aluminum pipe pressed together with a 1/4–inch (0.64–cm) die. The hoop must be inserted in the webbing cone, attached 10 meshes from the apex and laced all the way around with heavy twine.

(f) *Installation of the cone in the extension*. The apex of the cone must be installed in the extension within 12 inches (30.5 cm) behind the back edge of the funnel and attached in four places. The midpoint of a piece of number 60 twine (or at least 4–mesh wide strip of number 21 or heavier webbing) 3 ft (1.22 m) in length must be attached to the apex of the cone. This piece of twine or webbing must be attached within 5 meshes of the aft edge of the funnel at the center of each of its sides. Two 12–inch (30.5–cm) pieces of number 60 (or heavier) twine must be attached to the top and bottom of the 11–inch (27.9–cm) cone hoop. The opposite ends of these two pieces of twine must be attached to the top and bottom center of the extension webbing to keep the cone from inverting into the funnel.

G. Composite Panel.

1. *Description*. The Composite Panel BRD is a variation to the alternative funnel construction method of the Jones-Davis BRD except the funnel is assembled by using depth-stretched and heat-set polyethylene webbing with square mesh panels on the inside

instead of the flaps formed from the extension webbing. In addition, no hoops are used to hold the BRD open.

2. *Minimum Construction and Installation Requirements.* The Composite Panel BRD must contain all of the following:

(a) *Webbing extension.* The webbing extension must be constructed from a single rectangular piece of 1 ½–inch to 1 5/8–inch (3.8–cm to 4.1–cm) stretch mesh number 30 nylon with dimensions of 24 ½ meshes by 150 to 160 meshes. A tube is formed from the extension webbing piece by sewing the 24 ½–mesh sides together. The leading edge of the webbing extension must be attached no more than 4 meshes from the posterior edge of the TED grid.

(b) *Funnel.* The V-shaped funnel consists of two webbing panels attached to the extension along the leading edge of the panels. The top and bottom edges of the panels are sewn diagonally across the extension toward the center to form the funnel. The panels are 2–ply in design, each with an inner layer of 1 ½–inch to 1 5/8–inch (3.8–cm to 4.1–cm) heat-set and depth-stretched polyethylene webbing and an outer layer constructed of 2–inch (5.1–cm) square mesh webbing (1–inch bar). The inner webbing layer must be rectangular in shape, 36 meshes on the leading edge by 20 meshes deep. The 36–mesh leading edges of the polyethylene webbing should be sewn evenly to 24 meshes of the extension webbing 1 ½ meshes from and parallel to the leading edge of the extension starting 12 meshes up from the bottom center on each side. Alternately sew 2 meshes of the polyethylene webbing to 1 mesh of the extension webbing then 1 mesh of the polyethylene webbing to 1 mesh of the extension webbing toward the top. The bottom 20–mesh edges of the polyethylene layers are sewn evenly to the extension webbing on a 2 bar 1 mesh angle toward the bottom back center forming a v-shape in the bottom of the extension webbing. The top 20–mesh edges of the polyethylene layers are sewn evenly along the bars of the extension webbing toward the top back center. The square mesh layers must be rectangular in shape and constructed of 2–inch (5.1–cm) webbing that is 18 bars or squares on the leading edge. The depth of the square mesh layer must be no more than 2 inches (5.1 cm) less than the 20 mesh side of the inner polyethylene layer when stretched taught. The 18 bar leading edge of each square mesh layer must be sewn evenly 1 bar to 2 meshes of the 36–mesh leading edge of the polyethylene section and the sides are sewn evenly (in length) to the 20–mesh edges of the polyethylene webbing. This will form a v-shape funnel using the top of the extension webbing as the top of the funnel and the bottom of the extension webbing as the bottom of the funnel.

(c) *Cutting the escape opening.* There are two escape openings on each side of the funnel. The leading edge of the escape openings must be located on the same row of meshes in the extension webbing as the leading edge of the composite panels. The lower openings are formed by starting at the first attachment point of the composite panels and cutting 9 meshes in the extension webbing on an even row of meshes toward the top of the extension. Next, turn 90 degrees and cut 15 points on an even row toward the back of the extension webbing. At this point turn and cut 18 bars toward the bottom front of the extension webbing. Finish the escape opening by cutting 6 points toward the original starting point. The top escape openings start 5 meshes above and mirror the lower openings. Starting at the leading edge of the composite panel and 5 meshes above the lower escape opening, cut 9 meshes in the extension on an even row of meshes toward the top of the extension. Next, turn 90 degrees, and cut 6 points on an even row toward the back of the extension webbing. Then cut 18 bars toward the bottom back of the extension. To complete the escape opening, cut 15 points forward toward the original starting point. The area of each escape opening must total at least 212 in^2 (1,368 cm^2). The four escape openings must be double selvaged for strength.

NOTE: The ''Bycatch Reduction Device Testing Manual'' is published, excluding the Manual's appendices, as an appendix to this document. See the contact under **ADDRESSES** to obtain a complete Manual.

The following appendix will not appear in the Code of Federal Regulations.

Appendix—Bycatch Reduction Device Testing Manual

Definitions

Bycatch reduction criterion is the standard by which a BRD candidate will be evaluated. To be certified for use by the shrimp fishery in the Exclusive Economic Zone off the southeastern United States (North Carolina through Texas), the BRD candidate must demonstrate a successful reduction of total finfish bycatch by at least 30 percent by weight.

Bycatch reduction device (BRD) is any gear or trawl modification designed to allow finfish to escape from a shrimp trawl.

BRD candidate is a BRD to be tested for certification for use in the commercial shrimp fishery of southeastern United States.

Certified BRD is a BRD that has been tested according to the procedure outlined herein and has been determined by the RA as having met the bycatch reduction criterion.

Control trawl means a trawl that is not equipped with a BRD during the evaluation.

Evaluation and oversight personnel means scientists, observers, and other technical personnel who, by reason of their occupation or scientific expertise or training, are approved by the RA as qualified to evaluate and review the application and testing process.

Experimental trawl means the trawl that is equipped with the BRD candidate during an evaluation.

Net or side bias means when the net(s) being fished on one side of the vessel demonstrate a different catch rate (fishing efficiency) than the net(s) being fished on the other side of the vessel during paired-net tests.

Observer means a person on the list maintained by the RA of individuals qualified (see Appendix H) to supervise and monitor a BRD certification test.

Paired-net test means a tow during certification trials where a control net and an experimental net are fished simultaneously, and the catches and catch rates between the nets are compared.

Provisional Certification Criterion means a secondary benchmark which would allow a BRD candidate to be used for a time-limited period in the southeastern shrimp fishery. To meet the criterion, the BRD candidate must demonstrate a successful reduction of total finfish bycatch by at least 25 percent by weight.

Provisionally certified BRD means a BRD that has been tested according to the procedure outlined herein and has been determined by the RA as having met the provisional certification criterion. A BRD meeting the provisional certification criterion would be certified by the RA for a period of 2 years.

Regional Administrator (RA) means the Southeast Regional Administrator, National Marine Fisheries Service.

Required measurements refers to the quantification of gear characteristics such as the dimensions and configuration of the trawl, the BRD candidate, the doors, or the location of the BRD in relation to other parts of the trawl gear that are used to assess the performance of the BRD candidate.

Sample size means the number of successful tows (a minimum of 30 tows per test are required).

Shrimp trawler means any vessel that is equipped with one or more trawl nets whose on-board or landed catch of shrimp is more than 1 percent, by weight, of all fish comprising its on-board or landed catch.

Successful tow means that the control and experimental trawl were fished in accordance with the requirements set forth herein and the terms and conditions of the letter of authorization, and there is no indication problematic events, such as those listed in Appendix D–5, occurred during the tow to impact or influence the fishing efficiency (catch) of one or both nets.

Tow time means the total time (hours and minutes) an individual trawl was fished (i.e.,

the time interval beginning when the winch is locked after deploying the net overboard, and ending when retrieval of the net is initiated).

Trawl means a net and associated gear and rigging used to catch shrimp. The terms trawl and net are used interchangeably throughout this Manual.

Try net means a separate net pulled for brief periods by a shrimp trawler to test for shrimp concentrations or determine fishing conditions (e.g., presence of absence of bottom debris, jellyfish, bycatch, and seagrasses).

Tuning a net means adjusting the trawl and its components to minimize or eliminate any net or side bias that exists between the two nets that will be used as the control and experimental trawls during the certification test.

I. Introduction

This Bycatch Reduction Device Testing Manual (Manual) establishes a standardized process for evaluating the ability of bycatch reduction device (BRD) candidates to meet the established bycatch reduction criterion, and be certified for use in the EEZ by the southeastern shrimp fishery. BRDs are required for use in shrimp trawls fished shoreward of the 100–fathom (183–meter) depth contour in the Gulf of Mexico, and within the EEZ of the South Atlantic region.

Various BRD requirements also exist in state waters in the South Atlantic and off Florida and Texas in the Gulf of Mexico. Persons wishing to conduct BRD candidate evaluations exclusively in state waters do not need to apply to NMFS for authorization to conduct these tests, but should contact the appropriate state officials for authorizations. However, for data collected in such evaluations to be considered by NMFS for certification, the operations plan and data collection procedures must meet the criteria established in this Manual.

II. BRD Candidate Evaluations

A. Application

Persons interested in evaluating the efficiency of a BRD candidate must apply for, receive, and have on board the vessel during the evaluation, a Letter of Authorization (LOA) from the Regional Administrator (RA). To receive an LOA, the applicant must submit the following documentation to the RA: (1) a completed application form (Appendix A); (2) a brief statement of the purpose and goal of the activity for which the LOA is requested; (3) an operations plan (see Section C below) describing the scope, duration, dates, and location of the test, and methods that will be used to conduct the test; (4) an 8.5- inch x 11–inch (21.6–cm x 27.9–cm) diagram drawn to scale of the BRD design; (5) an 8.5–inch x 11–inch (21.6–cm x 27.9–cm) diagram drawn to scale of the BRD in the shrimp trawl; (6) a description of how the BRD is supposed to work; (7) a copy of the testing vessel's U.S. Coast Guard documentation or its state registration; and (8) a copy of the testing vessel's Federal commercial shrimp vessel permit.

An applicant requesting an LOA to test an unapproved turtle excluder device (TED) as a BRD (including modifications to a TED that would enhance finfish exclusion) must first apply for and obtain from the RA an experimental TED authorization pursuant to 50 CFR 223.207(e)(2). Applicants should contact the Protected Resources Division of NMFS' Southeast Regional Office for further information. The LOA applicant must include a copy of that authorization with the application.

Incomplete applications will be returned to the applicant along with a letter from the RA indicating what actions the applicant may take to make the application complete.

There is no cost to the applicant for the RA's administrative expenses such as reviewing applications, issuing LOAs, evaluating test results, or certifying BRDs. However, all other costs associated with the actual testing activities are the responsibility of the applicant, or any associated sponsor. If an application for an LOA is denied, the RA will provide a letter of explanation to the applicant, together with relevant recommendations to address the deficiencies that resulted in the denial.

B. Allowable Activities

Issuance of an LOA to test a BRD candidate in the South Atlantic or Gulf of Mexico allows the applicant to remove or disable the existing certified BRD in one outboard net (to create a control net), and to place the BRD candidate in another outboard net in lieu of a certified BRD (to create an experimental net). All other trawls under tow during the test must have a certified BRD, unless these nets are specifically exempted in the LOA. All trawls under tow during the test must have an approved TED unless operating under an authorization issued pursuant to 50 CFR 223.207(e)(2), whereby the test is being conducted on an experimental TED. The LOA, and experimental TED authorization if applicable, must be on board the vessel while the test is being conducted. The term of the LOA will be 60 days; should circumstances require a longer test period, the applicant may apply to the RA for a 60-day extension.

C. Operations Plan

An operations plan should be submitted with the application describing a method to compare the catches of shrimp and fish in a control net (net without a BRD candidate installed) to the catches of the same species in an experimental net (a net configured identically to the control net but also equipped with the BRD candidate).

The applicant may choose to conduct a pre-certification test of a prototype BRD candidate. A pre-certification test would be conducted when the intent is to assess the preliminary effectiveness of a prototype BRD candidate under field conditions, and to make modifications to the prototype BRD candidate during the field test. For pre-certification testing, the operations plan must include only a description of the scope, duration, dates, and location of the test, along with a description of methods that will be used to conduct the test. No observer is required for a pre-certification test, but the applicant may choose to use an observer to maintain a written record of the test. The applicant will maintain a written record for both the control and experimental net during each tow. Mandatory data collection is limited to the weight of the shrimp catch and the weight of the total finfish catch in each test net during each tow. These data must be submitted to NMFS at the conclusion of the test. Although not required, the applicant may wish to incorporate some or all the certification test requirements listed below.

For a BRD candidate to be considered for certification, the operations plan must be more detailed and address the following topics:

(1) The primary assumption in assessing the bycatch reduction efficiency of the BRD candidate during paired net tests is that the inclusion of the BRD candidate in the experimental net is the only factor causing a difference in catch from the control net. Therefore, the nets to be used in the tests must be calibrated (tuned) to minimize, to the extent practicable, any net or side bias in catch efficiency prior to beginning a test series, and tuned again after any gear modification or change. Additional information on tuning shrimp trawls to minimize bias is available from the Harvesting Technology Branch, Mississippi Laboratories, Pascagoula Facility, 3209 Frederic Street, Pascagoula, MS 39568 1207; phone (601) 762 4591.

(2) A standard tow time for a proposed evaluation should be defined. Tow times must be representative of the tow times used by commercial shrimp trawlers. The applicant should indicate what alternatives will be considered should the proposed tow time need adjustment once the test begins.

(3) A minimum sample size of 30 successful tows using a specific BRD candidate design is required for the statistical analysis described in Section F. No alterations of the BRD candidate design are allowed during a specific test series. If the BRD candidate design is altered, a new test series must be started. If a gear change (i.e., changing nets, doors, or rigging) is required, the nets should be tuned again before proceeding with further tests to complete the 30–tow series. Minor repairs to the gear (e.g., sewing holes in the webbing; replacing a broken tickler chain with a new one of the same configuration) are not considered a gear change.

(4) For tests conducted on twin-rig vessels, biases that might result from the use of a try net should be reduced to the extent practicable. Total fishing times for a try net must be a consistent percentage of the total tow time during each tow made in the test.

(5) To incorporate any net or side bias that remains after the tuning tows (e.g., the effect of a try net), or to accommodate for bias that develops between the control and experimental nets during the test, the operations plan should outline a timetable ensuring that an equal number of successful tows are made with the BRD candidate employed in both the port and starboard nets.

(6) Mandatory data to be collected during a test includes: (1) detailed gear specifications as set forth in Appendices B and C, and (2) pertinent information concerning the location, duration and catch from individual tows as set forth in Appendices D and F.

(7) Following each paired tow, the catches from the control and experimental nets must

be examined separately. This requires that the catch from each net be kept separate from each other, as well as from the catch taken in other nets fished during that tow. Mandatory data collections include recording the weight of the total catch of each test net (control and experimental nets), the catch of shrimp (i.e., brown, white, pink, rock, or other shrimp by species) in each test net, and the catch of total finfish in aggregate in each test net.

(8) When recording the detailed information on the species found in the catch, if the catch in a net does not fill one standard 1–bushel [ca. 10 gallon] (30 liters) polyethylene shrimp basket (ca. 70 lb) (31.8 kg), but the tow is otherwise considered successful, data must be collected on the entire catch of the net, and recorded as a ''select'' sample (see Appendices D and F), indicating that the values represent the total catch of the particular net. If the catch in a net exceeds 70 lb (31.8 kg), a well-mixed sample consisting of one standard 1–bushel [ca. 10 gallon] (30 liters) polyethylene shrimp basket must be taken from the total catch of the net. The total weight of the sample must be recorded, as well as the weights (and numbers as applicable) of the various species or species groups found within that sample. These sample values can then be extrapolated to estimate the quantity of those species or species groups found in the total catch of the particular net.

(9) Although not a criterion for certification, applicants testing BRD candidates are encouraged to collect additional information that may be pertinent to addressing bycatch issues in their respective regions. For example, in the western Gulf of Mexico applicants are especially encouraged to collect information on red snapper. If the applicant chooses to collect these data, the total (''select'') catch of the target species from each test net (not just from the sample) should be recorded along with lengths for as many individuals per net per tow as set forth in Appendices E and F. Additional information in regard to the catch can be recorded on forms such as Appendix G.

The operations plan should address what the applicant will do should it become necessary to deviate from the primary procedures outlined in the operations plan. The plan should describe in detail what will be done to continue the test in a reasonable manner that is consistent with the primary procedures. For example, it may become necessary to alter the pre-selected tow time to adapt to local fishing conditions to successfully complete the test. Prior to issuing a LOA, the RA may consult with evaluation personnel to review the acceptability of these proposed alterations.

D. Observer Requirements

It is the responsibility of the applicant to ensure that a qualified observer (see Appendix H) is on board the vessel during the certification tests. A list of qualified observers is available from the RA. Observers may include employees or individuals acting on behalf of NMFS, state fishery management agencies, universities, or private industry who meet the minimum requirements outlined in Appendix H. Any change in information or testing circumstances, such as replacement of the observer, must be reported to the RA within 30 days. Under 50 CFR 600.746, when any fishing vessel is required to carry an observer as part of a mandatory observer program under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801, *et seq.*), the owner or operator of the vessel must comply with guidelines, regulations, and conditions to ensure their vessel is adequate and safe to carry an observer, and to allow normal observer functions to collect information as described in this Manual. A vessel owner is deemed to meet this requirement if the vessel displays one of the following: (i) a current Commercial Fishing Vessel Safety Examination decal, issued within the last 2 years, that certifies compliance with regulations found in 33 CFR chapter I, and 46 CFR chapter I; (ii) a certificate of compliance issued pursuant to 46 CFR 28.710; or (iii) a valid certificate of inspection pursuant to 46 U.S.C. 3311. The observer has the right to check for major safety items, and if those items are absent or unserviceable, the observer may choose not to sail with the vessel until those deficiencies are corrected.

E. Reports

A report on the BRD candidate test results must be submitted by the applicant or associated sponsor before the RA will consider the BRD for certification. The report must contain a comprehensive description of the tests, copies of all completed data forms used during the tests, and photographs, drawings, and similar material describing the BRD. The captain, vessel owner, or the applicant must sign and submit the cover form (Appendix I). The report must include a description and explanation of any unanticipated deviations from the operations plan which occurred during the test. These deviations must be described in sufficient detail to indicate the tests were continued in a reasonable manner consistent with the approved operations plan procedures. Applicants must provide information on the cost of materials, labor, and installation of the BRD candidate. In addition, any unique or special circumstances of the tests, such as special operational characteristics or fishing techniques which enhance the BRD's performance, should be described and documented as appropriate.

F. Certification

The RA will determine whether the required reports and supporting materials are sufficient to evaluate the BRD candidate's efficiency. The determination of sufficiency would be based on whether the applicant adhered to the prescribed testing procedure or provided adequate justification for any deviations from the procedure during the test. If the RA determines that the data are sufficient for evaluation, the BRD candidate will be evaluated to determine if it meets the bycatch reduction criterion. In making a decision, the RA may consult with evaluation and oversight personnel. Based on the data submitted for review, the RA will determine the effectiveness of the BRD candidate, using appropriate statistical procedures such as Bayesian analyses, to determine if the BRD candidate meets the following conditions:

(1) There is at least a 50–percent probability that the true reduction rate of the BRD candidate meets the bycatch reduction criterion (i.e., the BRD candidate demonstrates a best point estimate [sample mean] that meets the certification criterion); and

(2) There is no more than a 10–percent probability that the true reduction rate of the BRD candidate is more than 5 percentage points less than the bycatch reduction criterion.

To be certified for use in the fishery, the BRD candidate will have to satisfy both conditions. The first condition ensures that the observed reduction rate of the BRD candidate has an acceptable level of certainty that it meets the bycatch reduction criterion. The second condition ensures the BRD candidate demonstrates a reasonable degree of certainty that the observed reduction rate represents the true reduction rate of the BRD candidate. This determination ensures the operational use of the BRD candidate in the shrimp fishery will, on average, provide a level of bycatch reduction that meets the established bycatch reduction criterion. Interested parties may obtain details regarding the hypothesis testing procedure to be used by contacting the Harvesting Technology Branch, Mississippi Laboratories, Pascagoula Facility, 3209 Frederic Street, Pascagoula, MS 39568 1207; phone (228) 762 4591. Following a favorable determination of the certification analysis, the RA will certify the BRD (with any appropriate conditions as indicated by test results) and add the BRD to the list of certified BRDs in the **Federal Register** through appropriate rulemaking procedures.

In addition, based on the data provided, the RA may provisionally certify a BRD candidate through appropriate rulemaking procedures based on the following condition:

There is at least a 50–percent probability that the true reduction rate of the BRD candidate is no more than 5 percentage points less than the bycatch reduction criterion (i.e., the BRD candidate demonstrates a best point estimate [sample mean] within 5 percentage points of the bycatch reduction criterion).

A provisional certification will be effective for 2 years from the date of publication in the **Federal Register** of a determination of provisional certification. This time period will allow additional wide scale industry evaluation of the BRD candidate, during which additional effort would be made to improve the efficiency of the BRD to meet the certification criterion.

III. BRDs Not Certified and Resubmission Procedures

The RA will advise the applicant, in writing, if a BRD is not certified. This notification will explain why the BRD was not certified and what the applicant may do to either modify the BRD or the testing procedures to improve the chances of having the BRD certified in the future. If certification was denied because of insufficient information, the RA will explain what information is lacking. The applicant must

provide the additional information within 60 days from receipt of such notification. If the additional information is not provided within 60 days, the application will be deemed abandoned. If the RA subsequently certifies the BRD, the RA will announce the certification in the **Federal Register**.

IV. Decertification of BRDs

The RA will decertify a BRD whenever NMFS determines a BRD no longer satisfies the bycatch reduction criterion. Before determining whether to decertify a BRD, the RA will notify the appropriate Fishery Management Council in writing, and the public will be provided an opportunity to comment on the advisability of any proposed decertification. The RA will consider any comments from the Council and public, and if the RA elects to proceed with decertification of the BRD, the RA will publish proposed and final rules in the **Federal Register** with a comment period of no less than 15 days on the proposed rule.

A provisionally certified BRD is valid for use in the fishery for 2 years from the date of publication of a notice in the **Federal Register**. If no new data are submitted to indicate the efficiency of the BRD has been improved, the RA will remove the BRD from the list of provisionally certified BRDs.

V. Interactions with Sea Turtles

The following section is provided for informational purposes. Sea turtles are listed under the Endangered Species Act as either endangered or threatened. The following procedures apply to incidental take of sea turtles under 50 CFR 223.206(d)(1):

''Any sea turtles taken incidentally during the course of fishing or scientific research activities must be handled with due care to prevent injury to live specimens, observed for activity, and returned to the water according to the following procedures:

(A) Sea turtles that are actively moving or determined to be dead (as described in paragraph (B)(4) below) must be released over the stern of the boat. In addition, they must be released only when fishing or scientific collection gear is not in use, when the engine gears are in neutral position, and in areas where they are unlikely to be recaptured or injured by vessels.

(B) Resuscitation must be attempted on sea turtles that are comatose or inactive by:

(1) Placing the turtle on its bottom shell (plastron) so that the turtle is right side up and elevating its hindquarters at least 6 inches (15.2 cm) for a period of 4 to 24 hours. The amount of elevation depends on the size of the turtle; greater elevations are needed for larger turtles. Periodically, rock the turtle gently left to right and right to left by holding the outer edge of the shell (carapace) and lifting one side about 3 inches (7.6 cm) then alternate to the other side. Gently touch the eye and pinch the tail (reflex test) periodically to see if there is a response.

(2) Sea turtles being resuscitated must be shaded and kept damp or moist but under no circumstance be placed into a container holding water. A water-soaked towel placed over the head, carapace, and flippers is the most effective method in keeping a turtle moist.

(3) Sea turtles that revive and become active must be released over the stern of the boat only when fishing or scientific collection gear is not in use, when the engine gears are in neutral position, and in areas where they are unlikely to be recaptured or injured by vessels. Sea turtles that fail to respond to the reflex test or fail to move within 4 hours (up to 24, if possible) must be returned to the water in the same manner as that for actively moving turtles.

(4) A turtle is determined to be dead if the muscles are stiff (rigor mortis) and/or the flesh has begun to rot; otherwise, the turtle is determined to be comatose or inactive and resuscitation attempts are necessary.

Any sea turtle so taken must not be consumed, sold, landed, offloaded, transshipped, or kept below deck.''

[FR Doc. E8–2679 Filed 2–12–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 070213033–7033–01]

RIN 0648–XF55

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Processors Using Hook-and-Line Gear in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher processors using hook-and-line gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the A season allowance of the 2008 Pacific cod total allowable catch (TAC) allocated to catcher processors using hook-and-line gear in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 8, 2008, through 1200 hrs, A.l.t., June 10, 2008.

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

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (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.

The A season allowance of the 2008 Pacific cod TAC allocated to catcher processors using hook-and-line gear in the BSAI is 27,979 metric tons (mt) as established by the 2007 and 2008 final harvest specifications for groundfish in the BSAI (72 FR 9451, March 2, 2007) and revision (72 FR 71802, December 19, 2007). See § 679.20(a)(7)(ii)(A)(4), § 679.20(a)(7)(iv)(A)(2), § 679.20(c)(3)(iii), and § 679.20(c)(5).

In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that the A season allowance of the 2008 Pacific cod directed fishing allowance allocated to catcher processors using hook-and-line gear in the BSAI has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher processors using hook-and-line gear in the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

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) 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 closure of Pacific cod by catcher processors using hook-and-line gear in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of February 6, 2008.

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.

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

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

Dated: February 7, 2008.

Emily H. Menashes,

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

[FR Doc. 08–640 Filed 2–7–08; 3:10 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 070213032–7032–01]

RIN 0648–XF57

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Non-American Fisheries Act Crab Vessels Catching Pacific Cod for Processing by the Inshore Component in the Central Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for the A season allowance of the 2008 Pacific cod sideboard limits apportioned to non-American Fisheries Act (AFA) crab vessels catching Pacific cod for processing by the inshore component in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the A season allowance of the 2008 Pacific cod sideboard limits apportioned to non-AFA crab vessels catching Pacific cod for processing by the inshore component in the Central Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), February 9, 2008, until 1200 hrs, A.l.t., September 1, 2008.

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. Regulations governing sideboard protections for GOA groundfish fisheries appear at subpart B of 50 CFR part 680.

The A season allowance of 2008 Pacific cod sideboard limits apportioned to non-AFA crab vessels catching Pacific cod for processing by the inshore component in the Central Regulatory Area of the GOA is 609 metric tons (mt) for the GOA, as established by the 2007 and 2008 harvest specifications for groundfish of the GOA (72 FR 9676, March 5, 2007) and revision (73 FR 1831, January 10, 2008).

In accordance with § 680.22(e)(2)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the A season allowance of the 2008 Pacific cod sideboard limits apportioned to non-AFA crab vessels catching Pacific cod for processing by the inshore component in the Central Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a sideboard directed fishing allowance for Pacific cod as 599 mt in the Gulf of Alaska. The remaining 10 mt in the Gulf of Alaska will be set aside as bycatch to support other anticipated groundfish fisheries. In accordance with § 680.22(e)(3), the Regional Administrator finds that this sideboard directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by non-AFA crab vessels catching Pacific cod for processing by the inshore component in the Central Regulatory Area of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

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) 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 sideboard directed fishing closure of Pacific cod apportioned to non-AFA crab vessels catching Pacific cod for processing by the inshore component in the Central Regulatory Area 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 February 7, 2008.

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.

This action is required by § 680.22 and is exempt from review under Executive Order 12866.

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

Dated: February 8, 2008.

Emily H. Menashes,

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

[FR Doc. 08–652 Filed 2–8–08; 1:54 pm]

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Proposed Rules

Federal Register
Vol. 73, No. 30
Wednesday, February 13, 2008

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214, 215 and 274a

[CIS No. 2428–07; Docket No. USCIS–2007–0055]

RIN 1615–AB65

Changes to Requirements Affecting H–2A Nonimmigrants

AGENCY: U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is proposing amendments to its regulations affecting temporary and seasonal agricultural workers within the H–2A nonimmigrant classification and their U.S. employers. This rule proposes to relax the current limitations on the ability of U.S. employers to petition unnamed agricultural workers to come to the United States and include multiple beneficiaries who are outside the United States on one petition. The rule proposes to revise the current limitations on agricultural workers' length of stay including: lengthening the amount of time an agricultural worker may remain in the United States after his or her employment has ended and shortening the time period that an agricultural worker whose H–2A nonimmigrant status has expired must wait before he or she is eligible to obtain H–2A nonimmigrant status again. This rule also proposes to provide for temporary employment authorization to agricultural workers seeking an extension of their H–2A nonimmigrant status through a different U.S. employer, provided that the employer is a registered user of the E–Verify employment eligibility verification program. In addition, the rule proposes to modify the current notification and payment requirements for employers when an alien fails to show up at the start of the employment period, an H–2A employee's employment is terminated, or an H–2A employee absconds from the worksite. To better ensure the integrity of the H–2A program, this rule also proposes to require certain employer attestations, preclude the imposition of fees by employers or recruiters on prospective beneficiaries, preclude reconsideration of certain temporary labor certification denials, and bar H–2A status for nationals of countries consistently refusing or unreasonably denying repatriation of its nationals. These changes are necessary to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers.

Finally, this rule proposes to establish a pilot program under which aliens admitted on certain temporary worker visas at a port of entry participating in the program must also depart through a port of entry participating in the program and present designated biographical information, possibly including biometric identifiers, upon departure. U.S. Customs and Border Protection will publish a Notice in the **Federal Register** designating which temporary workers must participate in the program, which ports of entry are participating in the program, which biographical and/or biometric information would be required, and the format for submission.

DATES: Written comments on this rule must be submitted on or before March 31, 2008 in order to be assured of consideration.

Written comments on the Paperwork Reduction Act section of this rule must be submitted on or before April 14, 2008.

ADDRESSES: You may submit comments, identified by DHS Docket No. USCIS–2007–0055, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529. To ensure proper handling, please reference DHS Docket No. USCIS–2007–0055 on your correspondence. This mailing address may also be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529. Contact Telephone Number (202) 272–8377.

FOR FURTHER INFORMATION CONTACT: Hiroko Witherow, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3000, Washington, DC 20529, telephone (202) 272–8410.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule. Comments that will provide the most assistance to the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), and U.S. Customs and Border Protection (CBP) in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Instructions: All submissions received must include the agency name and DHS Docket No. USCIS–2007–0055 for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov*. Submitted comments may also be inspected at the Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529.

II. Background

Over the years, U.S. employers have faced a shortage of U.S. workers who are able, willing, and qualified to fill agricultural jobs, and who would be available at the time and place needed to perform the work. To meet this need, U.S. employers have considered hiring foreign workers. However, before U.S. employers may hire such workers, immigration law requires that they first sponsor the workers by filing a petition based on their qualification within the

H–2A nonimmigrant classification. Immigration and Nationality Act (Act or INA) sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a).

A. Description of the Current H–2A Nonimmigrant Program

The H–2A nonimmigrant classification applies to aliens seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States on a temporary basis. INA sec. 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see* 8 CFR 214.1(a)(2) (designation for H–2A classification). Under current regulations, employment of a seasonal nature is employment that is tied to a certain time of year by an event or pattern and requires labor levels far above those necessary for ongoing operations. 8 CFR 214.2(h)(5)(iv). Employment is considered to be of a temporary nature where the employer's need to fill the position will last no longer than one year, absent extraordinary circumstances. *Id.*

Aliens seeking H–2A nonimmigrant status must be petitioned for by a U.S. employer. However, prior to filing the petition, the U.S. employer must complete the temporary agricultural labor certification process with the Department of Labor (DOL) for the job opening the employer seeks to fill with an H–2A worker. This process determines: whether the proposed employment is for agricultural labor or services; whether it is open to U.S. workers; if qualified U.S. workers are available; the adverse impact, if any, on similarly employed U.S. workers of employment of a qualified alien; and whether employment conditions, including housing, meet applicable requirements. 8 CFR 214.2(h)(5)(ii). After receiving a temporary labor certification, the U.S. employer files Form I–129, ''Petition for Nonimmigrant Worker,'' with the appropriate USCIS office. *See* 8 CFR 214.2(h)(5)(i)(A). In rare instances, when domestic labor fails to appear at the worksite and DOL has denied the employer's temporary labor certification and appeal of the denial, USCIS may consider the written denial of appeal as a certification if it is filed with evidence that domestic labor is unavailable. *Id.*

In order to meet its employment needs, an employer may petition for one or more H–2A workers. However, in the case of multiple beneficiaries, the total number of beneficiaries in the petition cannot exceed the number of positions indicated on the temporary labor certification, and all the beneficiaries on one petition must obtain a visa at the same consulate (or, if no visa is required, apply for admission at the same port of entry). 8 CFR 214.2(h)(5)(i)(B). Where the employer seeks to employ only one H–2A worker, the Form I–129 submitted by the employer must name that worker. 8 CFR 214.2(h)(5)(i)(C). If the employer includes multiple beneficiaries in the petition, the workers must be named unless they are unnamed in the DOL certification and are outside the United States. *Id.* The petition also must establish the temporary or seasonal nature of the employment and that the beneficiary meets the requirements in the temporary labor certification, including job and training requirements and any necessary post-secondary education or other formal training. 8 CFR 214.2(h)(5)(v).

The petitioner must make several petition agreements. The petitioner must: consent to allow access to the worksite where the labor will be performed; notify USCIS within twenty-four hours if an H–2A worker absconds or if the authorized employment ends more than five days before the temporary labor certification document expires, and pay $10 in liquidated damages for each instance where the employer cannot demonstrate compliance with the notification requirement; and pay $200 in liquidated damages for each instance where the employer cannot demonstrate that its H–2A worker either departed the United States or obtained authorized status based on another petition during the period of admission, or within five days of early termination (whichever comes first). 8 CFR 214.2(h)(5)(vi)(A).

An H–2A worker's stay is limited by the term of the approved H–2A petition. 8 CFR 214.2(h)(5)(viii)(C). He or she may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. 8 CFR 214.2(h)(15)(ii)(C). However, his or her total period of stay in H–2A nonimmigrant status may not exceed three years. *Id.* An H–2A worker who has reached the three-year maximum period of stay may seek H–2A nonimmigrant status again, but only after remaining outside the United States for a six-month period. 8 CFR 214.2(h)(5)(viii)(C).

Significant absences can interrupt the accrual towards the three-year cap of time spent as an H–2A worker. The H–2A worker can interrupt an accumulated stay of eighteen months or less by an absence from the United States of at least three months. *Id.* He or she can interrupt an accumulated stay of more than eighteen months by an absence from the United States of at least one-sixth of the accumulated stay. *Id.*

Once an H–2A worker's petition has expired, the H–2A worker is allowed an additional ten-day period before he or she is required to depart the United States. 8 CFR 214.2(h)(5)(viii)(B). However, an H–2A worker whose three-year limit has not been reached may seek to extend his or her stay with the same employer or a new employer. He or she is employment authorized for not more than 240 days past the authorized period of stay if the same employer petitions for an extension of stay before expiration of the authorized period of stay. 8 CFR 274a.12(b)(20). If a new employer files a request to extend the alien's stay in H–2A status, the alien is not employment authorized past the authorized period of stay and is not able to begin employment with the new employer until the petition is approved. 8 CFR 214.2(h)(2)(i)(D).

USCIS will not grant H–2A nonimmigrant status to an alien who violated the conditions of H–2A status within the previous five years by remaining beyond the authorized period of stay or engaging in unauthorized employment. 8 CFR 214.2(h)(5)(viii)(A).

B. Limited Use of H–2A Nonimmigrant Classification

Despite the availability of the H–2A nonimmigrant classification, a high percentage of the agricultural workforce is comprised of aliens who have no immigration status and are unauthorized to work. The Congressional Research Service Report to Congress, ''Farm Labor Shortages and Immigration Policy'' (Sept. 5, 2007), states that persons in the country illegally accounted for an estimated 37% of the domestic crop workforce in fiscal year (FY) 1994 to FY 1995. In FY 1997/FY 1998, this percentage increased to 52% out of the estimated 1.8 million workers employed on crop farms. By FY 1999/FY 2000, their proportion had increased to 55% before retreating to 53% in FY 2001/FY 2002.[1]

Members of the public have cited what they consider to be unnecessarily burdensome regulatory restrictions placed on the H–2A nonimmigrant classification as one of the principal reasons why U.S. agricultural employers facing a shortage of qualified U.S. workers do not fully use the H–2A nonimmigrant classification to petition for temporary or seasonal agricultural

[1] *See also* Research Report No. 8, U.S. Department of Labor Office of the Assistant Secretary for Policy Office of Program Economics (March 2000) (finding that in 1997–98, 52 percent of hired farm workers lacked work authorization, 22 percent were citizens and 24 percent were lawful permanent residents).

workers from abroad.[2] Upon an examination of the regulatory provisions governing the H–2A nonimmigrant classification, USCIS has identified several requirements regarding the duration of the H–2A workers' authorized period of stay that add unnecessary burdens for both the petitioning employers and H–2A workers. The regulations include limitations on the use of unnamed and multiple beneficiaries in the petition, and employment authorization following a change in employers. The regulations also require certain employer agreements and include financial consequences for failure to comply. This proposed rule modifies these regulatory limitations and requirements. In so doing, USCIS anticipates that these changes will improve the utility of the H–2A nonimmigrant classification, so that this classification will be a more effective means for supplying a legal workforce to agricultural employers.

To better ensure that the requirements proposed in this rule do not adversely affect H–2A workers, compromise national security, or undermine the integrity of the H–2A program, the rule also proposes a limited number of new terms and conditions on employers' participation in the program. First, the rule proposes to require an employer attestation regarding the scope of the H–2A employment and the use of recruiters to locate beneficiaries. Second, the rule proposes to provide for denial or revocation of the H–2A petition if an H–2A worker was charged a fee by the petitioner in connection with the employment. Third, the rule proposes to allow H–2A workers who are changing employers to begin work with the new petitioning employer before the change is approved by USCIS, but only if the new employer participates in USCIS' E–Verify program. The E–Verify program (successor to the Basic Pilot Program) provides employers with a free and electronic method for confirming the employment eligibility of their newly-hired employees. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) sec. 401–05, Pub. L. No. 104–208, 110 Stat. 3546 (September 30, 1996), as amended (8 U.S.C.A. 1324a note). Fourth, this rule proposes to prohibit the approval of an H–2A petition for a national of a country that consistently refuses or unreasonably delays repatriation of its nationals who have been ordered removed from the United States. Finally, this rule proposes a program to strengthen the reporting system for temporary workers departing the United States at the conclusion of their authorized period of stay.

III. Proposed Changes

A. Consideration of Denied Temporary Agricultural Labor Certifications

While current regulations allow USCIS, in limited circumstances, to approve H–2A petitions that are filed with denied temporary agricultural labor certifications, USCIS believes that this authority is of limited use and is proposing to remove it from the regulations. Current regulations permit USCIS to accept a written denial of an appeal of a denied temporary labor certification as a labor certification if the appeal denial is accompanied by evidence establishing that qualified domestic labor is unavailable to do the work. *See* 8 CFR 214.2(h)(5)(i)(A);[3] *see also* 8 CFR 214.2(h)(5)(ii) (last sentence). USCIS believes that determinations as to the availability of U.S. workers are not within the expertise of USCIS, but instead are more appropriately made by DOL. Therefore, USCIS will remove this process from 8 CFR 214.2(h)(5)(i)(A) and (ii). The employer, however, is not left without recourse. If the employer can establish that domestic labor is unavailable, it may seek a new temporary labor certification from DOL.

B. Unnamed Beneficiaries in the Petition

Currently, H–2A employers must name in the petition all the workers being sought (*i.e.*, beneficiaries) unless unnamed in the temporary labor certification involving multiple beneficiaries. This requirement places an undue burden on employers. *See* 8 CFR 214.2(h)(5)(i)(C) (naming requirement). It also fails to accommodate the hiring practices of agricultural employers. An intervening event may preclude an employer from being able to continue to petition for the beneficiaries named in the temporary labor certification. This rule proposes to alleviate the problems encountered by employers when workers become unavailable by removing most of the constraints on an employer's ability to petition for unnamed beneficiaries and maintaining only the requirement that the petition include the names of those beneficiaries who are already in the United States.

By removing from the current regulations the requirement to name beneficiaries outside of the United States on the petition, USCIS believes that agricultural employers would have more flexibility to recruit foreign workers that are actually interested in the position on the date of stated need. Since employers often start the temporary labor certification and petitioning processes several months ahead of the actual date of stated need, naming beneficiaries that far in advance increases the likelihood that those beneficiaries are unavailable to fill the positions. Conversely, if a beneficiary is already in the United States, USCIS believes that naming such beneficiaries is necessary because the granting of the petition will either confer a new immigration status or extend the status of a particular alien immediately upon approval, whereas prospective beneficiaries abroad still must undergo both a visa interview at a U.S. consulate and an inspection by a U.S. Customs and Border Protection officer upon arrival at a port of entry to the United States. Based on the proposed changes, if an employer wishes to petition for multiple beneficiaries, some of whom are in the United States and some of whom are outside the United States, the employer must name the beneficiaries who are in the United States, and only provide the number of beneficiaries who are outside the United States. This naming requirement would apply regardless of the number of beneficiaries on the petition or whether the temporary labor certification named beneficiaries.

Rather than amend the applicable H–2A provision at 8 CFR 214.2(h)(5)(i)(C), this rule proposes to incorporate these changes into the general provision at 8 CFR 214.2(h)(2)(iii), governing the naming of beneficiaries in H categories. USCIS believes that maintaining two separate provisions on the naming of beneficiaries unnecessarily complicates the regulations and results in confusion. Therefore, this rule proposes to remove the unnamed beneficiary requirements from 8 CFR 214.2(h)(5)(i)(C) and revise the requirements in the general provision at 8 CFR 214.2(h)(2)(iii). This provision, as revised, would specify which H classifications must name beneficiaries in the petition and which do not need to name beneficiaries and under what circumstances. Note that

[2] *See* Mexico-Migration: A Shared Responsibility. The U.S.-Mexico Migration Panel Carnegie Endowment for International Peace and Instituto Tecnológico Autónomo de México (2001); *see also* Washington, April M., ''*Canada offers migrant tips; Colorado looks north of the border for ways to draw workers*,'' Rocky Mtn. News 10 (Sep. 15, 2007) (quoting a farmer, ''There is a bottleneck at the federal level in approving work visas, causing real problems for farmers'').

[3] Note that 8 CFR 214.2(h)(5)(i)(A) currently erroneously cites to section 216(e)(2) of the INA as the statutory authority for administrative appeals of denied temporary labor certifications. The correct statutory provision is section 218(e)(2) of the INA.

USCIS also is developing a separate rulemaking action to amend requirements for H–2B that may have additional impacts on H classifications.

C. Multiple Beneficiaries

USCIS has determined that the current regulatory provision at 8 CFR 214.2(h)(5)(i)(B) that permits petitioners to petition for multiple beneficiaries who are overseas only if all the beneficiaries will obtain a visa at the same overseas consulate or apply for admission at the same port of entry is no longer necessary. This rule proposes to eliminate this requirement from 8 CFR 214.2(h)(5)(i)(B). This requirement previously was necessary because, in the past, USCIS had to forward each approved petition to the consulate overseas where a beneficiary will apply for a visa. For petitions containing a request for multiple beneficiaries, the beneficiaries had to apply for their visas at the same consulate to ensure effective tracking and usage of available numbers in an approved petition. However, the U.S. Department of State recently implemented a new electronic system to effectively track visa issuance for specific petitions approved for multiple beneficiaries in real time regardless of the consulate location where a beneficiary may apply for a visa. Thus, the proposed change will benefit a prospective H–2A employer by permitting the employer to file only one petition with USCIS when petitioning for multiple H–2A beneficiaries from multiple countries. The benefit to the employer will be realized not only in terms of convenience but also from a financial standpoint since the employer will only be responsible for paying one petition filing fee.

D. Payment of Fees by Beneficiaries To Obtain H–2A Employment

1. Grounds for Denial or Revocation on Notice

USCIS has found that certain job recruiters and U.S. employers are charging potential H–2A workers job placement fees in order to obtain H–2A employment. Such workers are coming to the United States to fill positions that U.S. workers are unwilling or unable to fill and are doing so in order to improve their own difficult economic circumstances at home. USCIS has learned that payment by these workers of job placement-related fees not only results in further economic hardship for them, but also, in some instances, has resulted in their effective indenture. In an effort to protect H–2A workers from such abuses, this rule proposes to provide USCIS with the authority to deny or revoke upon notice any H–2A petition if it determines (1) That the alien beneficiary has paid or has agreed to pay any fee or other form of compensation, whether directly or indirectly, to the petitioner, or (2) that the petitioning employer is aware that the alien beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service, in connection with obtaining the H–2A employment. *See* proposed 8 CFR 214.2(h)(5)(xi)(A); *see also* 8 CFR 214.2(h)(11)(iii) (revocation on notice). We understand that there may be circumstances where an alien beneficiary may seek to pay or otherwise compensate a recruiter, facilitator or similar employment service without the knowledge of the petitioner. By revoking or denying the petition in such circumstance, USCIS would be penalizing the alien beneficiary whose illegal actions should not be rewarded by continued stay in the United States, and deterring both aliens and recruiters from entering into such arrangements in the future. However, revocation or denial would also harm the petitioner as well, through loss of an employee. DHS solicits comments on appropriate administrative penalties in the event that USCIS determines that the alien beneficiary, without the knowledge of the petitioner, paid or agreed to pay a fee or any form of compensation to a facilitator, recruiter, or similar employment service, in connection with an offer or as a condition of H–2A employment.

USCIS believes that this proposal will help minimize immigration fraud and protect against other abuses that have occurred when such aliens have been required to pay such employment fees, including petition padding (i.e., the filing of requests for more workers than needed), visa selling, and human trafficking. This proposal would not preclude the payment of any finder's or similar fee by the prospective employer to a recruiter or similar service, provided that such payment is not assessed directly or indirectly against the alien worker.

To provide protection to H–2A workers who are in the United States based upon an approved petition that is later revoked pursuant to proposed 8 CFR 214.2(h)(5)(xi)(A), this rule proposes a thirty-day grace period during which time such workers may find new employment and apply for an extension of stay, or depart the United States. *See* proposed 8 CFR 214.2(h)(5)(xi)(B). During the thirty-day period, such workers would not be unlawfully present in the United States, but, instead, would be in an authorized period of stay. *See* INA sec. 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B). In general, the unlawful presence of an alien in the United States for more than 180 days results in the alien being inadmissible to the United States for a minimum of three years. *Id.*

Further, to minimize the costs to H–2A workers who are affected by the revocation of a petition pursuant to proposed 8 CFR 214.2(h)(5)(xi)(A), this rule also proposes to require employers to pay such workers' reasonable transportation expenses to return to their last place of foreign residence. Proposed 8 CFR 214.2(h)(5)(xi)(B). However, the rule would not require employers to be held liable for such expenses in cases where affected aliens obtain approval of an extension of H–2A stay based on a subsequent job offer with another employer during the thirty-day grace period, provided that the new employer states in the job offer that it will pay such reasonable return transportation expenses upon completion of the alien's new employment.

2. Employer Attestation

USCIS recognizes that some H–2A petitioners, particularly those petitioning for the first time and without the benefit of counsel, may not appreciate the limitations on H–2A employment imposed by the regulations and the representations in the H–2A petition and the accompanying application for temporary labor certification. This rule proposes to require H–2A petitioners to include with their petitions an attestation, certified as true and accurate by the petitioner under penalty of perjury, that during the period of intended employment for which the petition is approved, the petitioner will not materially change the information provided on the Form I–129 and the temporary labor certification, including, but not limited to, the alien workers' duties, their place of employment, and the entities for which the duties will be performed. Proposed 8 CFR 214.2(h)(5)(i)(C). USCIS believes that this requirement will apprise petitioners of their responsibilities and obligations, and, at the same time, help prevent the employment of H–2A alien workers in a manner that conflicts with the representations upon which approval of the petition is based. In the event that a material change does occur in the terms and conditions of employment specified in the original petition, petitioners are currently obligated to file a new petition under 8 CFR 214.2(h)(2)(i)(E).

As an anti-fraud and worker protection measure to complement the proposed changes to 8 CFR 214.2(h)(5)(xi), USCIS is further proposing that the petitioning employer also include in its attestation a statement that it has not received, nor intends to receive, any fee, compensation, or other form of remuneration from the workers it intends to hire or from any person, agency or other entity. The petitioner would also be required to attest to whether it has used a facilitator, recruiter, or any other similar employment service, to locate foreign workers to fill the positions covered by the H–2A petition, and if so, to provide the names of such facilitators, recruiters, or placement services.

E. Petition Agreements and Liquidated Damages

USCIS has found that the notification and liquidated damages requirements provided for in the current regulations at 8 CFR 214.2(h)(5)(vi)(A) are onerous on employers and not effective in ensuring that H–2A workers maintain their nonimmigrant status. Therefore, USCIS is proposing to modify this provision by requiring petitioners to provide written notification to DHS in the following instances: an H–2A worker fails to report to work within five days of the date of the employment start date; the employment terminates more than five days early; or the H–2A worker absconds from the worksite. *See* proposed 8 CFR 214.2(h)(5)(vi)(B)(1). The rule proposes to lengthen the time within which the petitioner must meet the notification requirements from the current twenty-four hours to forty-eight hours. The rule also proposes to provide the method of notification via notice in the **Federal Register**, as well as the date on which the new notification requirements will take effect. To enforce the notification provision, the rule proposes to require employers to retain evidence (e.g., a photocopy) of the written notification for a one-year period. *See* proposed 8 CFR 214.2(h)(5)(vi)(B)(2).

This rule further proposes to increase the liquidated damages for failing to meet the notification requirement from $10 to $500 per instance because the $10 amount is not a sufficient deterrent against noncompliance. *See* proposed 8 CFR 214.2(h)(5)(vi)(B)(3). However, the rule removes the current requirement for the petitioner to pay $200 in liquidated damages for failing to demonstrate that its H–2A worker either departed the United States or obtained authorized status based on another petition during the period of admission or within five days of early termination. USCIS believes that petitioners are not in a position to know or easily obtain this information.

Additionally, the rule proposes to add a provision setting forth the circumstances in which an H–2A worker may be found to be an absconder, thus defining a term that would otherwise vary in interpretation from one employer to the next, possibly to the detriment of the alien worker. *See* proposed 8 CFR 214.2(h)(5)(vi)(E). The definition employs the same five-day period used to trigger a notification requirement when the alien does not show-up for work at the beginning of the petition period.

In proposed 8 CFR 214.2(h)(5)(vi), USCIS is restructuring the entire paragraph. Substantive modifications were only made to the notification and liquidated damage requirements. Conforming amendments were made to 8 CFR 214.2(h)(5)(ix).

F. Violations of H–2A Status

USCIS has determined that the current provision at 8 CFR 214.2(h)(5)(viii)(A) precluding a new grant of H–2A status where the alien worker violated the conditions of H–2A status within the prior five years requires clarification. This provision only lists two types of status violations and fails to include all status violations. This rule clarifies that *any* violation of a condition of H–2A status committed within the five years prior to adjudication of the petition by USCIS will result in a denial of H–2A status.

G. Revocation of Labor Certification

DOL published a rule that proposes to allow for the revocation of an approved temporary agricultural labor certification when an employer violates the terms of that labor certification. The proposal includes a means to contest a possible revocation of the labor certification. Accordingly, in this rule, USCIS is proposing to provide for the immediate and automatic revocation of the petition upon the revocation of the labor certification by DOL. *See* proposed 8 CFR 214.2(h)(2)(11)(ii). Since the labor certification is a prerequisite for an H–2A petition, and the DOL proposed rule would provide for contesting revocation of the labor certification, USCIS need not engage in a separate review before the petition is revoked.

H. Prohibiting H–2A Petitions or Admissions for Nationals of Countries That Refuse Repatriation

An alien worker who violates his or her status may be subject to administrative proceedings before an immigration judge to remove the alien from the United States. *See* INA sections 237(a)(1)(C), 239(a), 240(a); 8 U.S.C. 1227(a)(1)(C), 1229(a), 1229a(a). A removal order typically includes the name of the country to which the alien is to be removed, which usually is the alien's country of nationality. In order to effectuate the removal order, DHS must ensure that the alien has the necessary travel documents (*e.g.*, passport) to return to the named country and that the country agrees to receive the alien. DHS has faced an on-going problem of countries refusing to accept or unreasonably delaying the acceptance of their nationals who have been ordered removed. To combat this problem, Congress gave the Secretary of State the authority to discontinue the issuance of visas to citizens, subjects, nationals, and residents of a country if DHS notifies the Secretary of State that the government of that country consistently denies or unreasonably delays their return. INA sec. 243(d), 8 U.S.C. 1253(d); *see also* IIRIRA sec. 307.

In an effort to further alleviate the problem, this rule proposes to preclude USCIS from approving a petition filed on behalf of one or more aliens from countries determined by the Secretary of Homeland Security to consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals or residents. *See* proposed 8 CFR 214.2(h)(5)(i)(F); *see also* INA secs. 214(a)(1), 215(a)(1) and 243(d); 8 U.S.C. 1184(a)(1), 1185(a)(1), and 1243(d). At the time that DHS makes such determination, DHS expects in most cases to notify the Secretary of State under INA 243(d) of the determination so that applications for H–2A visas from citizens, subjects, nationals, and residents of that country may be lawfully denied on that basis. The Secretary of Homeland Security will periodically review determinations that countries have consistently denied or unreasonably delayed acceptance of their nationals to ensure the determinations are still justified. These provisions are intended to encourage more nations to promptly accept the return of nationals subject to a final order of removal.

More generally, DHS expects that the proposals in this rule intended to increase the flexibility and attractiveness of the H–2A visa program, complemented by the streamlining proposals the Department of Labor is making in its H–2A rule, will increase the popularity of the program with U.S. agricultural employers. But even though a more workable H–2A program would mean fewer aliens entering the country illegally to seek work, it could also lead

to an increase in the number of H–2A workers that abscond from their workplace or overstay their immigration status. The repatriation proposal outlined above is designed, in part, to address this challenge. DHS hereby invites comments from the public on additional or alternative approaches, for example by restricting eligibility to nationals of countries that provide the most cooperation to the United States in administering the program, rather than by excluding those whose governments provide the least cooperation. DHS is particularly interested in additional ways to promote cooperation by foreign governments in matters of security, particularly in connection with travel and immigration, such as the country's willingness to share passport information and criminal records of aliens who are seeking admission to, or are present in, the United States under this program.

I. Period of Admission

This rule proposes to extend the H–2A admission period following the expiration of the H–2A petition from not more than ten days to an absolute thirty-day period. *See* proposed 8 CFR 214.2(h)(5)(viii)(B). The purpose of this post-petition period is to provide the H–2A worker enough time to prepare for departure or apply for an extension of stay based on a subsequent offer of employment. As discussed below, USCIS is proposing to increase the mobility of aliens from one H–2A employer to another (see proposed 8 CFR 274a.12(b)(21)). USCIS believes that the change to a thirty-day period will facilitate this new benefit.

The proposed rule also corrects 8 CFR 214.2(h)(5)(viii)(B) by removing an incorrect cross-reference to 8 CFR 214.2(h)(5)(ix)(C). In its place, a cross-reference to 8 CFR 214.2(h)(5)(viii)(B) should be included in 8 CFR 214.2(h)(5)(viii)(C).

J. Interruptions in Accrual Towards 3-Year Maximum Period of Stay

An alien's total period of stay in H–2A nonimmigrant status may not exceed three years. 8 CFR 214.2(h)(15)(ii)(C). However, certain periods of time spent outside the United States are deemed to ''stop the clock'' towards the accrual of the three-year limit. 8 CFR 214.2(h)(5)(viii)(C). USCIS has determined that the length of time that the current regulations require before an H–2A's three-year period of stay is deemed interrupted is unnecessarily long. This results in H–2A workers reaching the three-year cap on their authorized period of stay much sooner than reasonably anticipated by both the workers and their employers, causing disruptive breaks in employment and difficulty for employers to meet their time-sensitive agricultural requirements. This rule proposes to reduce from three months to forty-five days the minimum period spent outside the United States that would be considered interruptive of accrual of time towards the three-year limit, where the accumulated stay is eighteen months or less. *See* proposed 8 CFR 214.2(h)(5)(viii)(C). If the accumulated stay is longer than eighteen months, this rule proposes to simplify the calculation of the interruptive period required from at least one-sixth of the period of accumulated stay to two months. *Id.* These proposed reductions would reduce the amount of time employers are required to be without the services of needed workers and enable the employers to have a set timeframe from which they can better monitor compliance with the terms and conditions of H–2A status.

K. Post-H–2A Waiting Period

Once an H–2A worker has reached the three-year ceiling on H–2A nonimmigrant status, current regulations require the worker to wait six months outside the United States prior to seeking H–2A nonimmigrant status again (or any other nonimmigrant status based on agricultural activities). 8 CFR 214.2(h)(5)(viii)(C). USCIS believes that a shorter waiting period would better meet the needs of agricultural employers in a time-sensitive industry experiencing such a shortage of U.S. workers. This rule proposes to reduce the required absence period to three months, in order to reduce the amount of time employers would be required to be without the services of needed workers, while not offending the fundamental temporary nature of employment under the H–2A program.

L. Extending Status With New Employer and Participation in E-Verify

This proposed rule would permit H–2A workers to continue to be employment authorized while awaiting an extension of H–2A status based on a petition filed by a new employer accompanied by an approved labor certification. Proposed 8 CFR 274a.12(b)(21). Specifically, the new provision would authorize an individual who has filed an application for an extension of stay during his or her period of admission to be employed by the new, petitioning employer for a period not to exceed 120 days beginning from the date of the notice that USCIS issues to acknowledge that it has received the application for the extension of stay. USCIS issues such notices on Form I–797, ''Notice of Action.'' The notice date on Form I–797 is called the ''Received Date.'' Note that if the application for the extension of stay is denied by USCIS prior to the expiration of this 120-day period, employment authorization would automatically terminate upon notification of the denial decision.

The proposed rule places one condition on this employment authorization benefit: The new H–2A employer must be a registered user in good standing (as determined by USCIS) of USCIS' E–Verify program. If the new employer does not meet this condition, proposed 8 CFR 274a.12(b)(21) would not apply, and the alien worker would not be authorized to work for the new employer until USCIS grants the extension of stay application. USCIS believes that this proposed employment authorization provision will create an incentive for agricultural employers to enroll in the E-Verify program, thereby reducing opportunities for aliens without employment authorization to work in the agricultural sector and helping protect the integrity of the H–2A program.

This proposed rule makes conforming amendments to 8 CFR 214.2(h)(2)(i)(D) (prohibiting an alien from commencing employment until the new employer's petition is approved) and includes a cross-reference to proposed 8 CFR 274a.12(b)(21). It also includes a cross-reference to section 214(n) of the INA, 8 U.S.C. 1184(n). This statutory provision applies to aliens within the H–1B specialty worker classification and, in general, permits such aliens to work for a new employer before such an employer's petition is approved. The addition of section 214(n) of the INA, 8 U.S.C. 1184(n), in this proposed rulemaking is made so that the regulations conform to the statute.

M. Miscellaneous Changes to H–2A Program

1. Extensions of Stay Without New Temporary Labor Certifications

USCIS regulations currently provide that, under certain circumstances, an application for an extension of stay for an H–2A nonimmigrant worker need not contain an approved temporary labor certification. 8 CFR 214.2(h)(5)(x). This rule proposes revisions to this provision to improve its readability; it proposes no substantive changes.

2. Filing Locations

To improve the efficient processing of H–2A nonimmigrant petitions, USCIS recently established special mailing

addresses at the USCIS California Service Center for all H–2A petition filings. The current regulations, however, only permit petitions to be filed with the USCIS Service Center that has jurisdiction in the area where the alien will perform services (or receive training) except as provided for elsewhere in the regulations or by a designation specified in a notice published in the **Federal Register**. 8 CFR 214.2(h)(2)(i)(A). USCIS has found that effecting changes to filing procedures by notice in the **Federal Register** creates an unnecessary obstacle to the timely implementation of petition processing improvements. Such changes would be more timely conveyed to the public via the petition's form instructions and USCIS's Web site. Therefore, this rule proposes to remove the **Federal Register** notice requirement at 8 CFR 214.2(h)(2)(i)(A) and instead provides that the form instructions will contain information regarding appropriate filing locations for these nonimmigrant visa petitions.

N. USCIS Policy Applicable to H–2A Sheepherders

For a number of years, the Immigration and Naturalization Service (INS) and now USCIS have refrained from applying the three-year maximum period of stay to H–2A aliens who work as sheepherders. *See* Memorandum from INS Assistant Commissioner John R. Schroeder to Northern Service Center Director James M. Bailey, ''Limits of Stay for H–2A Sheepherders under 8 CFR 214.2(h)(5)(viii)(C)'' (Oct. 31, 1991) (referring to Letter from INS Commissioner Alan Nelson to Senator Alan K. Simpson (Nov. 11, 1987)) (stating that a 6-month absence from United States is not required of H–2A sheepherders). As a result, H–2A aliens working as sheepherders who have reached the three-year maximum period of stay have been able to commence a new three-year period of stay in H–2A status without ever departing and remaining outside the United States for six months. *See* 8 CFR 214.2(h)(5)(viii)(C) (specifying 6-month departure requirement). While USCIS recognizes the special nature of this unique type of agricultural work, including the need to herd sheep over extensive expanses of open range for long periods of time, USCIS has concluded that its policy of exempting H–2A sheepherders from the six-month departure requirement is inconsistent with the parameters of the H–2A classification. Those parameters require that H–2A workers have a residence in a foreign country that they have no intention of abandoning, and perform agricultural labor or services in the United States on a temporary basis. Without imposing a meaningful departure after the three-year maximum period of stay has been reached, USCIS has found that H–2A sheepherders' stay is not truly temporary.

Therefore, USCIS proposes to impose on H–2A sheepherders the same departure requirement applicable to all H–2A workers. However, before doing so, USCIS is soliciting comments from the public regarding this change in policy. Under the proposed change, USCIS would not take action against individuals who have already been admitted in H–2A classification to engage in sheepherding activities. Such individuals, however, would be required to depart from the United States at the end of their period of admission in H–2A status and remain outside of this country for the requisite time period (six months under the current regulation; three months under the proposed rule) before being eligible to obtain H–2A status again. *See* INA sec. 101(a)(15)(H)(ii)(A), 8 U.S.C. 1101(a)(15)(H)(ii)(A); 8 CFR 214.2(h)(5)(iv).

O. Land Border Exit System Pilot

The Secretary of Homeland Security is authorized to prescribe conditions for the admission of nonimmigrant aliens under section 214 of the INA. Section 235 of the INA provides for the inspection of applicants for admission. Pursuant to 8 CFR 235.1(h)(1), nonimmigrant aliens who are admitted to the United States, unless otherwise exempt, are issued Form I–94, ''Arrival/Departure Record,'' as evidence of the terms of admission. Once admitted into the country, nonimmigrant aliens are required to comply with all the conditions of their stay, depart the United States before the expiration of the period of authorized stay, and surrender the departure portion of the Form I–94 upon departure from the United States. Section 215 of the INA provides the authority for departure control for any person departing from the United States. Additionally, 8 CFR part 215 provides the regulations for controls of aliens departing from the United States. Specifically, 8 CFR 215.2 allows for DHS, at its discretion, to require any alien departing from the United States to be examined under oath and to submit for official inspection all documents in the alien's possession.

Available statistics indicate that a significant number of nonimmigrant aliens either do not turn in their Form I–94 upon departure or overstay their authorized period of stay. DHS intends to strengthen its departure control record keeping system. On August 10, 2007, the Administration announced that it would establish a new land-border exit system for guest workers, starting on a pilot basis. In order to ensure that temporary workers depart the United States within the authorized period, DHS is proposing to institute a land-border exit system for H–2A guest workers on a pilot basis. Under the proposed program, an alien admitted on an H–2A visa at a port of entry participating in the program must also depart through a port of entry participating in the program and present designated biographic and/or biometric information upon departure at the conclusion of their authorized period of stay. CBP would publish a Notice in the **Federal Register** designating which ports of entry are participating in the program, which biographic and/or biometric information would be required, and the format for submission of that information by the departing H–2A workers. The exit pilot program would allow DHS to ensure that the H–2A workers subject to this pilot program have departed from the United States when their authorization expires and would provide a foundation for the comprehensive land border exit system for guest workers proposed by the Administration in August 2007. DHS requests comments on the establishment of the proposed pilot program. DHS also solicits comments on whether to include H–2B workers in the exit pilot program. (The H–2B nonimmigrant classification applies to foreign workers performing nonagricultural temporary labor or services in the United States. INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 CFR 214.1(a)(2) (H–2B classification designation)).

DHS previously conducted exit pilot programs at selected air and sea ports of entry through United States Visitor and Immigrant Status Indicator Technology (US–VISIT) Program. See 69 FR 46556. Those pilots began in August 2004 and concluded in May 2007. The pilot program exit system proposed under this rule will utilize any applicable lessons learned from the US–VISIT air and sea exit pilot program. DHS will continue to coordinate these screening programs to ensure both security and efficiency of the programs.

IV. Rulemaking Requirements

A. Regulatory Flexibility Act-Initial Regulatory Flexibility Analysis

The H–2A program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign

workers to the United States to perform agricultural labor or services of a temporary or seasonal nature. U.S. employers have historically faced a shortage of domestically available workers for seasonal agricultural jobs. Many farm workers also in America lack proper work authorization and immigration status. In addition, the requirements that Federal labor and immigration authorities impose on farmers and agribusinesses to obtain H–2A workers are generally felt to be overly burdensome. Therefore, USCIS is proposing changes intended to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers.

1. Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

a. Regulated Entities

USCIS has concluded that the entities affected by this rule are generally categorized as small. By and large this rule applies to farms engaged in the production of livestock, livestock products, field crops, row crops, tree crops, and various other enterprises. It does not apply to support activities for agriculture. The industry affected by this rule, as described in the North American Industry Classification System (NAICS), as encompassing NAICS subsectors 111, Crop Production, and 112, Animal Production.

b. Number of Small Entities to Which the Proposed Rule Will Apply

USCIS estimates that it will receive approximately 6,300 petitions per year for H–2A workers with many farms submitting multiple petitions. About 5,000 of those are expected to be submitted by small entities. The number of regulated firms represents about 0.3 percent of all farmers and the number of H–2A employees make up about 9.3 percent of all farm workers. Finally, about 550 sheep ranchers (an unknown number but presumed majority of which are small entities) are expected to be directly affected by this proposed rule as a result of the proposed changes that are specific to sheepherders.

2. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

a. Paperwork Reduction Act

The proposed rule adds no ''reporting'' or ''recordkeeping'' requirements within the meaning of the Paperwork Reduction Act; thus the rule does not require professional skills for the preparation of ''reports'' or ''records'' under that Act.

b. New Reporting Requirement

The proposed rule would impose new reporting requirements on H–2A employers, including the time frame for reporting, the mechanisms for reporting, the amount of liquidated damages for failure to comply, and defenses for failure to comply. This rule proposes to announce via notice published in the **Federal Register** appropriate notification requirements and assesses liquidated damages for failure to comply with the notification requirements at $500 per violation. DHS has no basis for estimating the cost of this new requirement on H–2A employers. However, DHS believes that the occurrence of non-compliance is not prevalent enough to affect a substantial number of the affected entities. However, the agency has requested and seeks further comment on the actual costs or expenditures, if any, of impact on any one firm that is assessed liquidated damages as a result of being found to be in violation of this new requirement and how that impact may differ or vary for small entities.

3. Identification of Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rule

DHS is unaware of any duplicative, overlapping, or conflicting federal rules. As noted below, DHS seeks comments and information about any such rules, as well as any other state, local, or industry rules or policies that impose similar requirements as those in this proposed rule.

4. Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities, Including Alternatives Considered, Such as: (1) Establishment of Differing Compliance or Reporting Requirements or Timetables That Take into Account the Resources Available to Small Entities; (2) Clarification, Consolidation, or Simplification of Compliance and Reporting Requirements Under the Rule for Such Small Entities; (3) Use of Performance Rather Than Design Standards; (4) Any Exemption From Coverage of the Rule, or Any Part Thereof, for Such Small Entities

Throughout the development of the proposed rule DHS has made every effort to gather information regarding the economic impact of the rule's requirements on all operators, including small entities. Questions for public comment regarding the costs and benefits associated with the proposed rule with respect to how operators, including small entities, can comply with the rule's requirements are included in this part of the rule.

5. Questions For Comment To Assist Regulatory Flexibility Analysis

Please provide comment on any or all of the provisions in the proposed rule with regard to:

a. The impact of the provision(s) (including any benefits and costs), if any; and

b. What alternatives, if any, DHS should consider, as well as the costs and benefits of those alternatives, paying specific attention to the effect of the rule on small entities in light of the above analysis. In particular, please provide the above information with regard to the following sections of the proposed rule:

i. The new reporting requirements on H–2A employers, including the time frame for reporting, the mechanisms for reporting, the amount of liquidated damages for failure to comply, and defenses for failure to comply in 8 CFR 214.2(h)(2)(vi)(B)(*2*).

ii. The requirement for H–2A sheepherders to have the same departure requirement applicable to all H–2A workers under 8 CFR 214.2(h)(5)(viii)(C) (specifying 6-month departure requirement).

iii. Any other requirement not mentioned above.

c. Costs to ''implement and comply'' with the rule including expenditures of time and money for any employee training; attorney, computer programmer, or other professional time;

preparing relevant materials; processing materials, including, materials or requests for access to information; and recordkeeping.

Please describe ways in which the rule could be modified to reduce any costs or burdens for small entities consistent with the Immigration and Nationality Act's requirements.

Please describe whether and how technological developments could reduce the costs of implementing and complying with the rule for small entities or other operators.

Please provide any information quantifying the economic benefits of:

a. Reducing delays in the petition, application, and approval process.

b. Reducing the time required for an H–2A worker to be out of the country, allowing more time for departure after the visa has expired, and allowing for an extension of stay while a new petition is pending.

c. Encouraging employers who currently hire seasonal agricultural workers who are not properly authorized to work in the United States to replace those workers with legal workers.

d. Minimize immigration fraud and protect against abuses that occur when aliens are required to pay employment fees.

Please identify all relevant federal, state or local rules that may duplicate, overlap or conflict with the proposed rule. In addition, please identify any industry rules or policies that already require compliance with the requirements of the DHS proposed rule.

B. Provisions to Which the Regulatory Flexibility Act Does Not Apply

CBP is also seeking comments through this rule with respect to a pilot program that would require that aliens admitted on certain temporary worker visas at a port of entry must depart through a port of entry participating in the program. Although there may be costs associated with participation in this program, the aliens impacted by this portion of the rule are not considered ''small entities,'' as that term is defined in 5 U.S.C. 601(6). Since the regulation will require the alien to comply with the pilot program, rather than placing a requirement on the employers, the employers are not directly impacted by this proposed rule. Employers, including small entities, are free to offer assistance to their H–2A workers in complying with this requirement if they choose to do so. However, the employer's assumption of any costs inherent with complying with this requirement on behalf of their workers is voluntary and, therefore, not subject to the Regulatory Flexibility Act.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Small Business Regulatory Enforcement Fairness Act of 1996

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

E. Executive Order 12866

This rule has been designated as significant under Executive Order 12866. Thus, under section 6(a)(3)(C) of the Executive Order, USCIS is required to prepare an assessment of the benefits and costs anticipated to occur as a result of this regulatory action and provide the assessment to the Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs.

In summary, this rule proposes several changes to the H–2A visa program that USCIS believes are necessary to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers. There are no additional regulatory compliance requirements to be added that will cause a detectable increase in costs for participating firms. Costs of compliance will not be changed by this proposed rule. Volume of applications may increase slightly, but the burden of compliance both in time and fees will not increase above that currently imposed. Qualitatively, this rule will benefit applicants by:

- Reducing delays caused by IBIS checks holding up the petition application process.
- Reducing disruption of the life and affairs of H–2A workers in the United States.
- Protecting laborers' rights by precluding payment of fees by the alien.
- Preventing the filing of requests for more workers than needed, visa selling, coercion of alien workers and their family members, or other practices that exploit workers and stigmatize the H–2A program.
- Encouraging employers who currently hire seasonal agricultural workers who are not properly authorized to work in the United States to replace those workers with legal workers.
- Minimizing immigration fraud and human trafficking.

The H–2A program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the United States to perform agricultural labor or services of a temporary or seasonal nature. This rule is being promulgated as part of the reform process to make changes that are intended to provide agricultural employers with an orderly and timely flow of legal workers while protecting laborers' rights.

F. Temporary Alien Farm Workers: The Current H–2A Program

The H–2A nonimmigrant classification applies to aliens who are coming to the United States temporarily to perform agricultural labor or services of a temporary or seasonal nature. Seasonal employment is tied to a certain time of year that requires labor above regular operations. Temporary labor means the employer's need will last no longer than one year.

Aliens seeking H–2A nonimmigrant status first must be petitioned by a U.S. employer, after the employer has completed a temporary agricultural labor certification process with the Department of Labor (DOL). DOL determines whether employment is agricultural, whether it is open to U.S. workers, if qualified U.S. workers are available, the adverse impact of employment of a qualified alien, and whether employment conditions, including housing, meet applicable requirements. The U.S. employer then files Form I–129, ''Petition for Nonimmigrant Worker,'' which must name one or more alien beneficiaries; if multiple beneficiaries, they may be unnamed if unnamed in the DOL certification and outside the United States. The petition must establish the temporary, seasonal employment and that the beneficiary meets job and training, post-secondary education or other formal training requirements if necessary.

H–2A nonimmigrant status is valid for a total of three years, but can be renewed after the alien remains outside

the United States for a six-month period. The H–2A nonimmigrant can interrupt an accumulated stay of eighteen months or less by an absence from the United States of at least three months. He or she can interrupt an accumulated stay of more than eighteen months by absence from the United States of at least one-sixth of the accumulated stay. Once an H–2A nonimmigrant's authorized period of stay has expired, they have a ten-day grace period before being required to leave the United States. However, an H–2A nonimmigrant whose three-year limit has not been reached can be employment authorized for another 240 days past the authorized period of stay if requested by the same employer. If for a new employer, employment will not be authorized past the authorized period of stay until the petition is approved. H–2A nonimmigrant status is not approved for an alien who violated the conditions of H–2A status within the previous five years by remaining beyond the authorized period of stay or engaging in unauthorized employment.

V. Full Regulatory Impact Assessment

Over the years, U.S. employers have faced a shortage of available U.S. workers who are able, willing, and qualified to fill agricultural jobs, and who would be available at the time and place needed to perform the work. To meet this need, U.S. employers have considered hiring foreign workers. U.S. law requires that they first sponsor the workers by filing a petition based on their qualification within the H–2A nonimmigrant classification.

1. Unauthorized Workers

Estimates from many different government and non-government sources suggest that up to 70% of farmworkers in America lack proper work authorization and immigration status.[4] The United States Department of Labor reports that in 1997 and 1998, 52 percent of hired farmworkers lacked work authorization, 22 percent were citizens and 24 percent were lawful permanent residents.[5]

2. Insufficient Labor Pool

The H–2A temporary agricultural program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature. Before USCIS can approve an employer's petition for such workers, the employer must file an application with the Department of Labor stating there are not sufficient workers who are able, willing, qualified, and available, and the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Labor concerns are prevalent in areas where the agricultural industry is dependent on seasonal labor. For example, the California Farm Bureau Federation estimated that farm labor shortages resulted in $85 million in losses to its members in 2006.[6] Also, a 2007 survey of Wisconsin dairy producers cited an ample labor supply as a main limiting factor in the future of the survey subjects' farming operations.[7] Some commenters believe the requirements that Federal labor and immigration authorities impose on farmers and agribusinesses to obtain H–2A workers are overly burdensome. Others suggest that excessive bureaucratic delays by the responsible agencies in approving worker petitions contribute to the inability to attract sufficient workers.[8] A few sources feel the shortage of farm workers has been exacerbated by tighter security at the Mexican border.[9] Therefore, whether there is an ample supply of farm workers is a major concern in agricultural communities. In short, there is fairly widespread agreement that there is a problem in the seasonal agricultural worker program that needs to be addressed in some fashion.

A. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104–121), requires Federal agencies to conduct a regulatory flexibility analysis that describes the impact of the proposed rule on small entities whenever an agency is publishing a notice of proposed rulemaking. In accordance with the RFA, this section discusses the changes proposed in the subject rule and analyzes whether any of the changes entail compliance requirements with a significant economic impact on a substantial number of small entities requiring publication of an Initial Regulatory Flexibility Analysis.

1. Regulated Entities

a. Agriculture Employment.

The H–2A nonimmigrant classification applies to aliens seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States on a temporary basis. The work must be agricultural in nature. Table 1 [10] below summarizes the total number of farm workers in the most recent 5 calendar years and their average hourly wages in those years.

TABLE 1.—FARM WORKERS, UNITED STATES, 2002–2006

Year	Total number of workers in thousands	Average annual wages (Dollars per hour)		
		All workers	Field workers	Field and livestock workers
2002	885.7	8.81	8.12	8.18
2003	836.0	9.08	8.31	8.42
2004	825.2	9.23	8.45	8.56
2005	780.0	9.51	8.70	8.84
2006	751.9	9.87	9.06	9.15

[4] Regelbrugge, Craig J., American Nursery & Landscape Association. Co-chair, Agriculture Coalition for Immigration Reform, speech given at USDA Agricultural Outlook Conference, American Agriculture And Immigration Reform: An Industry Perspective, March 1, 2007.

[5] Research Report No. 8, U.S. Department of Labor Office of the Assistant Secretary for Policy, Office of Program Economics (March 2000).

[6] Farm Labor Shortages, Mechanization, Rural Migration News, Vol. 14 No. 4 (October 2007).

[7] 2007 Dairy Producer Survey, USDA, National Agricultural Statistics Service (July 2007).

[8] Washington, April M., *Canada offers migrant tips; Colorado looks north of the border for ways to draw workers* Sep. 15, 2007 Rocky Mtn. News 10 (quoting a farmer, ''There is a bottleneck at the federal level in approving work visas, causing real problems for farmers,'').

[9] Mountain State Reporter, United States Department of Agriculture, National Agricultural Statistics Service, West Virginia Department of Agriculture, Vol., 19, no. 9 (Sept. 2006).

[10] U.S. Department of Agriculture, National Agricultural Statistics Service, Statistical Bulletin 1007, Statistical Highlights of U.S. Agriculture for 2006 and 2007, October 2007, *http://www.nass.usda.gov/Publications/Statistical_Highlights/2007/2007stathi.txt.*

The H–2A program is used mainly by farms engaged in the production of livestock, livestock products, field crops, row crops, tree crops, and various other enterprises. The affected industries do not include support activities for agriculture.[11] Therefore, in accordance with the RFA, USCIS has identified the industry affected by this rule as described in the North American Industry Classification System (NAICS) as encompassing NAICS subsectors 111, Crop Production, and 112, Animal Production.[12]

b. Number Affected

In fiscal year 2007 USCIS received 6,212 Form I–129 petitions for H–2A employees, and approved petitions for 78,089 H–2A workers.[13] In fiscal year 2006, USCIS received 5,667 Form I–129 petitions and approved 5,448 of them for 56,183 workers. Also, in fiscal year 2006, 6,717 employers requested certification from the Department of Labor (DOL) for 64,146 H–2A workers, and for those workers, the United States Department of State (DOS) issued 37,149 H–2A visas. In fiscal year 2005, USCIS approved Form I–129 petitions for 49,229 workers, 6,725 employers requested certification from the Department of Labor for 50,721 employees, and 31,892 visas were issued by DOS.[14]

Thus, based on recent results, USCIS estimates that the baseline number of H–2A petitions volume absent this rule would in an average year be approximately 6,300 petitions [15] for an average of 70,000 total H–2A workers per year. In 2006 there were 2,089,790 farms in the United States and about 752,000 workers employed in agricultural jobs. Thus, about 0.3 percent of all farmers use the H–2A program and 9.3 percent of all farm workers are aliens employed under the H–2A program.

2. Size Categories of Affected Entities

The U.S. Small Business Administration (SBA) Small Business Size Regulations at 13 CFR part 121, provide that farms with average annual receipts of less than $750,000 qualify as small businesses for Federal Government programs. According to United States Department of Agriculture data, 44,348, or 2.1 percent, of the 2,128,982 farms in the U.S. had gross cash receipts of more than $500,000.[16] Since 97.9 percent of farms have sales of less than $500,000 it appears that almost all farms are small entities under the SBA definition. That means that almost all of the employers requesting USCIS approval to hire H–2A alien employees per year, an estimated 5,220, are small businesses looking to hire a seasonal farm worker.

The fact that the very small percentage of farms that use the H–2A program accounts for 9.3 percent of all farm workers indicates that those farms that use the H–2A program are larger than average. Nonetheless, the impacts of this rule would have to be totally concentrated among the largest farms in the U.S. in order for the affected entities to not be small as determined under SBA guidelines. Therefore, USCIS has concluded that the entities affected by this rule are generally categorized as small.

B. New Compliance Requirements of the Proposed Rule

1. Compliance Costs

Liquidated Damages for Non-reporting. USCIS is proposing new reporting requirements on H–2A employers, including the time frame for reporting, the mechanisms for reporting, the amount of liquidated damages for failure to comply, and defenses for failure to comply. This rule also proposes to enable DHS to announce via notice published in the **Federal Register** appropriate procedures for notifying DHS of events requiring employer notification. USCIS has no data on the number of employers that typically fail to comply with reporting requirements and no estimate of the number of firms that will have to pay liquidated damages. However, USCIS believes that the occurrence of non-compliance is not prevalent enough to affect a substantial number of the affected entities. Further, while $500 is believed to be sufficient to provide an incentive for participating firms to comply, it is not large enough to impose a significant economic impact on any one firm that is assessed liquidated damages as a result of being found to be in violation of this new requirement.

2. Costs of Exit Requirement

Under the proposed rule, certain aliens admitted on an H–2A visa must comply with the DHS Biometric Exit Pilot as part of US–VISIT. The Exit Pilot Program was implemented to provide a straightforward exit process to ensure that individuals adhere to the terms of their admission and is intended as an added measure to ensure the integrity of our immigration system. This means that the alien must depart through a port of entry participating in the program and present designated biographic and or biometric information upon departure at the conclusion of their authorized period of stay.[17] The alien must either: (1) Check out at an automated exit kiosk or with a US–VISIT exit attendant at the departure gate at the port, have their travel documents read, their two index fingers digitally scanned, a digital picture taken, receive a printed receipt that verifies that they have checked out, and present the receipt at their departure gate to confirm that they checked out; or (2) go through a biometric check-out process with a US–VISIT exit attendant stationed at visitors' departure gates. USCIS assumes that the additional time to register at time of departure is between ½ to 1 hour. USCIS seeks comment on this assumption. Thus, this rule will require H–2A to incur the following additional time costs, analyzed in the following model.

Estimating how many H–2A workers will be subject to the Exit Pilot requires determining how many H–2A workers who leave the country each year are doing so because their periods of authorized stay have ended. As stated above, that is why the Exit Pilot program was instituted—DHS had no process for ensuring that aliens complied with their periods of authorized stay. Since there is no follow-up monitoring system, there is little data available, and the statistics that are available are unreliable. USCIS does know that, in fiscal year 2007, it approved petitions for 78,089 H–2A workers.[18] This number, however, includes requests for extensions of stay and changes in employers; thus, it does not represent the number of H–2A

[11] A few larger Farm Labor Contractors and Crew Leaders (NAICS Code 115115) and Custom Harvesting Operations (NAICS 115113) are believed to use the H–2A program to meet their client's seasonal needs, but the objectives of the program and this rule are focused on the independent producer.

[12] U.S. Small Business Administration, Table of Small Business Size Standards, *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[13] These are not all new employees or entrants to the United States. This number includes petitions approved for an extension or change of employer that are not segregated for reporting purposes.

[14] *http://www.foreignlaborcert.doleta.gov/.*

[15] This figure may not represent the actual number of farm owners or operators as some larger farms may submit multiple petitions per year.

[16] Economic Class of Farms by Market Value of Agricultural Products Sold and Government Payments: 2002 *http://www.nass.usda.gov/census/census02/volume1/us/st99_1_003_003.pdf.*

[17] *http://www.dhs.gov/xnews/releases/press_release_0476.shtm.*

[18] These are not all new employees or entrants to the United States. This number includes petitions approved for an extension or change of employer that are not segregated for reporting purposes.

employees entering or exiting the U.S.[19] USCIS believes that the closest indicator available of the number of H–2A visitor exits per year would be the average number of entries per year. It is logical to assume that the number of employees beginning their authorized employment would vary only slightly from the number ending their authorized term of employment from one year to the next. The number of H–2A entries during fiscal years 2002 through 2006 averaged 17,551 per year.[20] As such, approximately 18,000 immigrant workers are expected to be affected by this rule and spend between ½ to 1 hour in the registration process during exit.

The costs of exit in this case are entirely opportunity costs, as the worker forgoes ½ to 1 hour in the registration process, and gives up this amount of time to his or her ''second best'' activity. It is also important to note that the opportunity cost to the worker depends on whether he or she could have been working, or could have been engaging in a leisure activity. According to Fugitt and Wilcox [21] (1999), opportunity cost of leisure time is calculated as ⅓ of the wage rate. However, if the respective H–2A individual could have been at work instead of in the exit registration process, the opportunity cost is the full value of the wage.

According to the U.S. Department of Labor [22], the hourly wage rate for the H–2A worker is $9.49. As such, the total annual undiscounted cost of H–2A workers having to spend ½ hour during the exit process is approximately $85,000 ($9.49 * ½ hour * 18,000). The opportunity costs if all workers spend a full hour in the exit process are approximately $171,000 ($9.49 *1 hour * 18,000).

However, the preceding estimates of opportunity costs to the H–2A worker assume that each individual is forgoing an hour of time at work. It may also be the case that the individual is foregoing leisure. As such, the opportunity cost of leisure time is represented as ⅓ the wage rate (Fugitt and Wilcox, 1999) as opposed to the full wage.

The undiscounted opportunity costs to workers in this case spending a ½ hour in the exit process are approximately $28,000 (⅓ * $9.49 * 18,000 * ½ hour). However, if each worker spends an hour in the exit process, the opportunity costs rise to approximately $56,000 (⅓ * $9.49 * 18,000 * 1 hour). As such, depending on what assumptions are made about the time required to exit and whether the time forgone is work or leisure, the annual undiscounted costs range from $28,000 to $171,000.

3. Fees

USCIS funds the cost of processing applications and petitions for immigration and naturalization benefits and services, and USCIS' associated operating costs, by charging and collecting fees. For each Form I–129 USCIS charges a filing fee of $320. While the enhancements in this rule will increase the number of H–2A petitions per year by making the program more attractive, there is no increase in per petition fees for employees being imposed by this rule. Thus, the fee impacts of this rule on each petitioning firm are neutral.

4. Paperwork Burden

USCIS estimates that the public reporting burden for each Form I–129 is 2 hours and 45 minutes per response, including the time for reviewing instructions, completing, and submitting the form. The aggregate public reporting burden for all firms affected by this rule may increase as a result of the increased due of the program. However, this rule proposes no changes to the per-firm reporting requirements or costs of the existing H–2A program.

5. Costs Imposed on Sheepherders and Their Employers

There may be a slightly negative impact on sheep ranchers in the few states in the Western United States as a result of one change that is necessary to bring sheepherder H–2A employees in under the requirements to return to their home countries that are applied to all other H–2A employees. Currently, H–2A aliens working as sheepherders who have reached their three-year maximum stay period may obtain a new three-year period of stay in H–2A status without departing and remaining outside the United States for six-months as required for other H–2A aliens. The period of stay in the alien's home country is proposed to be changed to three months in this rule and will be imposed on sheepherders the same as for all other H–2A workers.

a. Size of Sheep Farming Entities Affected

The sheep farming entities affected by this rule (Sheep Farming is NAICS Code 112410) are defined as small. No data exists on the relative breakdown on the number of sheep farms with average annual receipts of more than $750,000 (making them not qualify as a small business). However, nothing points to sheep ranches being comprised of a significantly higher percentage of large operations than other farm enterprises.[23] The number of people employed by sheep farms in the United States is unknown.[24] However, the number of United States farming operations with sheep totaled 69,090 during 2006.

Total sales of sheep and lambs in 2006 were $473 million for an average of $6,846 per farm.[25] Of these farms, 90.8 percent were comprised of operations having from 1 to 99 head. Farms with a range of 100 to 499 head of sheep comprise 7.6 percent of the industry and the remaining 1.6 percent were operations with 500 head or more.[26] Operations with more than 500 sheep account for 47.3 percent of the sheep production in the United States.

[27] USDA, National Agricultural Statistics Service, *http://www.nass.usda.gov/QuickStats/index2.jsp*.

The table below lists the top sheep producing states for 2007, indicating that the larger sheep farming operations are concentrated in the western United States.

SHEEP AND LAMBS.—TOTAL SHEEP AND LAMBS FOR 2007 [27]

State rank	State	Total sheep and lambs (thousand head)
1	Texas	1,070
2	California	610
3	Wyoming	460
4	Colorado	400
5	South Dakota	380

[19] See 2003–2005 figures at *http://www.dhs.gov/xlibrary/assets/statistics/publications/2005_NI_rpt.pdf*.

[20] Yearbook of Immigration Statistics, Temporary Admissions of Nonimmigrants to the United States: 2006 *http://www.dhs.gov/xlibrary/assets/statistics/publications/NI_FR_2006_508_final.pdf*.

[21] Fugitt, D. and S. Wilcox. (1999). *Cost-Benefit Analysis for Public Sector Decision Makers.* London, Quorium Books.

[22] Available at: *http://www.dol.gov/compliance/topics/wages-foreign-workers.htm.*

[23] Sheep and Lambs—Inventory, Wool Production, and Number Sold by Size of Flock: 2002. *http://www.nass.usda.gov/census/census02/volume1/us/st99_1_030_032.pdf.*

[24] E-mail from Scott Hollis, Livestock Section Statistician, USDA, NASS to Phillip Elder, Associate Counsel, USCIS, (November 02, 2007 1:15 PM EST) (on file with author).

[25] Total sales divided by total number of farms. Smaller farms do not generally derive a significant portion of their income from sheep farming.

[26] *Farms, Land in Farms, and Livestock Operations,* 2006 Summary, Agricultural Statistics Board, United States Department of Agriculture, National Agricultural Statistics Service.

b. Number of Sheep Farming Entities Affected

The policy exception for sheepherders not returning home for 6 months between their three year employment stints was provided because livestock operations utilize rangeland in the Western United States as a source of pasture and forage needed year round, and not seasonal employees, and a reliable domestic labor source did not exist. USCIS is proposing to reduce the required period for an H–2A employee to return to their home country to three months and believes that this reduced period will be reasonable for H–2A sheepherders as well, obviating the need for the sheepherder policy exception.

According to the American Sheep Industry Association, more than 500 sheep operations depend on foreign sheepherders for sheep production and more than 1,500 herders are in the United States continuously helping care for the flocks.[28] USCIS receives about 300 petitions a year for sheepherder H–2A employees, mostly from two sources: Western Range Association, of Salt Lake City Utah, and Mountain Plains Association, of Cheyenne, Wyoming. As of September 30, 2007, Western Range, had 929 H–2A sheepherders under contract with 217 member sheep ranchers. Of the 929 employees, 774 were from Peru, 79 were from Chile, 52 from Mexico, and 23 from Bolivia.[29] During calendar year 2007, Mountain Plains has acted as agent for 1,460 H–2A employees for livestock farms or ranches. Mountain Plains has placed employees with approximately 330 range production livestock operations, which are not limited to sheep but for this analysis USCIS will assume that they are all sheep farmers. Mountain Plains estimates that the 1,460 H–2A employees they have had in 2007 were 60 percent from Peru, 30 percent from Mexico, and 10 percent from Chile or other countries.

Thus, about 550 sheep ranchers [30] are expected to be directly affected by this proposed rule, representing less than 1 percent of the 69,090 sheep operations in the United States in 2006 and only 6 percent of the sheep producers in California, Colorado, Idaho, Montana, Nevada, Mew Mexico, and Wyoming. This small group will face a disproportionate impact from the proposed rule relative to other sheep farmers.

[28] *http://www.sheepusa.com.*

[29] Telephone conversations with Sarah Peters and Dennis Richens of the Western Range Association.

[30] Western Range—217 plus Mountain Plains—330 = 547—rounded to 550.

c. Size of Sheep Farming Entities Affected

The sheep farms that are members of Mountain Plains and Western Range have flocks that range in size from approximately 500 ewes to as high as about 10,000 ewes with total sales from sheep, lambs and wool ranging from $50,000 to $950,000. Operations, such as these, with more than 500 sheep account for 1.6 percent of sheep farming operations. Annual sales per sheep farm averages about $7,000 per farm; however, that figure includes many farms that barely exceed the minimum annual $1,000 in sales threshold that the United States Internal Revenue Service and USDA use to define a ''farm.'' The number of these directly affected farms that are small or large entities as a result of exceeding or falling below the $750,000 threshold defining those categories are unknown.

d. Increased Compliance Costs for Sheep Farms

(i) Travel Expenses

This rule only proposes that the sheepherder be required to stay away from the United States for three months or more before returning, as opposed to returning immediately as currently allowed. This rule does not change the requirement that a sheepherder return to his or her home country or regulations governing payment of the alien's travel expenses. The farmer must pay the costs for many of his H–2A sheepherders to go home every year anyway as a result of normal turnover, and this rule will not have an impact on that cost.

(ii) Availability and Cost of Labor

This proposed rule will not substantially reduce the availability of seasonal sheepherders or increase the cost of employing them. Sheepherders are unique from other H–2A seasonal agricultural employees in that sheepherders are needed year round, and not for short term needs with a start and end, such as a crop harvest. While the need for sheepherders increases in lambing or sheering season, the nature of the employment is not necessarily seasonal. The requirement to return home for six months fits a vegetable or row crop farm with at least six months between harvests. Ranches, however, need at least a few hands year round.

Due to the solitude experienced by a sheepherder who must live out on the range for extended periods of time, employee turnover may be more pronounced in the sheep ranching industry than in many others. Rates of employees absconding from rangeland H–2A jobs is estimated at 10 percent, which is much higher than in other employment based visa programs. A major complaint that sheep ranchers have about the H–2A program is the inability to have absconding employees, detained, deported, and replaced.

(iii) Training

If a farm loses an employee it may have to bring in another sheepherder and incur the costs of training the new employee on the specific requirements of that ranch. This rule is not expected to impact this cost.

(iv) Time Away From U.S. Between 3 Year Maximum Stays

Currently, a sheepherder may return to the United States immediately after returning home. This proposed rule will require him or her to remain outside the United States for three months.

The productivity and overall expenses of a typical user of the H–2A sheepherder program are not expected to be affected. A six-month stay-home requirement would be a major concern for sheep farms because that length of time may reduce the likelihood of the employee returning to the U.S. and increases the sheep farmers' risk of having an insufficient number of employees. However, the three-month stay home requirement will have a minimal impact. According to major users of the sheepherder H–2A program, most sheepherders stay home for two or three months already. Employers active in the program have already built that expectation into their planning.[31] The new mandatory three-month stay-away requirement will be an additional factor for a sheep ranch's consideration in deciding how many H–2A alien employees it needs. Also, the ranch will want to make sure that all of its H–2A sheepherders are not on the same cycle for their requirement to return home and stay. However, alien workers leave their jobs for a number of reasons on a regular basis and often have to return home for family events and emergencies. No increase in expenses is expected as a result of sheepherders being mandated under this rule to stay away. In addition, qualitative impacts are expected to be slight, if they occur at all.

Therefore, the changes proposed in the subject rule that add new compliance requirements on rangeland livestock operations will not have a significant economic impact.

[31] Sheep Industry Association, Mountain Plans, and Western Range.

C. Effect of Repatriation Provision

As stated above, this rule proposes to prohibit the approval of an H–2A petition for a worker from a country that refuses repatriation of its citizen, subjects, nationals or residents. Thus, where a country has no repatriation agreement with the United States, or where the country routinely refuses to issue travel documents, or cooperate in repatriation, or where for whatever reason the United States is unable to systematically repatriate deportees, H–2A employees from that country will not be permitted.

This change is intended to encourage more nations to promptly accept the return of their nationals who no longer have valid status as nonimmigrants in the United States. However, the actual impact is expected to be negligible because very few H–2A workers are from such countries. According to U.S. Immigrations and Customs Enforcement, the top five non-cooperating countries are the People's Republic of China, India, Vietnam, Pakistan, and Laos. However, 98 percent of all H–2A workers during FY 2006, based on number of admissions, were from Mexico (40,283), Jamaica (3,376), South Africa (757), Peru (562), and Canada (454). Repatriation is not a problem with these countries and there is no reason to believe that the changes made in this rule will cause any shift in major source countries for temporary agricultural workers at all, much less to the countries where this is a problem. Thus this change is not expected to have any impact on the availability of H–2A labor.

D. Other Impacts of the Proposed Changes

1. Volume of Applications

The changes proposed by this rule are intended to increase the flexibility and attractiveness of the H–2A visa program. Therefore, the proposals in this rule are expected to result in a small increase in the number of H–2A visas petitioned for and approved. USCIS has no reliable way to estimate the impact of these proposed changes on petition filings and approval volume with any precision. Nonetheless, it is reasonable to expect about a 5 percent increase per year in the number of employers filing a Form I–129 to request H–2A employees as a result of the proposals in this rule. Based on the 6,000 projected Form I–129 filings for H–2A employees per fiscal year, this would result in an estimated 300 additional filings per year.[32]

[32] 5,667 + 6,212/2 = 5,940 × .05 = 297.

2. Qualitative Impacts

Reduced delays: USCIS expects no significant increase in filings to result from allowing employers to petition for unnamed beneficiaries and only requires the petition to include the names of those beneficiaries who are in the United States. In H–2A filings many beneficiaries are currently unnamed. This change will benefit applicants mainly by eliminating the requirement that beneficiaries be named so that no Intragency Border Inspection System (IBIS) check will hold up the petition application process.

Improved quality of life for H–2A seasonal workers. Reducing the time required for an H–2A worker to be out of the country, allowing more time for departure after the visa has expired, and allowing for an extension of stay while a new petition is pending, will cause less disruption of the life and affairs of H–2A workers in the United States.

Reduce abuses in the program. Another major goal of this rule, in addition to providing agricultural employers with an orderly and timely flow of legal workers, is protecting laborers' rights. Changes e, f, g, and h above, go directly to protecting laborers' rights by precluding the payment of employment or recruitment fees by aliens seeking H–2A positions. Specifically, these changes will reduce the abuse of H–2A employees by unscrupulous H–2A petitioners and/or their agents, who have required (or who have used third parties that require) persons seeking H–2A positions to pay such fees. USCIS also believes that this rule will help minimize the immigration fraud and abuses that have been known to occur when aliens are required to pay employment fees. Abuses that will be reduced by the changes in e, f, g and h will include petition padding (i.e., the filing of requests for more workers than needed), sale of H–2A positions to the highest bidder, and human trafficking. Changes e, f, g and h are also intended to deter the coercion of alien workers and their family members by recruiters, facilitators, and others who would otherwise pressure such persons for payment of debts incurred in connection with seeking an H–2A position. These changes will also discourage other exploitative practices that, in the past, have tarnished the reputation of the H–2A program.

In addition, the attestation requirement referred to in change f above will ensure continued compliance with section 218 of the INA. Should the employer wish to employ an H–2A worker in a different capacity than that represented in its labor certification, application, and petition, it may after complying with some requirements depending on the circumstances. This change will ensure continued compliance with section 218 of the INA and the integrity of the H–2A program.

In summary, the changes in e, f, g, and h are essential for ensuring against the most egregious of the documented abuses to the H–2A program while in no way limiting the availability of H–2A workers to U.S. agricultural employers.

Illegal immigration (number of agricultural workers who are unauthorized) will decline. It is presumed that this rule will result in those employers who currently hire seasonal agricultural workers who are not properly authorized to work in the United States to replace those workers with legal workers to the extent that this rule allows the employer to obtain a sufficient number of H–2A employees considering the costs and risk associated with hiring no worker or an unauthorized worker.

3. Government Costs

This rule is expected to result in no changes in program costs for the government.

E. Summary and Conclusion

1. Small Entity Effects

The entities affected by this rule are nearly all categorized as small under the RFA. However, only about 0.3 percent of all farmers use the H–2A program and 9.3 percent of all farm workers are aliens employed under the H–2A program. As for sheep ranchers that may be directly affected by the changes in this rule, the 550 identified predominant users comprise less than 1 percent of the 69,090 sheep operations in the United States and Puerto Rico in 2006, and only 6 percent of the operations in California, Colorado, Idaho, Montana, Nevada, New Mexico, and Wyoming. USCIS believes that the percentages of total farms affected by this rule do not represent a sufficient portion of the agricultural producers in the United States to rise to a level that could be called substantial as the term is intended under the RFA.

This rule will not impose a significant economic impact on any firms. This rule proposes several changes to the H–2A visa program that USCIS believes are necessary to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers. There are no additional regulatory compliance requirements to be added that will cause a detectable increase in costs for participating firms. Thus, when comparing the annualized costs of this

proposed rule as a percentage of a typical participating regulated small firm's annual sales there is no significant economic effect.

2. Increased Costs for Small Businesses

Costs of compliance for small businesses will not be changed by this proposed rule. Volume of applications may increase slightly, but the burden of compliance both in time and fees will not increase above that currently imposed.

3. Increased Costs for Individuals

The annual undiscounted costs for aliens admitted on an H–2A visa to comply with the DHS Biometric Exit Pilot as Part of US–VISIT range from $28,000 to $171,000.

4. Benefits

This rule will benefit applicants by:

- Reducing delays caused by IBIS checks holding up the petition application process:
- Reducing disruption of the life and affairs of H–2A workers in the United States;
- Protecting laborers' rights by precluding payment of fees by the alien;
- Preventing the filing of requests for more workers than needed, visa selling, coercion of alien workers and their family members, or other practices that exploit workers and stigmatize the H–2A program;
- Encouraging employers who currently hire seasonal agricultural workers who are not properly authorized to work in the United States to replace those workers with legal workers; and
- Minimizing immigration fraud and human trafficking.

F. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988

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

H. Paperwork Reduction Act

This rule requires that a petitioner submit Form I–129, Petition for Nonimmigrant Worker, seeking to classify an alien as an H–2A nonimmigrant. This form has been previously approved for use by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The OMB control number for this collection is 1615–0009. However, USCIS will make minor changes to the Form I–129 by requiring an employer to certify that during the period of intended employment for which the petition is approved, the petitioner will not expand the alien workers' duties, place of employment, nor the entities for which the duties will be performed beyond the information provided on the Form I–129 and temporary labor certification, and by updating the language describing employers' responsibility to inform DHS of H–2A employee no-show, termination, or abscondment and the requirement to pay liquidated damages for failure to make such notification. In addition, USCIS estimates that the number of U.S. employers using the Form I–129 will increase. Accordingly, once this rule is published as a final rule, USCIS will submit to OMB, the Form I–129 (with minor changes) and raise the number of respondents and burden hours associated for this information collection using an OMB 83–C, Correction Worksheet.

In addition, this rule requires, as a prerequisite to an H–2A worker receiving an automatic extension of employment authorization with the filing of a petition by a new employer, that employers enroll in E-Verify, which is an information collection system previously approved for use under the Paperwork Reduction Act. The OMB Control Number for this information collection is 1615–0092.

Under the changes contained in this regulation, USCIS estimates that the number of U.S. employers using E-Verify will increase. Accordingly, once this rule is published as a final rule, USCIS will submit an OMB 83–C, Correction Worksheet, to OMB raising the number of respondents and burden hours associated for this information collection.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students, Victims.

8 CFR Part 215

Administrative practice and procedure, Aliens.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185, 1186a, 1187, 1221, 1253, 1281, 1282, 1301–1305 and 1372; section 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 8 CFR part 2.

2. Section 214.2 is amended by:

a. Revising paragraphs (h)(2)(i)(A) and (D);

b. Revising paragraph (h)(2)(iii);

c. Revising paragraph (h)(5)(i)(A);

d. Revising paragraph (h)(5)(i)(B);

e. Revising paragraph (h)(5)(i)(C);

f. Adding a new paragraph (h)(5)(i)(F);

g. Removing last sentence from (h)(5)(ii);

h. Revising paragraph (h)(5)(vi);

i. Revising paragraph (h)(5)(viii)(A);

j. Revising paragraph (h)(5)(viii)(B);

k. Revising paragraph (h)(5)(viii)(C);

l. Adding a new paragraph (h)(5)(viii)(D);

m. Revising paragraph (h)(5)(ix);

n. Revising paragraph (h)(5)(x);

o. Adding a new paragraph (h)(5)(xi); and by

p. Revising paragraph (h)(11)(ii).

The revisions and additions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(h) * * *

(2) * * *

(i) * * *

(A) *General.* A United States employer seeking to classify an alien as an H–1B, H–2A, H–2B, or H–3 temporary employee must file a petition on Form I–129, Petition for Nonimmigrant Worker, as provided in the form instructions.

* * * * *

(D) *Change of employers.* If the alien is in the United States and seeks to

change employers, the prospective new employer must file a petition on Form I–129 requesting classification and an extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay must conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. Except as provided by 8 CFR 274a.12(b)(21) or section 214(n) of the Act, 8 U.S.C. 1184(n), the alien is not authorized to begin the employment with the new petitioner until the petition is approved. An H–1C nonimmigrant alien may not change employers.

* * * * *

(iii) *Naming beneficiaries.* H–1B, H–1C, and H–3 petitions must include the name of each beneficiary. All H–2A and H–2B petitions must include the name of each beneficiary who is currently in the United States, but need not name any beneficiary who is not currently in the United States. However, a petitioner who files on behalf of workers who are not present in the United States an H–2B petition that is supported by a temporary labor certification requiring education, training, experience, or special requirements of the beneficiary must name all the requested workers in each petition. Unnamed beneficiaries must be shown on the petition by total number. If all of the beneficiaries covered by an H–2A or H–2B temporary labor certification have not been identified at the time a petition is filed, multiple petitions for subsequent beneficiaries may be filed at different times but must include a copy of the same temporary labor certification. Each petition must reference all previously filed petitions for that temporary labor certification.

* * * * *

(5) * * *

(i) * * *

(A) *General.* An H–2A petition must be filed on Form I–129 with a single valid temporary agricultural labor certification. The petition may be filed by either the employer listed on the temporary labor certification, the employer's agent, or the association of United States agricultural producers named as a joint employer on the temporary labor certification.

(B) *Multiple beneficiaries.* The total number of beneficiaries of a petition or series of petitions based on the same temporary labor certification may not exceed the number of workers indicated on that document. A single petition can include more than one beneficiary if the total number does not exceed the number of positions indicated on the relating temporary labor certification.

(C) *Petitioner's Attestation.* A petitioner must file an attestation, certified as true and accurate by an appropriate official of the petitioner, that during the period of intended employment for which the petition is approved, neither the alien workers' duties, place of employment, nor the entities for which the duties will be performed will expand beyond the related information provided on the Form I–129 and labor certification. The petitioner must also state in the attestation whether: It received, directly or indirectly, any fee or other form of compensation from any alien beneficiary; it has any arrangement or intends to have an arrangement for remuneration, direct or indirect, from any recruiter, facilitator or similar employment service with which it coordinates employment of the H–2A workers, and if so, the name of any recruiter, facilitator, or similar employment service used to locate H–2A workers; and, to the best of its knowledge, any alien beneficiary has provided, or intends to provide, any remuneration, direct or indirect, to any such recruiter, facilitator, or similar employment service.

* * * * *

(F) *Petitions for Nationals of Countries That Refuse Repatriation.* No H–2A petition can be approved for a citizen, subject, national or resident of a country whose government the Secretary of Homeland Security has determined consistently denies or unreasonably delays accepting the return of citizens, subjects, nationals or residents who are subject to a final order of removal from the United States. The Secretary will review such determinations periodically to evaluate if the subject country is accepting repatriated nationals.

* * * * *

(vi) *Petitioner consent and notification requirements*—(A) *Consent.* In filing an H–2A petition, a petitioner and each employer consents to allow access to the site where the labor is being performed for the purpose of determining compliance with H–2A requirements.

(B) *Agreements.* The petitioner agrees to the following requirements:

(*1*) To notify DHS in writing, within 48 hours, and beginning on a date and in a manner specified in a notice published in the **Federal Register** if: An H–2A worker fails to report for work within 5 days after the employment start date stated on the petition; the employment of an H–2A worker terminates more than 5 days before the employment end date stated on the petition; or an H–2A worker absconds from the worksite.

(*2*) To retain evidence of such notification and make it available for inspection by DHS officers for a one-year period beginning on the date of the notification.

(*3*) To pay $500 in liquidated damages for each instance where it cannot demonstrate it is in compliance with the notification requirement.

(C) *Process.* Except when the petitioner has admitted in writing a failure to comply with the notification requirement, the petitioner will be given written notice and 10 days to reply before being given written notice of the assessment of liquidated damages.

(D) *Failure to pay liquidated damages.* If liquidated damages are not paid within 10 days of assessment, an H–2A petition may not be processed for that petitioner or any joint employer shown on the petition until such damages are paid.

(E) *Abscondment.* An H–2A worker has absconded if he or she has not reported for work for a period of 5 days without the consent of the employer.

* * * * *

(viii) * * *

(A) *Effect of violations of status.* An alien may not be accorded H–2A status who USCIS finds to have, at any time during the past 5 years, violated any of the terms or conditions of admission into the United States as an H–2A nonimmigrant, including remaining beyond the specific period of authorized stay or engaging in unauthorized employment.

(B) *Period of admission.* An alien admissible as an H–2A nonimmigrant shall be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to one week before the beginning of the approved period for the purpose of travel to the worksite, and a 30-day period following the expiration of the H–2A petition for the purpose of departure or extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12 or section 214(n) of the Act, the beneficiary may not work except during the validity period of the petition.

(C) *Limits on an individual's stay.* Except as provided in paragraph (h)(5)(viii)(B) of this section, an alien's stay as an H -2A nonimmigrant is limited by the term of an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining

an extension of stay. However, an individual who has held H–2A status for a total of 3 years may not again be granted H–2A status until such time as he or she remains outside the United States for an uninterrupted period of 3 months. An absence from the United States can interrupt the accrual of time spent as an H–2A nonimmigrant against the three-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least two months. Eligibility under this paragraph (h)(5)(viii)(C) will be determined in admission, change of status or extension proceedings. An alien found eligible for a shorter period of H–2A status than that indicated by the petition due to the application of this paragraph (h)(5)(viii)(C) shall only be admitted for that abbreviated period.

(D) *Nationals of Countries That Refuse Repatriation.* No alien may be accorded H–2A status who is a citizen, subject, national or resident of a country whose government the Secretary of Homeland Security has determined consistently denies or unreasonably delays accepting the return of citizens, subjects, nationals or residents who are subject to a final order of removal from the United States. The Secretary of Homeland Security will review such determinations periodically to evaluate if the subject country is accepting repatriation within a reasonable period of time.

(ix) *Substitution of beneficiaries after admission.* An H–2A petition may be filed to replace H–2A workers whose employment was terminated early. The petition must be filed with a copy of the certification document, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (h)(5)(i)(D) of this section. It must also be filed with a statement giving each terminated worker's name, date and country of birth, and termination date. A petition for a replacement may not be approved where the requirements of paragraph (h)(5)(vi) of this section have not been met. A petition for replacements does not constitute the notification required by paragraph (h)(5)(vi)(B)(*1*) of this section.

(x) *Extensions in emergent circumstances.* In emergent circumstances, as determined by a Service Center director, a single H–2A petition may be extended without an approved labor certification if filed on behalf of one or more beneficiaries who will continue to be employed by the same employer that previously obtained an approved petition on the beneficiary's behalf, so long as the employee continues to perform the same duties and will be employed for no longer than 2 weeks after the expiration of previously-approved petition. The previously approved petition must have been based on an approved temporary labor certification.

(xi) *Treatment of petitions and alien beneficiaries upon a determination that fees were collected from alien beneficiaries*—(A) *Denial or revocation of petition.* As a condition to approval of an H–2A petition, no fee or other compensation (either direct or indirect) may be collected from a beneficiary of an H–2A petition by a petitioner, agent, facilitator, recruiter, or similar employment service in connection with an offer or condition of H–2A employment. If a Service Center director determines that the petitioner has collected, or entered into an agreement to collect, such fee or compensation or that the petitioner is aware that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service, in connection with obtaining the H–2A employment, the H–2A petition will be denied or revoked on notice.

(B) *Effect of petition revocation.* Upon revocation of an H–2A petition based upon paragraph (h)(5)(xi)(A) of this section, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment. The employer shall be liable for the alien beneficiary's reasonable costs of return to his or her last place of foreign residence abroad, unless such alien obtains an extension of stay based on an approved H–2A petition filed by a different employer, and such employer states in the job offer that it will pay the alien's reasonable return transportation expenses upon completion of the his or her new employment.

* * * * *

(11) * * *

(ii) *Immediate and automatic revocation.* The approval of any petition is immediately and automatically revoked if the petitioner goes out of business, files a written withdrawal or the petition, or the Department of Labor revokes the labor certification upon which the petition is based.

* * * * *

PART 215—CONTROLS OF ALIENS DEPARTING FROM THE UNITED STATES

2. The authority citation for part 215 continues to read as follows:

Authority: 8 U.S.C. 1104; 1184; 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1365a note, 1379, 1731–32.

3. Section 215.9 is added to read as follows:

§ 215.9 Temporary Worker Visa Exit Program.

An alien admitted on an H–2A visa at a port of entry participating in the Temporary Worker Visa Exit Program must also depart at the end of their authorized period of stay through a port of entry participating in the program and present designated biographic and/or biometric information upon departure. U.S. Customs and Border Protection will publish a notice in the **Federal Register** designating which H–2A workers must participate in the Temporary Worker Visa Exit Program, which ports of entry are participating in the program, which biographical and/or biometric information would be required, and the format for submission of that information by the departing designated temporary workers.

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

4. The authority citation for section 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

5. Section 274a.12 is amended by:

a. Removing the word ''or'' at the end of paragraph (b)(19);

b. Removing the period at the end of paragraph (b)(20), and adding a ''; or'' in its place; and by

c. Adding a new paragraph (b)(21).

The addition reads as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(21) A nonimmigrant alien within the class of aliens described in 8 CFR 214.2(h)(1)(ii)(C) who filed an application for an extension of stay pursuant to 8 CFR 214.2 or 8 CFR 214.6 during his or her period of admission. Such alien is authorized to be employed by a new employer that has filed an H–2A petition naming the alien as a beneficiary and requesting an extension of stay for the alien for a period not to exceed 120 days beginning from the ''Received Date'' on Form I–797 (Notice of Action) acknowledging receipt of the

petition requesting an extension of stay, provided that the employer has enrolled in and is a participant in good standing in the E-Verify program, as determined by USCIS in its discretion. Such authorization will be subject to any conditions and limitations noted on the initial authorization, except as to the employer and place of employment. However, if the District Director or Service Center director adjudicates the application prior to the expiration of this 120-day period and denies the application for extension of stay, the employment authorization under this paragraph (b)(21) shall automatically terminate upon 15 days after the denial decision. The employment authorization shall also terminate automatically if the employer fails to remain a participant in good standing in the E-Verify program, as determined by USCIS in its discretion.

* * * * *

Michael Chertoff,

Secretary.

[FR Doc. E8–2532 Filed 2–12–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0109; Directorate Identifier 2007–NM–235–AD]

RIN 2120–AA64

Airworthiness Directives; Lockheed Model 382, 382B, 382E, 382F, and 382G Series Airplanes

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

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

SUMMARY: This document announces a reopening of the comment period for the above-referenced NPRM. The NPRM proposed the adoption of a new airworthiness directive for all Lockheed Model 382, 382B, 382E, 382F, and 382G series airplanes. That NPRM invites comments concerning the proposed requirements for revising the FAA-approved maintenance inspection program to include inspections that will give no less than the required damage tolerance rating for each structural significant item (SSI), doing repetitive inspections to detect cracks of all SSIs, and repairing cracked structure. This reopening of the comment period is necessary to provide additional opportunity for public comment on the proposed requirements of that NPRM.

DATES: We must receive comments on this proposed AD by March 31, 2008.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Lockheed Martin Aeronautics Company, 86 South Cobb Drive, Marietta, Georgia 30063.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.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 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Carl Gray, Aerospace Engineer, Airframe Branch, ACE–117A, FAA, Atlanta Aircraft Certification Office, One Crown Center, 1895 Phoenix Boulevard, suite 450, Atlanta, Georgia 30349; telephone (770) 703–6131; fax (770) 703–6097.

SUPPLEMENTARY INFORMATION:

We proposed to amend 14 CFR part 39 with a notice of proposed rulemaking (NPRM) for an AD for all Lockheed Model 382, 382B, 382E, 382F, and 382G series airplanes. The NPRM was published in the **Federal Register** on November 14, 2007 (72 FR 64005). The NPRM proposed to require revising the FAA-approved maintenance inspection program to include inspections that will give no less than the required damage tolerance rating for each structural significant item (SSI), doing repetitive inspections to detect cracks of all SSIs, and repairing cracked structure. The NPRM action invites comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD.

Actions Since NPRM Was Issued

Since we issued the NPRM, we have received one comment. Lynden Air Cargo requests an additional 45 days to comment on the NPRM. Lynden Air Cargo states that it needs more time to:

- Review Lockheed Martin Model 382, 382B, 382E, 382F, and 382G Series Aircraft Service Manual Publication (SMP), Supplemental Structural Inspection Document, SMP 515–C–SSID, Change 1, dated September 10, 2007 (referred to the NPRM as the appropriate source of service information for accomplishing the proposed actions). Lynden Air Cargo states that the service information was not made available by the Type Certificate holder until December 18, 2007.
- Comment about the conclusion in the Regulatory Evaluation (located in the docket) that the NPRM does not affect intrastate aviation in Alaska. Lynden Air Cargo states that its military operations in Alaska account for some 4.5 million pounds of lift per year.
- Review service difficulty reports to validate the presence of an unsafe condition relating to the affected airplanes. Lynden Air Cargo states that it does not appear that the requirements of the NPRM are based upon any unsafe condition related to a particular type design.

It is our intent to address the identified unsafe condition in a timely manner with minimum disruption to industry. We encourage interested parties to continue to evaluate the NPRM and to submit additional comments with more specific details concerning issues that we may need to evaluate before finalizing decisions on the proposal. We have determined that such input may be beneficial before adoption of a final rule. As a result, we have decided to reopen the comment period for 45 days to receive additional comments.

No part of the regulatory information has been changed; therefore, the NPRM is not republished in the **Federal Register**.

Comments Due Date

We must receive comments on this AD action by March 31, 2008.

Issued in Renton, Washington, on February 7, 2008.

Kevin Hull,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–2742 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0166; Directorate Identifier 2007–NM–329–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Boeing Model 747 airplanes listed above. This proposed AD would require repetitive inspections for broken or missing fasteners in the single-row hinge fasteners of the forward and aft cargo doors, and related investigative/corrective actions. This proposed AD results from reports of broken and missing fasteners in the hinges of the forward and aft cargo doors in both the body hinge segments and the door hinge segments. We are proposing this AD to detect and correct broken or missing fasteners in the hinge segments with a single fastener row, which could lead to opening of the cargo door during flight and result in rapid decompression of the airplane.

DATES: We must receive comments on this proposed AD by March 31, 2008.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.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 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6437; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

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–2008–0166; Directorate Identifier 2007–NM–329–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://www.regulations.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

We have received reports of broken fasteners in the hinge segments of the forward and aft cargo doors. Two operators have reported broken fasteners in both the body hinge segments and the door hinge segments. One operator of a Model 747–400 series airplane found three fractured fasteners at the aft cargo door, and a subsequent torque check showed that two other fasteners were also fractured. Another operator reported that all eight fasteners of a hinge segment at the forward cargo door of a Model 747–300 series airplane were fractured. This operator also reported finding four fractured fasteners in one hinge segment at the forward cargo door of a different airplane. Broken or missing fasteners in the hinge segments, if not detected and corrected, could lead to opening of the cargo door during flight and result in rapid decompression of the airplane.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 747–52A2287, dated October 25, 2007. The service bulletin describes procedures for a repetitive detailed inspection for broken or missing fasteners of the single-row hinge fasteners of the forward and aft cargo door hinge segments, and related investigative and corrective actions. If no broken fastener is found, the service bulletin specifies the related investigative action of applying torque to all the fasteners at that segment to detect any broken fastener. If any inspection or torque application shows a broken fastener, the service bulletin specifies the corrective action of replacing all fasteners in the hinge segment where the broken fastener is found.

FAA's Determination and Requirements of This Proposed AD

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design. This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Difference Between the Proposed AD and the Service Bulletin.''

Difference Between the Proposed AD and the Service Bulletin

The Accomplishment Instructions of the service bulletin do not state the action to take if there is a missing fastener. This proposed AD would require replacing all fasteners in any hinge segment that has one or more missing fasteners.

Interim Action

A Boeing investigation has not determined a specific root cause for the unsafe condition; therefore, we consider this proposed AD interim action. If final action is later identified, we might consider further rulemaking then.

Costs of Compliance

We estimate that this proposed AD would affect 165 airplanes of U.S. registry. The ''Estimated Costs'' 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 product	Number of U.S.-registered airplanes	Fleet cost
Detailed inspection	3	$80	$240, per inspection cycle.	165	$39,600, per inspection cycle.
Torque application (for any hinge segment with no broken or missing fastener).	7	80	$560, per inspection cycle.	Up to 165	Up to $92,400, per inspection cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

We 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.

You can find our regulatory evaluation and the estimated costs of compliance 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:

Boeing: Docket No. FAA–2008–0166; Directorate Identifier 2007–NM–329–AD.

Comments Due Date

(a) We must receive comments by March 31, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from reports of broken and missing fasteners in the hinges of the forward and aft cargo doors in both the body hinge segments and the door hinge segments. We are issuing this AD to detect and correct broken or missing fasteners in the hinge segments, which could lead to the cargo door opening during flight and result in rapid decompression of the airplane.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Repetitive Inspection and Related Investigative/Corrective Actions

(f) Before the accumulation of 7,200 total flight cycles or within 3,000 flight cycles after the effective date of this AD, whichever occurs later: Do a detailed inspection for broken or missing fasteners of the single-row hinge fasteners of the forward and aft cargo door hinge segments, and do all applicable related investigative (torque application) and corrective actions by accomplishing all the actions specified in the Accomplishment Instructions of Boeing Alert Service Bulletin 747–52A2287, dated October 25, 2007. Do all applicable related investigative and corrective actions before further flight. Repeat the inspection thereafter at intervals not to exceed 6,000 flight cycles. Where the service bulletin does not give an action to take if there is one or more fasteners missing from a hinge segment, replace all fasteners in the hinge segment before further flight in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 747–52A2287, dated October 25, 2007.

Alternative Methods of Compliance (AMOCs)

(g)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6437; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Issued in Renton, Washington, on February 4, 2008.

Kevin Hull,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–2588 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 138

[Docket No. USCG–2005–21780]

RIN 1625–AA98

Financial Responsibility for Water Pollution (Vessels) and OPA 90 Limits of Liability (Vessels and Deepwater Ports); Correction

AGENCY: Coast Guard, DHS.

ACTION: Proposed rule; correction.

SUMMARY: The Coast Guard published in the **Federal Register** of February 5, 2008, a notice of proposed rulemaking which, among other things, would amend the regulatory requirements for vessel operators to establish and maintain evidence of financial responsibility. That document contained an incorrect effective date and was also unclear. This document corrects the preamble and regulatory text to the proposed rule to clarify the effective date and the distinction between the financial responsibility applicable amounts and limits of liability.

DATES: Comments and related material must reach the Docket Management Facility on or before May 5, 2008. Comments sent to the Office of Management and Budget (OMB) on collection of information must reach OMB on or before May 5, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2005–21780 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online: http://www.regulations.gov*.

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

You must also send comments on collection of information to the Office of Information and Regulatory Affairs, Office of Management and Budget. To ensure that the comments are received on time, the preferred method is by e-mail at *nlesser@omb.eop.gov* or fax at 202–395–6566. An alternate, though slower, method is by U.S. mail to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, ATTN: Desk Officer, U.S. Coast Guard.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Benjamin White, National Pollution Funds Center, Coast Guard, telephone 202–493–6863. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Coast Guard published an NPRM in the **Federal Register** of February 5, 2008, (73 FR 6642) which, among other things, proposed amending the regulatory requirements for vessel operators to establish and maintain evidence of financial responsibility. That document contained an incorrect effective date and was also unclear. This document corrects the preamble and regulatory text to the proposed rule to clarify the effective date and the distinction between the financial responsibility applicable amounts of § 138.80(f) and limits of liability in proposed Subpart B.

In FR Doc. E8–1516, appearing on page 6642 in the **Federal Register** of Tuesday, February 5, 2008, the following corrections are made:

Preamble [Corrected]

1. On page 6645, in the third column, after the reference to *Section 138.85,* remove the paragraph that states: ''This new section of the proposed rule would establish an implementation schedule that would apply to the increased applicable amounts in Subpart B of this proposed rule, and whenever the financial responsibility applicable amounts under Subpart B are amended by regulation. This would occur in instances including, but not limited to, future regulatory changes mandated by statute, and when the limits of liability in proposed subpart B of this Part are amended to reflect significant increases in the Consumer Price Index pursuant to 33 U.S.C. 2704(d)(4).'' and add, in its place, the following paragraph: ''This new section of the proposed rule would establish an implementation schedule that would apply to the increased applicable amounts referenced in 138.80(f) of this proposed rule, and whenever the financial responsibility applicable amounts under § 138.80(f) are amended by regulation. This would occur in instances including, but not limited to, future regulatory changes mandated by statute, and when the limits of liability in proposed subpart B of this Part are amended to reflect significant increases in the Consumer Price Index pursuant to 33 U.S.C. 2704(d)(4).''

§ 138.85 [Corrected]

2. On page 6654 in the first column, revise the proposed regulatory text for proposed § 138.85 to read as follows:

§ 138.85 Implementation Schedule

The effective date of the applicable amounts referenced in § 138.80(f) of this part will be [INSERT DATE 120 DAYS AFTER PUBLICATION OF FINAL RULE IN THE **Federal Register**]. In the event an applicable amount referenced in § 138.80(f) is thereafter amended by regulation, the effective date of the amended applicable amount will be 120 days after publication of a final rule in the **Federal Register**, unless another date is required by statute and specified in the amending regulation. Each operator of a vessel described in § 138.15, must have established, on or before the effective date of the applicable amount including any amendments thereto, evidence of financial responsibility acceptable to the Director, NPFC, in an amount equal to or greater than the total applicable amount.''

Dated: February 7, 2008.

William Grawe,

Acting Director, National Pollution Funds Center, United States Coast Guard.

[FR Doc. E8–2685 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2007–1043; FRL–8528–5]

Approval and Promulgation of Air Quality Implementation Plans; Michigan; PSD Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; reopening of public comment period.

SUMMARY: EPA is reopening the public comment period for a proposed rule published January 9, 2008 (73 FR 1570). On January 9, 2008, EPA proposed a conditional approval of a revision to Michigan's SIP submitted by the Michigan Department of Environmental Quality on December 21, 2006. The revisions were submitted to add the Prevention of Significant Deterioration

(PSD) construction permitting program. This program affects major stationary sources in Michigan that are subject to or potentially subject to the PSD construction permit program. On January 25, 2008, EPA received a request from the Environmental Law and Policy Center, the Michigan Energy Alternatives, the Michigan Land Use Institute, the Natural Resources Defense Council and the Sierra Club, to extend the public comment period an additional 30 days from the closing date of February 8, 2008. EPA is granting this request by reopening the comment period for an additional 30 days after February 8, 2008.

DATES: The comment period is extended until March 10, 2008.

ADDRESSES: Submit comments, identified by Docket ID No. EPA–R05–OAR–2007–1043 to: Pamela Blakley, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–4447, *blakley.pamela@epa.gov*. Additional instructions to comment can be found in the notice of proposed rulemaking published January 9, 2008 (73 FR 1570).

FOR FURTHER INFORMATION CONTACT: Laura Cossa, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–0661, *cossa.laura@epa.gov*.

Dated: February 6, 2008.

Gary Gulezian,

Acting Regional Administrator, Region 5.

[FR Doc. E8–2704 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–1002; FRL–8521–6]

Approval and Promulgation of Air Quality Implementation Plans; State of Colorado; Regulation No. 7, Section XII, Volatile Organic Compounds From Oil and Gas Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to take direct final action approving a State Implementation Plan (SIP) revision submitted by the State of Colorado. On August 3, 2007, the Governor's designee submitted revisions to Colorado's Regulation No. 7, ''Emissions of Volatile Organic Compounds,'' Section XII, ''Volatile Organic Compounds (VOC) From Oil and Gas Operations.'' EPA is proposing to approve the revisions to Regulation No. 7, Section XII. This action is being taken under Section 110 of the Clean Air Act.

In the ''Rules and Regulations'' section of this **Federal Register**, EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a non-controversial SIP revision and anticipates no adverse comments. A detailed rationale for the approval is set forth in the preamble to the direct final rule. If EPA receives no adverse comments, EPA will not take further action on this proposed rule. If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of the rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

DATES: Written comments must be received on or before March 14, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2007–1002, by one of the following methods:

- *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *E-mail: videtich.callie@epa.gov* and *fiedler.kerri@epa.gov*.
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Mail:* Callie A. Videtich, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Callie A. Videtich, Director, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Suite 300, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Please see the direct final rule which is located in the Rules Section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Kerri Fiedler, Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, phone (303) 312–6493, and e-mail at: *fiedler.kerri@epa.gov*.

SUPPLEMENTARY INFORMATION: See the information provided in the Direct Final action of the same title which is located in the Rules and Regulations Section of this **Federal Register**.

Authority: 42 U.S.C. 7401 et seq.

Dated: January 15, 2008.

Robert E. Roberts,

Regional Administrator, Region VIII.

[FR Doc. E8–2507 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA–HQ–OAR–2007–0002; FRL–8529–1]

Approval of Louisiana's Petition To Relax the Summer Gasoline Volatility Standard for the Grant Parish Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the State of Louisiana's request to relax the federal Reid Vapor Pressure (RVP) standard applicable to gasoline introduced into commerce in the Grant Parish 8-hour ozone attainment area (Grant Parish) during the summer high ozone season—June 1 to September 15 of each year. Grant Parish is a designated attainment area under the 8-hour ozone National Ambient Air Quality Standard (''NAAQS'') and is a redesignated attainment area under the 1-hour ozone NAAQS. This action amends our regulations to change the summertime RVP standard for Grant Parish from 7.8 pounds per square inch (psi) to 9.0 psi. EPA has determined that this change to our federal RVP regulations is consistent with the applicable provisions of the Clean Air Act. Louisiana's request is supported by evidence that Grant Parish can implement the 9.0 psi RVP standard and maintain the 8-hour ozone NAAQS and that relaxation of the applicable RVP standard to 9.0 psi will provide economic benefits.

DATES: Comments must be received on or before March 14, 2008. Request for a public hearing must be received by February 28, 2008. If we receive a request for a public hearing, we will publish information related to the timing and location of the hearing and the timing of a new deadline for public comments.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2007–0002, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-Docket@epa.gov*.
- *Fax:* Air and Radiation Docket—(202) 566–9744.
- *Mail:* Air Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention: Docket ID No. EPA–HQ–OAR–2007–0002. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St. NW., Washington, DC 20503.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2007–0002. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://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.

Docket: All documents in the docket are listed in the *http://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. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Sean Hillson, Office of Transportation and Air Quality, Transportation and Regional Programs Division, Mailcode AASMCG, Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, MI 48105; telephone number: (734) 214–4789; fax number: (734) 214–4052; e-mail address: *Hillson.Sean@epa.gov*.

SUPPLEMENTARY INFORMATION: In the ''Rules and Regulations'' section of today's **Federal Register**, we are making these revisions as a direct final rule without prior proposal because we view these revisions as noncontroversial and anticipate no adverse comment.

We have explained our reasons for these revisions in the preamble to the direct final rule. For further information, please see the information provided in the preamble to the direct final rule. If we receive no adverse comment, we will not take further action on this proposed rule. If we receive adverse comment on the rule, or on one or more distinct actions in the rule, we will withdraw the direct final rule, or the portions of the rule receiving adverse comment. We will address all public comments in a subsequent final rule based on this proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

The contents of this preamble are listed in the following outline:

I. General Information
II. Summary of Rule
III. Statutory and Executive Order Reviews
IV. Statutory Provisions and Legal Authority

I. General Information

A. Does This Action Apply to Me?

This action will affect you if you produce, import, distribute, or sell gasoline fuel for use in Grant Parish, Louisiana. The following table gives some examples of entities that may have to follow the regulations. But because these are only examples, you should carefully examine the regulations in 40 CFR part 80. If you have questions, call the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Examples of potentially regulated entities	NAICS codes [a]
Petroleum Refineries	324110
Gasoline Marketers and Distributors	424710 424720
Gasoline Retail Stations	447110
Gasoline Transporters	484220 484230

[a] North American Industry Classification System (NAICS).

B. What Should I Consider as I Prepare My Comments for EPA?

1. Submitting CBI

Do not submit confidential business information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

• Describe any assumptions and provide any technical information and/or data that you used.

• If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

• Provide specific examples to illustrate your concerns, and suggest alternatives.

• Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

• Make sure to submit your comments by the comment period deadline identified.

II. Summary of Rule

This proposed rule would relax the applicable RVP (Reid Vapor Pressure) standard of 7.8 psi (pounds per square inch) to 9.0 psi in Grant Parish, Louisiana, during the summer high ozone season—June 1 to September 15 of each year. The State of Louisiana petitioned us for this relaxation in May 2005 and raised several valid points to justify this action. First, Grant Parish is classified as rural, is not adjacent to any urban area, and has a population of roughly 18,700 as of the 2000 Census. Second, air quality reflects a general decrease in emissions of ozone-forming pollutants since redesignation to attainment under the 1-hour standard in 1995 (data has fluctuated from year-to-year, but averaging annual emissions over three-year increments evidences the downward trend). Additionally, there is an economic advantage to relaxing the applicable RVP standard. Grant Parish is isolated from other (former) nonattainment areas which are required to use 7.8 psi gasoline. This isolation increases transportation costs which translate to roughly 2 cents per gallon increase in price to the consumer.

Finally, the Grant Parish 8-hour ozone attainment area has submitted an 8-hour maintenance demonstrating that the use of 9.0 psi gasoline will not interfere with attainment of the 8-hour NAAQS. EPA Region 6 approved this maintenance plan in November 2007. Grant Parish was formerly a 1-hour ozone nonattainment area and was redesignated to attainment in 1995, but at that time did not request relaxation of the applicable RVP standard. In 2004, Grant Parish was designated as attainment for the 8-hour ozone standard and, under the Phase 1 Ozone Implementation Rule, Grant Parish was required to submit an 8-hour maintenance plan under Clean Air Act section 110(a)(1). In Louisiana's 2006 8-hour maintenance demonstration, the state supported their petition by modeling 9.0 psi gasoline and demonstrated that Grant Parish will be able to maintain attainment of the 8-hour standard for 10 years, thereby meeting the requirements to have the applicable gasoline volatility standard relaxed.

For additional discussion of the proposed rule changes, see the direct final rule EPA has published in the ''Rules and Regulations'' section of today's **Federal Register**. This proposal incorporates by reference all the reasoning, explanation, and regulatory text from the direct final rule.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to OMB review.

B. Paperwork Reduction Act

This action does not impose any new information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., and therefore is not subject to these requirements.

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 Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (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; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This action will relax the federal RVP standard for gasoline sold in Grant Parish, Louisiana, during the ozone control season (June 1 to September 15), from 7.8 psi to 9.0 psi, and is therefore expected not to have a significant economic impact on a substantial number of small entities. The rule does not impose any requirements or create impacts on small entities beyond those, if any, already required by or resulting from the CAA Section 211(h) Volatility Control program. We continue to be interested in the potential impacts of the proposed rule 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 of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small

governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this rule 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 one year. Today's rule merely relaxes the Federal RVP standard for gasoline in the Grant Parish area, and thus avoids imposing the costs that the existing Federal regulations would otherwise impose. Today's rule, therefore, is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. As discussed above, the rule relaxes an existing standard and affects only the gasoline industry.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination With Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications, as specified in Executive Order 13175. This rule would relax the applicable RVP standard in Grant Parish, LA, during the ozone control season (June 1 to September 15) from 7.8 psi to 9.0 psi. It applies only to Grant Parish, LA. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045, ''Protection of Children From Environmental Health Risks and Safety Risks'' (62 FR 19885, Apr. 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. As previously discussed, the Grant Parish area has continued to meet the 1-hour ozone standard since 1995 and has met the 8-hour ozone standard since initial designations were issued in 2004. The maintenance plan approved on November 6, 2007 shows maintenance of the 8-hour ozone NAAQS for the entire maintenance time period of 2002 through 2014 with the 9.0 psi RVP standard.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the applicable 8-hour ozone NAAQS which establish the level of protection provided to human health or the environment. This rule will relax the applicable volatility standard of gasoline during the summer possibly resulting in slightly higher mobile source emissions. However, the State of Louisiana has demonstrated in a maintenance plan Approval of Louisiana's Petition To Relax the Summer Gasoline Volatility Standard for the Grant Parish Area page 18 of 18—Proposal that this action will not interfere with attainment of the 8-hour ozone NAAQS and therefore disproportionately high and adverse human health or environmental effects

on minority or low-income populations are not an anticipated result.

IV. Legal Authority

Authority for this action is in sections 211(h) and 301(a) of the Clean Air Act, 42 U.S.C. 7545(h) and 7601(a).

List of Subjects in 40 CFR Part 80

Environmental protection, Administrative practice and procedures, Air pollution control, Fuel additives, Gasoline, Incorporation by reference, Motor vehicle and motor vehicle engines, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: February 7, 2008.

Stephen L. Johnson,

Administrator.

[FR Doc. E8–2705 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 74

[MB Docket No. 04–233; FCC 07–218]

Report on Broadcast Localism and Notice of Proposed Rulemaking

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document provides a summary of the public comments and reply comments received in response to the Federal Communications Commission's *Notice of Inquiry* concerning broadcast localism and the testimony received at the six field hearings on localism. The document also outlines several proposed rule changes designed to enhance broadcast localism and diversity, to increase and improve the amount and nature of broadcast programming that is targeted to the local needs and interests of a licensee's community of service, and provide more accessible information to the public about broadcasters' efforts to air such programming. It seeks comment on those such proposals that are not the subject of other ongoing or contemplated Commission rulemaking proceedings.

DATES: Comments are due on or before March 14, 2008. Reply comments are due on or before April 14, 2008.

ADDRESSES: You may submit comments, identified by MB Docket No. 04–233, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by *e-mail: FCC504@fcc.gov* or *phone:* 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. In addition to filing comments with the Office of the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission, 445 12th St, SW., Room 1–C823, Washington, DC 20554, or via the Internet at *PRA@fcc.gov;* and also to Nicholas A. Fraser of the Office of Management and Budget (OMB), via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, please contact Jeremy M. Kissel, Media Bureau, Policy Division, at (202) 418–2120, or via e-mail at *Jeremy.Kissel@fcc.gov.*

For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams at 202–418–2918, or via the Internet at *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report on Broadcast Localism and Notice of Proposed Rulemaking,* FCC 07–218, adopted on December 18, 2007, and released on January 24, 2008 (*Report*). The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

1. In August 2003, the Commission launched a Localism in Broadcasting initiative to review, and possibly enhance, localism practices among broadcasters, which are designed to ensure that each station treats the significant needs and issues of the community that it is licensed to serve with the programming that it offers. In addition to establishing procedures by which the Commission would study the state of broadcast localism and take any steps necessary to strengthen such efforts by licensees, on July 1, 2004, the Commission issued a *Notice of Inquiry* (*NOI*) concerning localism. Through the *NOI*, the Commission sought direct input from the public on how broadcasters are serving the interests and needs of their communities; whether the agency needs to adopt new policies, practices, or rules designed directly to promote localism in broadcast television and radio; and, if so, what those policies, practices, or rules should be.

2. The *NOI* took note that, during the Commission's 2002 review of its structural broadcast ownership rules, the agency received public comments indicating that many broadcasters may be failing to meet the needs of their local communities. In response, the Commission opened a separate inquiry proceeding (MB Docket No. 04–233) to seek public input on a number of issues related to broadcast localism. Among them were questions as to how broadcasters are communicating with the communities that they serve and are serving the needs of those communities, including whether stations are airing a sufficient amount of community-responsive programming, such as news, political material and disaster warnings, as well as the state of their service to traditionally underserved audiences. It also sought comment on the relationship between networks and their affiliated stations, payola and sponsorship identification, the license renewal process and possible additional spectrum allocations. The *NOI* also asked whether, based on that analysis, the Commission should take action to ensure that licensees meet their localism obligations or, in the alternative, should continue to rely on market forces and the existing issue-responsive programming rules to encourage broadcasters to meet their obligations.

3. In the *Report,* the Commission summarizes the record of the comments and testimony amassed in the localism proceeding for each of the nine general localism areas of inquiry specified in

the *NOI:* (1) Communication between licensees and their stations' communities; (2) nature and amount of community-responsive programming; (3) political programming; (4) underserved audiences; (5) disaster warnings; (6) network affiliation rules; (7) payola/sponsorship identification; (8) license renewal procedures; and (9) additional spectrum allocations. The Commission then provides an analysis of the pertinent record, and notes those areas in which the Commission believes that revision of its rules, procedures, and policies may be called for to ensure that broadcasters effectively meet the needs and problems of their communities with the programming that they air.

4. Specifically, in the *Report,* the Commission directs the Media Bureau to update *The Public and Broadcasting* publication to include information concerning the broadcast renewal process, applicable deadlines, and complaint procedures; states its intention to establish a Commission contact point dedicated to providing information to members of the public regarding how they can become involved in the Commission's processes; notes its intention to begin a proceeding to propose rules promoting access by cable and satellite subscribers to the programming of television broadcast stations licensed to communities in the states in which they live to address situations in which cable and satellite subscribers often do not receive the local news and information provided by an in-state station because the Commission's rules effectively require carriage of an out-of-state station; directs the Media Bureau's Audio Division to develop a new computer program to assist potential radio applicants in identifying suitable available commercial FM spectrum in the location from which they desire to operate; and reiterates its intention to address the issues in the Emergency Alert System proceeding within six months. The Commission also calls for comment on the topics described below.

5. *Renewal Application Pre- and Post-Filing Announcements.* The Commission seeks comment on whether it should change its existing rule governing the so-called ''pre-filing and post-filing announcements'' that licensees must air in connection with their renewal applications, and calls for comment on these new measures. In addition to the existing requirement for on-air announcements about soon-to-be-filed and pending renewal applications, the Commission seeks comment on whether it should require that the same information be posted on a licensee's Web site during the relevant months (*i.e.*, the posting begins on the sixth month before the license is due to expire and remains in place until after the deadline for filing petitions to deny). The Commission also seeks comment on whether it should broaden the required language for the announcements contained in 47 CFR 73.3580(d)(4)(i), which currently provides the Commission's mailing address as a source for information concerning the broadcast license renewal process, to include the agency's Web site address. Moreover, the Commission seeks comment on whether, where technically feasible, the licensee's on-line provision of the Commission's web address could be linked directly to the agency's Web site.

6. *Community Advisory Boards.* The Commission seeks comment on its tentative conclusion that, to determine significant community needs and issues, licensees should convene and periodically consult with permanent advisory boards made up of officials and other leaders from the community of each broadcast station. The Commission believes that such community advisory boards will promote both localism and diversity and, as such, should be an integral component of the Commission's localism efforts. Accordingly, the Commission seeks comment on this proposal, and on other rules or guidelines that it might adopt to foster improved communication between licensees and members of their communities.

7. *Remote Station Operation.* The Commission notes that a number of commenters expressed concern about the prevalence of automated broadcast operations, which allow the operation of stations without a local presence, and the perceived negative impact that they have on licensees' ability to determine and serve local needs, in particular, providing vital information in times of emergency. In its recent *Digital Audio Notice of Proposed Rulemaking,* the Commission sought comment on whether changes in remote radio operation should affect existing rules. In that proceeding, the Commission is considering requiring that radio licensees maintain a physical presence at each radio broadcasting facility during all hours of operation. In the *Report*, the Commission seeks comment on whether it should extend any such requirement to television stations, as well as to radio facilities.

8. *Renewal Application Processing Guidelines.* The Commission also seeks comment on its tentative conclusion to adopt specific procedural guidelines for the processing of renewal applications for stations based upon their localism programming performance during the preceding license term. It also invites comment on any related issues that the Commission should consider in connection with the possible adoption of specific localism-related processing guidelines for broadcast renewal applications.

9. *Main Studio Location.* The Commission seeks comment on whether it should revert to its pre-1987 main studio rule, requiring that a station's main studio be situated within the station's community of license, in order to encourage broadcasters to produce locally originated programming. It seeks comment on this proposal, including whether accessibility of the main studio increases interaction between the broadcast station and the community of service.

10. *Affiliate Station Review of Network Programming.* The Commission seeks comment on whether it could be useful for licensees, in fulfilling their localism obligations, to be able to review network programming at some point sufficiently in advance of airtime to determine its appropriateness for airing. It seeks comment on whether this issue already has been addressed by existing affiliation agreement terms and, if private contractual arrangements have not addressed this issue, whether it should establish rules requiring such a right.

11. *Voice-Tracking.* The Commission seeks comment on the prevalence of voice-tracking, a practice by which stations import popular out-of-town personalities from bigger markets to smaller ones, and customize their programming to make it appear as if the personalities are actually local residents. It also seeks comment on whether the Commission can and should take steps to limit the practice, require disclosure, or otherwise address it.

12. *Submission of Music Playlist Information.* The Commission also seeks comment on whether it should require licensees to provide the Commission with data regarding their airing of the music and other performances of local artists and how they compile their stations' playlists, which the Commission would use in its consideration of the renewal applications of the stations to which they relate, in evaluating the overall station performance under localism. If so, the Commission seeks input as to in what form these disclosures should be required and what information should be supplied.

13. *Upgrade of LPTV Stations to Class A Facilities.* The Commission also seeks

comment on its tentative conclusion to allow, in some cases, additional qualified low-power television stations to be granted Class A status and, if so, how it should define eligibility for such upgrades, and the Commission's statutory authority to take such action.

14. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates listed on the first page of this summary. All such filings should refer to MB Docket No. 04–233, unless otherwise instructed in the document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24,121 (1998).

Procedural Matters

A. Initial Regulatory Flexibility Analysis

15. Pursuant to the Regulatory Flexibility Act (RFA), the Bureau has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the proposals considered in the *Report*. The text of the IRFA is set forth in Appendix B of the *Report.* Written public comments are requested on this IRFA. Comments must be filed in accordance with the same filing deadlines as those for comments on the *Report*, and they should have a separate and distinct heading designating them as responses to the IRFA. The Bureau will send a copy of the *Report,* including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

B. Initial Paperwork Reduction Act of 1995 Analysis

16. This document contains new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

Initial Regulatory Flexibility Analysis

17. As required by the Regulatory Flexibility Act, as amended (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules considered in the *Report*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Report* as indicated on the first page of the *Report*. The Commission will send a copy of the *Report*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *Report* and the IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

18. In August 2003, the Commission launched a Localism in Broadcasting initiative designed to review, and possibly enhance, localism practices among broadcasters which are designed to ensure that each station treats the significant needs and issues of the community that it is licensed to serve with the programming that it offers. The Commission subsequently issued a *Notice of Inquiry (NOI)* concerning localism. Through the *NOI*, the Commission sought direct input from the public on how broadcasters are serving the interests and needs of their communities; whether the agency needs to adopt new policies, practices, or rules designed directly to promote localism in broadcast television and radio; and, if so, what those policies, practices, or rules should be. The *Report* invites comment on several proposals designed to enhance broadcast localism and diversity, including increasing and improving the amount and nature of broadcast programming that is targeted to the local needs and interests of a licensee's community of service, and providing more accessible information to the public about broadcasters' efforts to air such programming.

19. The record in the proceeding demonstrates that some broadcasters devote significant amounts of time and resources to airing programming that is responsive to the needs and interests of broadcasters' communities of license, while many other commenters raised serious concerns that broadcasters' efforts, as a general matter, fall far short from what they should be. In the *Report,* the Commission details several proposals that will promote both localism and diversity in broadcasting, and seeks comment on same.

B. Legal Basis

20. The *Report* is adopted pursuant to sections 4(i), 303, 612, and 616 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, 532 and 536.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

21. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental entity'' under Section 3 of the Small Business Act. In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

22. *Television Broadcasting.* In this context, the application of the statutory definition to television stations is of concern. The Small Business Administration defines a television broadcasting station that has no more than $13 million in annual receipts as a small business. Business concerns included in this industry are those ''primarily engaged in broadcasting images together with sound.'' According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of February 5, 2007, 872 (about 70 percent) of the 1,260 commercial television stations in the United States have revenues of $13 million or less. However, in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the attribution rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

23. An element of the definition of ''small business'' is that the entity not be dominant in its field of operation. The Commission is unable at this time and in this context to define or quantify the criteria that would establish whether a specific television station is dominant in its market of operation. Accordingly, the foregoing estimate of small

businesses to which the rules may apply does not exclude any television stations from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of ''small business'' is that the entity must be independently owned and operated. It is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

24. *Radio Broadcasting.* The Small Business Administration defines a radio broadcasting entity that has $6.5 million or less in annual receipts as a small business. Business concerns included in this industry are those ''primarily engaged in broadcasting aural programs by radio to the public.'' According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of February 5, 2007, 10,442 (about 95 percent) of 10,962 commercial radio stations in the United States have revenues of $6.5 million or less. We note, however, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

25. In this context, the application of the statutory definition to radio stations is of concern. An element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time and in this context to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

26. *FM Translator Stations and Low Power FM Stations.* The proposed rules and policies could affect licensees of FM translator and booster stations and low power FM (LPFM) stations, as well as to potential licensees in these radio services. The same SBA definition that applies to radio broadcast licensees would apply to these stations. The SBA defines a radio broadcast station as a small business if such station has no more than $6.5 million in annual receipts. Currently, there are approximately 4,131 licensed FM translator and booster stations and 771 licensed LPFM stations. Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition.

27. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

28. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide. Industry data indicate that, of 1,076 cable operators nationwide, all but 11 are small under this size standard. In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers. Thus, under this second size standard, most cable systems are small.

29. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

30. *Open Video Services.* Open Video Service (OVS) systems provide subscription services. The SBA has created a small business size standard for Cable and Other Program Distribution. This standard provides that a small entity is one with $13.5 million or less in annual receipts. The Commission has certified a large number of OVS operators, and some of these are currently providing service. Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, DC, and other areas. RCN has sufficient revenues to assure that it does not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS. Given this fact, the Commission concludes that those entities might qualify as small businesses, and therefore may be affected by the rules and policies adopted herein.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

31. The *Report* proposes a number of rule changes that, if adopted and implemented, may affect reporting, recordkeeping, and other compliance requirements on small entities. As noted above, we invite small entities to comment in response to the rules

proposed in the *Report*. Each of the proposals is described below.

32. The *Report* seeks comment on whether the existing rules governing so-called ''pre-filing and post-filing announcements'' that licensees must air in connection with their license renewal applications should be changed. Specifically, the Commission seeks comment on whether the same information that is currently required for on-air announcements about soon-to-be-filed and pending renewal applications should be posted on a licensee's website during the relevant months (*i.e.*, the posting begins on the sixth month before the license is due to expire and remains in place until after the deadline for filing petitions to deny). The *Report* also seeks comment on whether to broaden the required language for these announcements contained in 47 CFR 73.3680(d)(4)(i), which currently provides the Commission's mailing address as a source for information concerning the broadcast license renewal process, to include the agency's website address and, where technically feasible, to provide a link directly to the agency's Web site.

33. The *Report* invites comment on the Commission's tentative conclusion that licensees should convene and periodically consult with permanent community advisory boards made up of officials and other leaders from the community of each broadcast station for the purpose of determining significant community needs and issues, and whether the Commission should adopt similar rules or guidelines to foster licensees' communication with members of their stations' communities. It also seeks comment on whether television licensees should be required to maintain a physical presence at each television broadcasting facility during all hours of station operation. The *Report* further seeks comment on the Commission's tentative conclusion that it should adopt specific procedural guidelines for the processing of license renewal applications for stations based upon their localism programming performance during the preceding license term. The *Report* also seeks comment on whether a licensee should be required to situate its station main studio within the station's community of license to encourage production of locally originated programming, and whether accessibility of the main studio increases interaction between the licensee and its station's community of service.

34. The *Report* also seeks comment on whether it could be useful for licensees of stations affiliated with networks, in fulfilling their localism obligations, to be able to review network programming at some point sufficiently in advance of airtime and whether existing affiliation agreements address such matters. It also seeks comment on the prevalence of voice-tracking, and whether the Commission can and should take steps to limit the practice, require disclosure, or otherwise address it. The *Report* also seeks comment on whether the Commission should require licensees to provide the agency with data regarding their airing of the music and other performances of local artists and how they compile their stations' playlists. It also seeks comment on the appropriate form of such disclosures and in what manner, if any, the local nature of a station's music programming should be considered in any renewal application processing guidelines. Finally, the *Report* seeks comment on the Commission's tentative conclusion that it should allow additional qualified LPTV stations to be granted Class A status, as well as on how to define eligibility and the Commission's statutory authority to take such action.

E. Steps Taken To Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

35. The RFA requires an agency to describe any significant alternatives that might minimize any significant economic impact on small entities. Such alternatives may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

36. As noted, we are directed under law to describe any such alternatives we consider, including alternatives not explicitly listed above. The *Report* describes and seeks comment on several possible ways to enhance broadcast localism and diversity, including increasing and improving the amount and nature of broadcast programming that is targeted to the local needs and interests of a licensee's community of service, and providing more accessible information to the public about broadcasters' efforts to air such programming. The *Report* seeks comment on how the proposals described herein will achieve that goal, and commenters are invited to propose steps that the Commission may take to minimize any significant economic impact on small entities.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

37. None.

Ordering Clauses

38. Accordingly, *it is ordered*, pursuant to the authority found in sections 4(i), 303, 612, and 616 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, 532 and 536, the *Report* on Broadcast Localism and Notice of Proposed Rulemaking *is adopted*.

39. *It is further ordered* that pursuant to sections 1, 4(i) and (j), 301, 302, 303, 307, 308, 309, 319, and 324 of the Communications Act of 1934, 47 U.S.C. 151, 154(i) and (j), 301, 302, 303, 307, 308, 309, 319, and 324 that *notice is hereby given* of the proposals and tentative conclusions described in the Report on Broadcast Localism and Notice of Proposed Rulemaking.

40. *It is further ordered* that the Reference Information Center, Consumer Information Bureau, shall send a copy of the Report on Broadcast Localism and Notice of Proposed Rulemaking, including the Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 73

Radio broadcast services.

47 CFR Part 74

Experimental radio, Auxiliary, Special broadcast and other program distributional services.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–2664 Filed 2–12–08; 8:45 am]

BILLING CODE 6712–01–P

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

48 CFR Parts 9901 and 9903

Cost Accounting Standards Board (CAS) Exemption for Contracts Executed and Performed Outside the United States, Its Territories, and Possessions

AGENCY: Cost Accounting Standards Board, Office of Federal Procurement Policy, OMB.

ACTION: Notice of Discontinuation of Case.

SUMMARY: The Office of Federal Procurement Policy (OFPP), Cost Accounting Standards (CAS) Board, is providing public notification of the decision to discontinue its review of the exemption for contracts that are executed and performed outside the United States, its territories, and possessions.

FOR FURTHER INFORMATION CONTACT: Laura Auletta, Manager, Cost Accounting Standards Board, 725 17th Street, NW., Room 9013, Washington, DC 20503 (telephone: 202–395–3256).

SUPPLEMENTARY INFORMATION:

A. Regulatory Process

The Cost Accounting Standards Board's rules, regulations and Standards are codified at 48 CFR Chapter 99. The Office of Federal Procurement Policy Act, 41 U.S.C. 422(g)(1), requires the Board, prior to the establishment of any new or revised Cost Accounting Standard, to complete a prescribed rulemaking process. The process generally consists of the following four steps:

1. Consult with interested persons concerning the advantages, disadvantages, and improvements anticipated in the pricing and administration of government contracts as a result of the adoption of a proposed Standard.
2. Promulgate an Advance Notice of Proposed Rulemaking (ANPRM).
3. Promulgate a Notice of Proposed Rulemaking (NPRM).
4. Promulgate a Final Rule.

This notice announces the discontinuation of a case after completing step one of the four-step process.

B. Background and Summary

On September 15, 2005, the CAS Board issued a Staff Discussion Paper inviting comments regarding whether the exemption at 48 CFR 9903.201–1(b)(14) should be revised or eliminated (70 FR 53977). The SDP discussed the history of the exemption. In summary, this discussion stated that the original CAS Board was established by Section 2168 of the Defense Production Act of 1950 (DPA). Section 2163 of the DPA, entitled ''Territorial Application of Act,'' provided that Sections 2061 through 2170 of the Act ''shall be applicable to the United States, its territories and possessions, and the District of Columbia'' (United States). Therefore, because the provisions of the DPA were applicable only within the United States, the CAS Board rules, regulations and standards were also applicable only within the United States. In 1980, the original CAS Board ceased to exist under the DPA and administration of the standards was undertaken by the Department of Defense until the CAS Board was re-established in 1988 under the Office of Federal Procurement Policy (OFPP) Act. In 1991, the new CAS Board retained the exemption when it recodified its rules and regulations at 48 CFR 9902.201–1(b)(14) on April 17, 1992 (57 FR 14148). The SDP published on September 15, 2005 invited public comments on whether the Board should revisit the exemption.

C. Public Comments

The Board received three sets of public comments in response to the staff discussion paper (available at *http://www.whitehouse.gov/omb/procurement/casb/index_public_comments.html*). None of the comments supported the Board revising or eliminating the exemption. In fact, all three of the comments offered arguments for why the CAS Board should retain the exemption.

One commented that while the OFPP Act, unlike the DPA, does not specifically limit CAS to contracts and subcontracts executed and performed within the United States, when Congress intends for laws to have extra-territorial effect, it would expressly state that intention. Additionally, the commenter notes that given the dynamic nature of international relations and bilateral agreements, the CAS Board would find it difficult to insure consistency of its regulations with international law and trade agreements. This commenter also questioned the material impact of the exemption, stating that, based on anecdotal evidence, contractors do not invoke the exception frequently. The value of the exemption, noted the commenter, includes putting foreign and U.S. companies on an equal footing by applying the same local accounting requirements; facilitating government procurements in the context of war readiness, other military action or disaster relief.

Another commenter discussed the impracticality of applying CAS to contracts and subcontracts performed entirely outside the United States, noting, in part, that a contractor would be expected to follow the accounting conventions (rules and regulations) of the country where the contract is being performed. Requiring contractors and those in their supply chain to follow CAS instead would likely make participation in the U.S. Government procurement process prohibitive.

Another commenter expressed concern that eliminating the exemption would result in applying CAS to foreign contractors that would otherwise be small businesses, since the CAS small business exemption applies only to firms that have a place of business located in the United States.

While the CAS Board does not necessarily share each of the views expressed in these comments, the Board agrees with the conclusion not to delete or revise the exemption, especially with the absence of any commenter support for any such revision or elimination.

D. Conclusion

Based on the public input and Board discussions of this issue, the Board finds that the exemption should be retained without change.

Paul A. Denett,

Administrator, Office of Federal Procurement Policy.

[FR Doc. E8–2668 Filed 2–12–08; 8:45 am]

BILLING CODE 3110–01–P

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

48 CFR Part 9904

Cost Accounting Standards Board; Allocation of Home Office Expenses to Segments

AGENCY: Cost Accounting Standards Board, Office of Federal Procurement Policy, OMB.

ACTION: Staff Discussion Paper (SDP).

SUMMARY: The Cost Accounting Standards Board (the Board), Office of Federal Procurement Policy, invites public comments on a staff discussion paper (SDP) addressing potential revisions to Cost Accounting Standard (CAS) 403, ''Allocation of Home Office Expenses to Segments.'' This SDP addresses whether the current thresholds that require use of the three factor formula for allocating residual home office expenses require revision.

DATES: Comments must be in writing and must be received by April 14, 2008.

ADDRESSES: Due to delays in receipt and processing of mail, respondents are strongly encouraged to submit comments electronically to ensure timely receipt. Electronic comments may be submitted to *casb2@omb.eop.gov*. Please include your name, title, organization, and reference case ''CAS–2008–01S.''

Comments may also be submitted via facsimile to (202) 395–5105. Comments via regular mail should be addressed to the Office of Federal Procurement Policy, 725 17th Street, NW., Room 9013, Washington, DC 20503, ATTN: Laura Auletta. Please note that any comments received will be posted in their entirety, including any personal and/or business confidential information provided, at *http://www.whitehouse.gov/omb/procurement/casb.html* after the close of the comment period.

FOR FURTHER INFORMATION CONTACT: Laura Auletta, Manager, Cost Accounting Standards Board, 725 17th Street, NW., Room 9013, Washington, DC 20503 (telephone: 202–395–3256).

SUPPLEMENTARY INFORMATION:

A. Regulatory Process

The Board's rules, regulations and standards are codified at 48 CFR Chapter 99. The Office of Federal Procurement Policy Act, 41 U.S.C. 422(g)(1), requires the Board, prior to the establishment of any new or revised Standard, to complete a prescribed rulemaking process. The process generally consists of the following four steps:

1. Consult with interested persons concerning the advantages, disadvantages and improvements anticipated in the pricing and administration of government contracts as a result of the adoption of a proposed Standard (i.e., prepare and publish SDP).

2. Promulgate an Advance Notice of Proposed Rulemaking (ANPRM).

3. Promulgate a Notice of Proposed Rulemaking (NPRM).

4. Promulgate a Final Rule.

The SDP published with this notice is issued by the Board in accordance with the requirements of 41 U.S.C. 422(g)(1)(B), and is the first of the four-step process.

The Board has received two recommendations to revise the CAS 403 operating revenue thresholds used in determining if a contractor is required to apply the three factor formula to allocate residual home office expenses to segments. The research accomplished to date by the Board staff is the basis for the SDP being released today.

B. Background

Over the past few years, the Board has received two proposals to revise the CAS operating revenue thresholds for determining if a contractor is required to use the three factor formula to allocate residual home office expenses to segments.

1. Consumer Price Index: A proposal from the Aerospace Industries Association (AIA) recommends that the operating revenue thresholds be raised by 400 percent to reflect the changes in the consumer price index (CPI) from 1973 to 2003.

2. Conduct Staff Study: A proposal from the Department of Defense (DoD) recommends that the Board obtain actual statistics of various companies and conduct a staff study similar to that performed by the original Board. This proposal recommends that the study update the thresholds to reflect the impact that economic changes, industry changes, and the advent of acquisition reform have had in the years since the thresholds were established.

C. Staff Discussion Paper

I. Background

- 48 CFR 9904.403–40(c)(2) requires that home office residual expenses be allocated to segments using the three factor formula if the residual expenses exceed:
  - 3.35 percent of the first $100 million of operating revenue;
  - .95 percent of the next $200 million of operating revenue;
  - .30 percent of the next $2.7 billion of operating revenue; and
  - .20 percent of all amounts over $3 billion of operating revenue.
- The operating revenue thresholds at 48 C.F.R 9904.403–40(c)(2) were promulgated in December 1972 and have not been revised in the 35 years since.
- The Board has decided to initiate a case to determine if the current thresholds require revision. This case will analyze all aspects of this issue. For example, in addition to the inflation of the dollar, the last 35 years have also seen a change in the nature of home offices. In particular, the number of home offices have significantly increased due to the proliferation of intermediate home offices. In determining whether to revise the current thresholds, the Board will need to analyze if and to what extent such a proliferation impacts the thresholds. In addition, the Board will need to determine if and to what extent a data call is needed to obtain information necessary to reach an informed decision on this issue.

II. Staff Research

Comments on Alternatives

1. Use Consumer Price Index (CPI): On August 26, 2003, AIA sent a letter to the Board recommending that the operating revenue thresholds be raised by 400 percent to reflect the changes in the CPI from 1973 to 2003. The staff believes the AIA recommendation offers the advantage of a simple and quick revision to the out-of-date thresholds. It is also an objective measure of the economic escalation that has occurred since the thresholds were initially promulgated. A significant disadvantage is that the increase in the CPI may not be a good measure of increases necessary to the three factor formula. For example, the number of home offices have significantly increased due to the proliferation of intermediate home offices. The increase in home offices may warrant a smaller increase in the three factor formula than the CPI would provide. A second disadvantage is that the Board will not be aware of the exact impact the revision will have on the number of companies covered by the three factor formula.

The CPI represents changes in prices of all goods and services purchased for consumption by urban households. User fees (such as water and sewer service) and sales and excise taxes paid by the consumer are also included. Income taxes and investment items (like stocks, bonds, and life insurance) are not included. It is an objective measure of the economic escalation that has occurred since the thresholds were initially promulgated.

A potential problem concerning the use of the CPI is that historical values are not revised when there are improvements in the index. Consequently, past errors in methodology are only corrected prospectively (i.e., the historical data is not corrected). Most of the major improvements in the CPI have tended to reduce measured inflation. As a result, the increase in the CPI since 1972 overstates inflation.

The overstatement in the CPI can be mitigated by using alternative versions that incorporate current methodology in measuring past price movements. From 1972 to 1978, the best alternative version is the CPI–U–X1, which provides an adjustment to the CPI that computes housing costs using rental equivalents (this method was adopted for the official CPI in the early 1980s). However, the CPI–U–X1 does not include other improvements to the CPI that were adopted in the early 1980s.

The CPI–U–RS, which was developed in the late 1990s, incorporates changes in methodology implemented since 1978. Thus, it can be used to analyze inflationary trends in the CPI without interference from changes in methodology. New values based on current methods are released each April.

From December 1972 through December 1977, the CPI–U–X1

increased by a factor of 1.43. From January 1978 through February 2007, the CPI–U–RS increased by a factor of 3.26. To compute the increase for the period December 1972 through February 2007, the factor for the CPI–U–X1 is multiplied by the factor for the CPI–U–RS (1.43 x 3.26) to obtain an inflation factor of 4.66.

Applying this factor to the current thresholds at 48 C.F.R 9904.403–50 yields the following revised thresholds for application of the three factor formula:

- 3.35 percent of the first $470 million of operating revenue;
- .95 percent of the next $930 million of operating revenue;
- .30 percent of the next $12.6 billion of operating revenue; and
- .20 percent of all amounts over $14.0 billion of operating revenue.

2. Conduct Staff Study: On September 26, 2002, DoD sent a letter to the Board recommending that, as part of the comprehensive review, the Board obtain actual statistics of various companies and conduct a staff study similar to that performed by the original Board. DoD recommended that the study update the thresholds to reflect the impact that economic changes, industry changes, and the advent of acquisition reform have had in the years since the thresholds were established. The staff believes that the DoD recommendation offers the Board an opportunity to understand the impact that various revisions would have on the number of companies subject to the three factor formula before drafting an ANPRM. The disadvantage is that the analysis will require significant time and effort to accomplish, and it is possible that such an analysis would not yield useful data for determining the appropriate thresholds.

III. Public Input

The Board is requesting public input on whether the thresholds should be raised, the potential advantages and disadvantages of the two alternatives described above, and any additional recommended alternatives the commenters may have. Key questions for consideration include, but are not limited to, the following:

1. Should the operating revenue thresholds be revised? Why or why not?

2. If the threshold should be revised, what should be the basis of that revision (e.g., CPI, staff study, other)?

3. What are the advantages and disadvantages of the two alternatives described above?

4. What type of data is currently available for performance of the staff study?

5. Is the administrative burden of collecting the data associated with the staff study commensurate with risk?

6. To what extent does the proliferation of intermediate home offices impact any potential revision of the operating revenue thresholds?

Paul A. Denett,

Administrator, Office of Federal Procurement Policy.

[FR Doc. E8–2666 Filed 2–12–08; 8:45 am]

BILLING CODE 3110–01–P

Notices

Federal Register
Vol. 73, No. 30
Wednesday, February 13, 2008

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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Notice of Meeting

Pursuant to the Federal Advisory Committee Act, notice is hereby given of a meeting of the Advisory Committee on Voluntary Foreign Aid (ACVFA).

Date: Thursday, February 28, 2008 (9 a.m. to 3 p.m.)

Location: National Press Club Ballroom, 529 14th Street, NW., Washington, DC 20045.

Please note that this is the anticipated agenda and is subject to change.

Keynote: Henrietta H. Fore, USAID Administrator and Director of United States Foreign Assistance, will speak on the Global Development Commons, including its role as a driver of development and the link between economic growth and democratic governance. She will also provide an update on USAID's response to the ACVFA working groups' recommendations.

Democratic Governance and Economic Growth: An examination of what has worked successfully in democratic governance and economic growth programs will be discussed in two parts. Particular attention will be paid to those programs that have been or could be successfully replicated in other countries.

Cutting Edge Partnerships: Carol Adelman, ACVFA Vice Chair, will lead a discussion with representatives from the corporate, foundation, and end user communities on innovative partnerships that have stimulated economic growth and promoted good democratic governance. Speakers include Lauren Moser Counts with Shorebank, Corey Griffin with Microsoft Corporation, Donald F. Terry with the Inter-American Development Bank, Jennifer Hodgson with WINGS Global Fund for Community Foundations and a representative from Global Giving.

USAID's Lessons Learned: Discussion of successes and challenges countries that attain both democracy and high economic growth, with a specific focus on USAID's contributions. Possible countries may include Costa Rica, India, Botswana, Chile, and Estonia. The discussion will be moderated by Ted Weihe, ACVFA member, and panelists will include Simeon Djankov, with the World Bank, Chad Evans with the Council on Competitiveness, Mary Ott with USAID's Office of Economic Growth, Mary Ryckman with the Office of the U.S. Trade Representative, and Dorothy Taft with USAID's Office of Democracy and Governance.

Global Knowledge Sharing for Development: Knowledge management tools, including the Global Development Commons, will be discussed as to how they could benefit the variety of actors in democratic governance and economic growth. The discussion will be moderated by Judith Hermanson, ACVFA member, and panelists will include Steve Gale with USAID and representatives from academia and web portals.

The meeting is free and open to the public. Persons wishing to attend the meeting can register online at *http://www.usaid.gov/about_usaid/acvfa* or with Jenny Chun of the Hill Group at *hkim@thehillgroup.com* or 301–897–2789 ext. 115 or with Jocelyn Rowe at *jrowe@usaid.gov* or 202–712–4002.

Dated: February 6, 2008.

Jocelyn M. Rowe,

Executive Director, Advisory Committee on Voluntary, Foreign Aid (ACVFA), U.S. Agency for International Development.

[FR Doc. E8–2739 Filed 2–12–08; 8:45 am]

BILLING CODE 6116–01–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

Board for International Food and Agricultural Development One Hundred and Fifty-Third Meeting; Notice of Meeting

Pursuant to the Federal Advisory Committee Act, notice is hereby given of the one hundred and fifty-third meeting of the Board for International Food and Agricultural Development (BIFAD). The meeting will be held from 8 a.m. to 5 p.m. on February 27, 2008 at the National Press Club located at 529 14th St., NW., Washington, DC. The venue will be the 1st Amendment Room which is located on the 13th floor of the National Press Club.

Dr. Robert Easter, Chairman of BIFAD will open the meeting. Dr. Easter is the Dean, College of Agriculture, Consumer and Environment Sciences at the University of Illinois. Dean Easter's appointment as Chairman was confirmed by the White House on January 21, 2008. Dean Easter has been serving as interim Chairman since April 30, 2007 when Mr. Peter McPherson, former USAID Administrator, resigned from the Board. The Board also welcomes two new members: Mr. H. H. Barlow III (Kentucky) and Mr. Keith Eckel (Pennsylvania). They will be sworn in by Jacqueline E. Schafer, Assistant Administrator for the Economic Growth, Agriculture and Trade Bureau, USAID.

The morning session's topics will include presentations on the Global Summit on Higher Education and Development, and also the Global Development Commons as being initiated by USAID Administrator Henrietta H. Fore. Status Reports will be given on two of BIFAD's activities; the study on ''Defining a Title XII Activity,'' and the Conference of Deans which is being planned for April 2008. There will be a general discussion focusing on Strategic Directions of BIFAD in 2008. Jacqueline E. Schafer will brief the Board on the President's 2009 budget and its impacts for agriculture programs.

Following the Board's executive luncheon (closed to the public) and the swearing-in of the new Board members BIFAD will be updated on the ''Universities as Sub-Contractor's'' issue and on USAID's approach for preparing the 2007 Title XII Report. Highlighting the afternoon session will be discussion with the Office of Agriculture on planning actions for two new CRSPs (Global Horticulture and Global Livestock-Climate Change). BIFAD committee actions will also be discussed; including updates by Ray Miller, Chair of BIFAD's new special Task Force and Sandra Russo, Chair of BIFAD's sub-committee Strategic Partnership for Agricultural Research and Education (SPARE).

SPARE-Special Notice: The SPARE committee will hold its next meeting on February 26, 2008. It will begin at 1:30 p.m. The meeting venue is in the multi-purpose conference room located on the

1st floor of NASULGC's offices located at 1307 New York Ave., NW., Washington, DC.

The Board and SPARE meetings are free and open to the public. The Board and SPARE welcomes an open dialog to promote greater focus on critical issues facing USAID and international agriculture. Those wishing to attend the meeting or obtain additional information about BIFAD should contact Dr. Ronald S. Senykoff, the Designated Federal Officer for BIFAD. Write him in care of the U.S. Agency for International Development, Ronald Reagan Building, Office of Agriculture, Bureau for Economic Growth, Agriculture and Trade, 1300 Pennsylvania Avenue, NW., Room 2.11–085, Washington, DC 20523–2110 or telephone him at (202) 712–0218 or fax (202) 216–3010.

Ronald S. Senykoff,

USAID Designated Federal Officer for BIFAD, Office of Agriculture and Food Security, Bureau for Economic Growth, Agriculture & Trade, U.S. Agency for International Development.

[FR Doc. E8–2744 Filed 2–12–08; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF AGRICULTURE

Forest Service

RIN 0596–AC50

Notice of Extension of Public Comment Period—Proposed Directives for Forest Service Outfitting and Guiding Special Use Permits and Insurance Requirements for Forest Service Special Use Permits

AGENCY: Forest Service, USDA.

ACTION: Notice of extension for public comment period.

SUMMARY: The Forest Service is extending the public comment period for the proposed directive regarding Forest Service Outfitting and Guiding Special Use Permits and Insurance Requirements for Forest Service Special Use Permits for an additional 30 days to March 20, 2008. The original notice called for comments to be submitted by January 17, 2008 (72 FR 59246, October 19, 2007). A second notice (72 FR 71113, December 14, 2007) extended the comment period until February 19, 2008.

DATES: Comments must be received in writing by March 20, 2008.

ADDRESSES: Send comments electronically by following the instructions at the Federal eRulemaking portal at *http://www.regulation.gov.* Comments also may be submitted by mail to U.S. Forest Service, Attn: Carolyn Holbrook, Recreation and Heritage Resources Staff (2720), 1400 Independence Avenue, SW., Mail Stop 1125, Washington, DC 20250–1125. If comments are sent electronically, the public is requested not to send duplicate comments by mail. Please confine comments to issues pertinent to the proposed directives, explain the reasons for any recommended changes, and, where possible, reference the specific section and wording being addressed.

All comments, including names and addresses when provided, will be placed in the record and will be available for public inspection and copying. The public may inspect comments received on these proposed directives in the Office of the Director, Recreation and Heritage Resources Staff, 4th Floor Central, Sidney R. Yates Federal Building, 14th and Independence Avenue, SW., Washington, DC, on business days between 8:30 a.m. and 4 p.m. Those wishing to inspect comments are encouraged to call ahead at (202) 205–1426 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Carolyn Holbrook, (202) 205–1426, Recreation and Heritage Resources Staff.

Dated: February 7, 2008.

Gloria Manning,

Associate Deputy Chief—NFS.

[FR Doc. E8–2656 Filed 2–12–08; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

National Tree-Marking Paint Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The National Tree-marking Paint Committee will meet in Asheville, North Carolina on May 13–15, 2008. The purpose of the meeting is to discuss activities related to improvements in, concerns about, and the handling and use of tree-marking paint by personnel of the Forest Service and the Department of the Interior's Bureau of Land Management.

DATES: The meeting will be held May 13–15, 2008, from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Four Points by Sheraton Asheville Downtown, 22 Woodfin Street, Asheville, NC 28801. Persons who wish to file written comments before or after the meeting must send written comments to Dave Haston, Chairman, National Tree-marking Paint Committee, Forest Service, USDA, San Dimas Technology and Development Center, 444 East Bonita Avenue, San Dimas, California 91773, or electronically to *dhaston@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Dave Haston, Sr. Project Leader, San Dimas Technology and Development Center, Forest Service, USDA, (909) 599–1267, extension 294 or *dhaston@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The National Tree-marking Paint Committee comprises representatives from the Forest Service national headquarters, each of the nine Forest Service Regions, the Forest Products Laboratory, the Forest Service San Dimas Technology and Development Center, and the Bureau of Land Management. The General Services Administration and the National Institute for Occupational Safety and Health are ad hoc members and provide technical advice to the committee.

A field trip will be held on May 13 and is designed to supplement information related to tree-marking paint. This trip is open to any member of the public participating in the public meeting on May 14–15. However, transportation is provided only for committee members.

The main session of the meeting, which is open to public attendance, will be held on May 14–15.

Closed Sessions

While certain segments of this meeting are open to the public, there will be two closed sessions during the meeting. The first closed session is planned for approximately 10 a.m. to noon on May 14. This session is reserved for individual paint manufacturers to present products and information about tree-marking paint for consideration in future testing and use by the agency. Paint manufacturers also may provide comments on tree-marking paint specifications or other requirements. This portion of the meeting is open only to paint manufacturers, the committee, and committee staff to ensure that trade secrets will not be disclosed to other paint manufacturers or to the public. Paint manufacturers wishing to make presentations to the Tree-marking Paint Committee during the closed session should contact the committee chairperson at the telephone number listed at **FOR FURTHER INFORMATION CONTACT** in this notice. The second closed session is planned for

approximately 9 a.m. to 11 a.m. on May 15, 2007. This session is reserved for Steering Committee members only.

Any person with special access needs should contact the Chairperson to make those accommodations. Space for individuals who are not members of the National Tree-marking Paint Committee is limited and will be available to the public on a first-come, first-served basis.

Dated: February 8, 2008.

Gloria Manning,

Associate Deputy Chief—NFS.

[FR Doc. E8–2655 Filed 2–12–08; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

RIN 0596–AC44

Native Plant Material Policy (Forest Service Manual 2070)

AGENCY: Forest Service, USDA.

ACTION: Notice of issuance of agency final directive.

SUMMARY: The Forest Service is issuing a new directive to Forest Service Manual (FSM) 2070 for native plant materials, which provides direction for the use, growth, development, and storage of native plant materials.

DATES: This directive is effective February 13, 2008.

ADDRESSES: A copy of the final directive is available at *http://www.fs.fed.us/rangelands/whoweare/documents/FSM2070_Final_2_062905.pdf.*

The administrative record for this final directive is available for inspection and copying at the office of the Director, Rangeland Management Staff, USDA Forest Service, 3rd Floor South, Sidney R. Yates Federal Building, 1400 Independence Avenue, SW., Washington, DC, from 8:30 a.m. to 4 p.m., Monday through Friday, except holidays. Those wishing to inspect the administrative record are encouraged to call in advance to Brian Boyd, (202) 205–1496 to facilitate entrance into the building.

FOR FURTHER INFORMATION CONTACT: Larry Stritch, Rangeland Management Staff, USDA Forest Service, Mailstop 1103, 1400 Independence Avenue, SW., Washington, DC 20250, (202) 205–1279.

SUPPLEMENTARY INFORMATION: Title 36 CFR 219.10(b) states: ''The overall goal of the ecological element of sustainability is to provide a framework to contribute to development and maintenance of native ecological systems by providing desired ecological conditions to support diversity of native plant and animal species in the plan area''. Executive Order 13112 (February 3, 1999, sec. 2(a)(2)(IV)) on invasive species states the agencies will ''provide for restoration of native species and habitat conditions in ecosystems that have been invaded [by non-native species]''. In accordance with the Executive order and regulation, the Forest Service is issuing a new final directive to Forest Service Manual (FSM) 2070 for native plant materials, which addresses the uses of these materials in the revegetation, restoration, and rehabilitation of National Forest System lands in order to achieve the Agency's goal of providing for the diversity of plant and animal communities. The policy directs collaboration with federal, state, and local government entities and the public to develop and implement actions to increase the availability of native plant materials for use in revegetation, restoration, and rehabilitation.

Toward development of this policy, the goal of the Forest Service is to promote the use of native plant materials in revegetation for restoration and rehabilitation in order to manage and conserve terrestrial and aquatic biological diversity. This policy defines a native plant as: all indigenous terrestrial and aquatic plant species that evolved naturally in an ecosystem.

This policy also requires the use of best available information to choose ecologically adapted plant materials for the site and situation. Moreover, the policy states that native plants are to be used when timely natural regeneration of the native plant community is not likely to occur; native plant materials are the first choice in revegetation for restoration and rehabilitation efforts.

This policy does not discount the management use of non-native plant materials. Non-native, non-invasive plant species may be used when needed: (1) In emergency conditions to protect basic resource values such as soil stability and water quality; (2) As an interim, non-persistent measure designed to aid in new establishment of native plants (unless natural soil, water and biotic conditions have been permanently altered); (3) In conditions and management situations where native plant species are not available; and (4) When working in permanently altered plant communities. Under no circumstances will invasive plant species be used.

Public Comments on Proposed Policy and Forest Service's Responses:

Overview

On May 26, 2006, the Forest Service published the proposed policy in the **Federal Register** and sought public comment in adopting a new policy on native plant materials into Forest Service Manual 2070 (71 FR 30375).

During the 60-day comment period on the proposed policy which ended on July 26, 2006, the agency received one request for an extension of the comment period.

On July 25, 2006 the Forest Service published the Notice of Extension of Public Comment Period in the **Federal Register** (71 FR 42079) and extended the comment period 30 days. During the 30-day extended comment period on the proposed policy which ended August 24, 2006, no requests for a further extension of the comment period were received.

The Forest Service received 53 letters or electronic messages in response to this proposed policy. Each respondent was placed into one of the following categories:

Business	10
Federal Agencies	2
State Agencies	4
Non-Governmental Organizations	16
Individuals (unaffiliated or unidentifiable)	21

Most respondents (42) offered general comments supporting the proposed FSM 2070 Native Plant Material Policy. Nine respondents offered several comments not supporting the policy and two commenters were neutral. Many respondents offered specific comments about sections of the proposed policy.

General Comments

Many respondents expressed very supportive comments in favor of the use of native plants by the Forest Service in carrying out restoration, revegetation, and rehabilitation projects. The respondents who were not supportive of the proposed policy were concerned with the cost, availability, and equipment to put native plant seed and other native plant materials into the ground. FSM 2070 gives the decisionmaker wide latitude in determining when, where, and which native species to use. FSM 2070.3 allows cost and availability of native species to be a consideration when deciding not to use native plant materials. The feasability of sowing or planting native plant materials would be a consideration as well. Additionally, cost of personnel to manage and oversee

this program was a concern as well. The Forest Service will be adding these duties to existing program management responsibilities.

Comment. The preference of certain plant species ought not to be the foremost policy objective of the Forest Service pertaining to resource protection; the primary consideration should be, as it has been, the rapid and effective reestablishment of vegetation, using whatever species are most successful in doing so.

Response. The Forest Service agrees that the timely reestablishment of vegetation to protect soil and water resource values is our part of our mission. It is important that reestablishment of vegetation does not itself cause a new problem, as may be the case with non-native species, and the FSM provides sufficient discretion to allow for non-native planting when natives are not available or appropriate.

Comment. Many native plant species are not conducive to being mechanically spread, due to oddly shaped seeds and other factors. Many species are also characterized by long germination periods, rendering them of little utility for rapid site occupancy.

Response. The final policy takes into account factors such as those identified by the commenter, and native and non-native plant material that cannot meet this direction will not be used. The final policy has not been changed from the proposal in this respect.

Comment. We do not support the use of non-native, non-invasive plant materials regardless of the situation. It is well known that a non-native plant species may be present in an ecosystem for decades before it becomes invasive.

Response. The Forest Service is very aware of the challenging issues surrounding the removal of invasive species and not letting invasive, non-native species become established. There will be instances when native plant materials are not available or their cost is prohibitive. The FSM provides the line officer with ''limited'' circumstances when non-native plant materials may be used. The final policy has not been changed from the proposal in this respect. The Forest Service, working with our partners, will continue to use the best available information when selecting non-native plant materials for restoration, revegetation and reehabilitation projects.

Comment. Several commenters expressed the need for the Forest Service to work with adjacent landowners and with other governmental agencies to provide for effective invasive species control. It will do the Forest Service no good to restore an area to native plants, only to have it engulfed with invasive vegetation from adjoining land.

Response. We agree that cooperation with adjacent landholders and all our partners and stakeholders will be essential to successful implementation of this policy.

Comment. The proposed directive does not include any language about commercial uses of native plants.

Response. FSM direction for the commercial harvest of special forest products is contained within FSM 2400.

Comment. We would encourage adding a policy to include a segment on native plant materials in Forest Service outreach and education efforts, forest visitor centers and supporting interpretive materials and adding appropriate native plant materials curriculum to existing training courses for managers, planners and field staff.

Response. We agree with the goal of public outreach, education efforts, etc. FSM 2070.2 objectives 1—6 contain specific direction to promote, inform, train, and educate our personel and to work with our partners in doing so. Many of these public outreach objectives are met through our various interpretive materials and programs that are created and delivered on the forest and grassland level, making it more specific to their local publics. A great deal of this type of information has already been placed on the Forest Service's Celebrating Wildflowers Web site (*http://www.fs.fed.us/wildflowers*) where a considerable amount of material on native plant materials has been posted. As it pertains to training, the Forest Service will incorporate aspects of this native plant materials policy into various exisiting training courses. FSM 2070.45(3) and FSM 2070.45(6) require Forest and Grassland Supervisors to ensure that this policy is implemented and that all pertinent and required training is carried out so as to implement this new policy on native plant materials.

Comment. Several *Comment*ers want certain parts of the policy to list important partners such as state native plant societies, local universities, invasive/exotic plant pest species councils and others.

Response. The Forest Service has a proud history of working with our partners, concerned citizens and other stakeholders. The Forest Service believes there is no need to list specific partners in order to carry out the policy to cooperate with partners. Moreover, it would be a long list, and even so would inevitably be incomplete. The agency will work closely with all interested parties in the implementation of this new policy.

Comment. One *Comment*er stated, ''if invasive plants are removed and the area replanted with native plants, the native plants do not survive. They are browsed by deer. Revegetation and rehabilitation cannot take place until the size of the deer herd is controlled. Deer herd management is the first priority.''

Response. We agree in many of our national forests very large numbers of deer are having adverse effects on our native plants and native plant communities. The Forest Service has close working relationships with the state wildlife agencies. We are working with them to find long-term solutions to overly large deer populations. The Forest Service has undertaken short-term measures to protect native plants from deer such as fencing exclosures and use of protective netting over native plants.

Comment. All the attention appears to focus on the 'large flora' species, and ignores the rhizosphere species of mycorrhiza, rhizobium and other soil beneficial bacteria and fungi.

Response. We agree that micro flora and fauna contained in the soil are very important considerations in the choice and use of native plant materials. This policy addresses species classified as belonging to the Kingdom Plantae. Bacteria are classified as belonging to Kingdom Monera. Fungi are classified as belonging to the Kingdom Fungi. Therefore they are not addressed in this policy.

Comment. The assumption seems to be that ''plant species'' or ''vegetative material'' pertains to vascular plants.

Response. This policy addresses the use of native plant materials. The definition of native plant species does not exclude non-vascular plants. The policy addresses any species belonging to the Kingdom Plantae and as such includes both vascular and non-vascular plant species.

Comment. There absolutely must be some standard reference list as to what is native and what is not.

Response. The policy does not provide a standard list or reference because the determination of whether a plant species is native must be made on a local basis; a species may be native in one area of a state and not in another.

The Forest Service did not receive any *Comment*s on sections 2070.11 Laws; section 2070.12 Regulations; and section 2070.13 Executive Orders.

Sections 2070.2 Objectives and 2070.3 Policy received many *Comment*s that cut across both sections. Therefore,

comments on those sections and the agency's responses are consolidated.

Comment. One commenter was concerned with non-native plants that may be ''exempted'' due to the need to maintain historical integrity. What would happen if an invasive species like purple loosestrife had been planted there by a CCC crew.

Response. This policy does not address the removal of noxious weeds or invasive species. Direction for noxious weeds is addressed in FSM 2080. The Forest Service is currently developing policy to address invasive species.

Comment. One organization commented ''that Policy points 2070.3(2) and 2070.3(3) appear to contradict each other. * * * believes differentiating between the intention of using persistent plant materials in Policy point 2070.3(2) and non-persistent plant materials in Policy point 2070.3(3) can eliminate this contradiction.''

Response. In this final directive 2070.3(2), we have inserted the word ''persistent'' to make the meaning of the directive clearer. FSM2070.3(2) now reads:

> Restrict the use of **persistent**, (added emphasis) non-native, non-invasive plant materials to only those situations when timely reestablishment of a native plant community either through natural regeneration or with the use of native plant materials is not likely to occur.

Comment. One organization stated ''We feel it should be clearly stated in the policy that it is acceptable to utilize non-invasive, non-native plants for wildlife habitat improvement. Non-native non-invasive plants should be considered for use in a variety of situations including areas that have not been permanently or tempoarily altered. Some examples would be permanent and temporary wildlife openings, log landings, skid trails, temporary roads that have been closed and are used for linear wildlife openings.'' A number of commenters took a similar position with respect to planting for wildlife habitat.

Response. FSM 2070.2(4) states: ''Promote the appropriate use and availability of native and appropriate non-native plant materials.'' While the general policy is to give primary consideration to the use of native plant species, the policy is flexible and allows for the use of non-native, non-invasive plant species in certain types of situations. FSM 2070 gives the decision maker broad discretion in the use of both native and non-native non-invasive plant species. The Forest Service has a proud history of working with other state and federal agencies, Tribes, and other interested organizations including organizations with wildlife habitat improvement as one of their primary mission areas. Working with our partners we will look for opportunities to develop a readily available supply of native plant materials that may be used in place of non-native, non-invasive plant species and still meet habitat management goals. FSM 2070.3(2)(c) now reads: ''In permanently highly altered plant communities, such as road cuts, permanent and temporary wildlife openings, log landings, skid trails, temporary roads that have been closed and are used for linear wildlife openings and sites dominated by non-native non-invasive species.''

Comment. This direction fails to designate criteria or qualifications for staff delegated to decide what plants are suitable for use.

Response. The agency believes that the direction does in fact establish qualifications for staff who will select plants to be used in revegetation, rehabilitation or restoration. The FSM provides for direction and statement of policy. FSM 2070.45 delegates to the Forest and Grassland Supervisors the responsibility for training personnel to become trained or certified. Local conditions will require specific training that addresses local needs. For example, each state will have different laws and regulations concerning the labeling of seed.

Comment. One commenter believes that the addition of several words to the introductory sentence of section 2070.3 of FSM 2070 will lend greater clarity to the specific purpose of this document. Specifically he suggests that the bold, underlined words in the phrase below be added to the text: ''Policies for the selection, use and storage of native and non-native plant materials *that are used in the revegetation, restoration and rehabilitation of National Forest system lands* are as follows.

Response. The Forest Service agrees. FSM 2070.3 has been changed to read:

> Policies for selection, use and storage of native and non-native plant materials that are used in the revegetation, restoration and rehabilitation of National Forest System lands are as follows: (emphasis added)

Comment. In FSM 2070.3(2)(c), we are not comfortable with the example where reestablishment of a native plant community is not likely to occur. It is true some roadsides and roadcuts have fill or exposure of soils or other features that make establishment of the surrounding native community unlikely, and sites that are predominately exotic weeds may make establishment of a diverse native community difficult. However, use of even limited native species in these areas would provide a buffer to the surrounding areas and reduce the threat of the spread of weedy species following natural disturbances. In this instance we would prefer to include a clarifying phrase, such as ''where no suitable native species can be established.''

Response. Nothing in FSM 2070 precludes the use of native species in any revegetation, restoration or rehabilitation project including roadcuts. There are many projects where the Forest Service has used native species in roadside projects. FSM 2070.3(1) states:

> Ensure native plant materials are given primary consideration.
>
> The purpose of giving examples of where non-native non-invasive species may be used was to provide the public and Forest Service personel with additional information. Other examples could include reclaimed mine spoils. However, the overarching consideration, especially for these type of projects, is contained in FSM 2070.2(2) which states:
>
> Maintain adequate protection for soil and water resources, through timely and effective revegetation of disturbed sites that could not be restored naturally.

Comment. Several commenters wanted further restrictions on the use of native plant materials that are not representative of the local ecotypes as outlined in FSM 2070.3.

Response. We have changed FSM 2070.3(1) to now read

> Ensure genetically appropriate (emphasis added) native plant materials are given primary consideration.

Comment. One commenter wanted ''emergency conditions'' from FSM 2070.3(2)(a) defined.

Response. The determinination of emergency conditions is best determined at the local level by the appropriate line officer, *i.e.* district ranger and forest or grassland supervisor. Further FSM 2070.3(3) directs that:

> Select non-native plants as interim, non-persistent plant materials provided they will not hybridize with local species, will not permanently displace native species or offer serious long-term competition to the recovery of endemic plants and are designed to aid in the re-establishment of native plant communities.

Comment. FSM 2070.3(8) should address special forest products as well as timber.

Response. FSM 2070.3(8) now reads in part, Specific direction for commercial timber species and special forest products is in FSM 2470.

Comment. The directive does not include any mention of the cultural

aspects of native plants or require the involvement of experts who would be able to inform sociocultural considerations. Under FSM 2070.4—Responsibilities: Language needs to be added to include social scientists in assessment and planning regarding the type of native plant species selected.

Response. The direction does not provide for the resource skills necessary to carry out a project analysis. It is the responsibility of the Forest, Grassland Supervisor, or District Ranger to determine which personnel will be assigned to the inter-disciplinary team that conducts the project analysis. The only requirement this direction provides for a revegetation, restoration or rehabilitation project is found at FSM 2070.3(5) which states:

> Ensure that development, review and/or approval of revegetation, rehabilitation and restoration plans, including species selection, genetic heritage, growth stage and any needed site preparation, is done by a plant materials specialist who is knowledgeable and trained or certified in the plant community type where the revegetation will occur.

Other resource specialists are assigned to an interdisciplinary team based upon scoping comments from the public and the various resources that need to be analyzed as part of the project analysis. If socio-cultural aspects of potential plant species chosen is an issue that needs to be addressed the appropriate line officer will ensure that the necessary expertise is available to analyze the issue.

The Forest Service received a comment concerning section 2070.41 Chief.

Comment. One commenter suggested that the Forest Service include the seed industry when promoting cooperation and coordination for the development and supply of native and non-native plant materials (FSM 2070.41.3 Responsibilities of the Chief).

Response. The Forest Service agrees. FSM 2070.41.3 has been changed to incorporate the seed industry. FSM 2070.41.3 now reads:

> Promotes cooperation and coordination between federal agencies, state, tribal and local governments, the seed industry (emphasis added), the nursery industry, partners and the public for the development and supply of native and non-native plant materials.

The Forest Service received no comments for section 2070.42 Deputy Chief for National Forest Systems.

The Forest Service received no comments for section 2070.43 Regional Forester.

The Forest Service received several comments concerning section 2070.45 Forest and Grassland Supervisors.

Comment. Proposed FSM 2070.45 states that Forest and Grassland Supervisors may ''delegate the authority, if necessary, to use genetically appropriate native and non-native plant materials in revegetation projects.'' This direction fails to designate criteria or qualifications for staff delegated to decide what plants are suitable for use.

Response. FSM 2070.4 lays out the delegation of authorities from the Chief down to the District Ranger. Only a line officer can make an agency decision and only a line officer may be delegated authority to make a decision. FSM 2070.45 is stating that a Forest or Grassland Supervisor may delegate the authority; in this case the delegation is to the District Ranger. Staff do not make decisions.

Comment. One commenter stated that the Forest Service must provide sufficient training based on the best available science for plant material specialists.

Response. The Forest Service agrees. The Forest Service will provide appropriate and necessary training to enable the agency to implement this new direction.

The Forest Service received no comments for section 2070.46 District Ranger.

The Forest Service received many comments concerning section 2070.5 Definitions.

Comment. Many commenters believe the Forest Service definition of ''native plant'' is too restrictive. One commenter believes the selection of this material by the project manager can be better implemented by separating the definition of plants into three categories; local native plant material, non-local native plant material and introduced plant material. Many other comments were submitted concerning the definition of ''native plant.''

Response. The definition of native plant has been changed to the definition used by the federal interagency Plant Conservation Alliance. The definition now reads:

> A plant species which occurs naturally in a particular region, state, ecosystem and habitat without direct or indirect human actions.

Comment. Several commenters wanted the definition of noxious weed changed.

Response. The definition of noxious weed has been amended to provide further clarification. The definition now reads,

> A plant species designated as a noxious weed by the Secretary of Agriculture pursuant to the Plant Protection Act of 2000 or by the responsible State official. Noxious weeds generally possess one or more of the following characteristics: aggressive and difficult to manage, poisonous, toxic, parasitic, a carrier or host of serious insects or disease, and being non-native or new to or not common to the United States or parts thereof.

Comment. A number of respondents offered comments asking for rewording of the definitions of several terms contained in FSM 2070.5.

Response. The Forest Service disagrees in changing the definitions of terms except for the change of definition for ''native plant'' and ''noxious weed'' as noted above. The remaining definitions were examined, and based upon the use of these terms by the scientific community, the definitions remain unchanged.

Section 2070.6 References received one comment.

Comment. More references should be cited, but I have none to offer.

Response. Realizing that providing a list of references invariably will result in omissions, the Agency has removed section 2070.6—References from the final policy.

Therefore, for the reasons set out in this notice, the Forest Service is adopting as final an amendment to FSM 2070 to establish native plant material policy. The final directive is available at the addresses listed in the **ADDRESSES** section of this notice.

Regulatory Certifications

Regulatory Impact

This final directive has been reviewed under USDA procedures and Executive Order 12866 (September 30, 1993) on regulatory planning and review. It has been determined that this is not a significant action. This final action to provide agency direction would not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This final action would not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this final action would not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipient's program. Accordingly, this final action is not subject to Office of Management and Budget review under Executive Order 12866.

Environmental Impact

These final additions to Forest Service Manual (FSM) 2070 would address the use of native plant materials in revegetation, rehabilitation, and restoration projects; and when nonnative, noninvasive species may be used. Section 31.1b of Forest Service Handbook (FSH) 1909.15 (57 FR 43168; September 18, 1992) excludes from documentation in an environmental assessment or impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instruction.'' The Agency's preliminary assessment is that this final action falls within this category of actions, and that no extraordinary circumstances exist as currently defined which would require preparation of an environmental impact statement or environmental assessment. A final determination will be made upon adoption of the final directive.

Federalism

The agency has considered this final directive under the requirements of Executive Order 13132 (August 4, 1999) on federalism. The agency has made an assessment that the final directive conforms with the federalism principles set out in this executive order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the national government and the States, nor on the distribution of power and responsibilities among the various levels of government. Therefore, the Agency concludes that the final directive does not have federalism implications.

Consultation and Coordination With Indian Tribal Governments

This final directive has been reviewed under Executive Order 13175 (November 6, 2000) on consultation and coordination with Indian tribal governments. This final directive 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. Nor does this final directive impose substantial direct compliance costs on Indian tribal governments or preempt tribal law. Therefore, it has been determined that this final directive does not have tribal implications requiring advance consultation with Indian tribes.

No Takings Implications

This final directive has been analyzed in accordance with the principles and criteria contained in Executive Order 12630 (March 15, 1998) on governmental actions and interference with constitutionally protected property rights. It has been determined that the final directive does not pose the risk of a taking of constitutionally protected private property.

Civil Justice Reform Act

This final action has been reviewed under Executive Order 12988 (February 7, 1996) on civil justice reform. If this final directive were adopted: (1) All State and local laws and regulations that are in conflict with this final directive or which would impede its full implementation would be preempted; (2) no retroactive effect would be given to this final directive; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

Energy Effects

This final directive has been reviewed under Executive Order 13211 (May 18, 2001) on actions concerning regulations that significantly affect energy supply, distribution, or use. It has been determined that this final directive does not constitute a significant energy action as defined in the Executive Order.

Controlling Paperwork Burdens on the Public

This final directive does not contain any additional recordkeeping or reporting requirements associated with onshore oil and gas exploration and development or other information collection requirements as defined in Title 5 Code of Federal Regulations (CFR), part 1320. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

Dated: February 7, 2008.

Abigail R. Kimbell,

Chief.

[FR Doc. E8–2659 Filed 2–12–08; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket Number 070104002–7796–02]

Census Designated Place (CDP) Program for the 2010 Census—Final Criteria

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of final criteria and program implementation.

SUMMARY: This Notice announces the Bureau of the Census' (Census Bureau's) final criteria for defining census designated places (CDPs) for the 2010 Census. CDPs[1] are statistical geographic entities representing closely settled, unincorporated communities that are locally recognized and identified by name. They are the statistical equivalents of incorporated places, with the primary differences being the lack of both a legally-defined boundary and an active, functioning governmental structure, chartered by the state and administered by elected officials. CDPs defined for the 2010 Census also will be used to tabulate American Community Survey, Puerto Rico Community Survey, Economic Census data after 2010, and potentially data from other Census Bureau censuses and surveys.

In addition to providing final criteria for CDPs, this Notice also contains a summary of comments received in response to proposed criteria published in the April 6, 2007, **Federal Register** (72 FR 17326), as well as the Census Bureau's response to those comments.

DATES: This notice's final criteria will be effective on February 13, 2008.

FOR FURTHER INFORMATION CONTACT: The Geographic Standards and Criteria Branch, Geography Division, U.S. Census Bureau, via e-mail at *geo.psap.list@census.gov* or telephone at 301–763–3056.

SUPPLEMENTARY INFORMATION:

I. Background

The CDP concept and delineation criteria have evolved over the past five decades in response to data user needs for place-level data. This evolution has taken into account differences in the way in which places were perceived, and the propensity for places to incorporate in various states. The result, over time, has been an increase in the number and types of unincorporated communities identified as CDPs, as well as increasing consistency in the relationship between the CDP concept

[1] The term CDP includes comunidades and zonas urbanas in Puerto Rico.

and the kinds of places encompassed by the incorporated place category, or a compromise between localized perceptions of place and a concept that would be familiar to data users throughout the United States, Puerto Rico, and the Island Areas.

Although not as numerous as incorporated places or municipalities,[2] CDPs have been important geographic entities since their introduction for the 1950 Census. (CDPs were referred to as ''unincorporated places'' from 1950 through the 1970 decennial censuses.) For the 1950 Census, CDPs were defined only outside urbanized areas and were required to have at least 1,000 residents. For the 1960 Census, CDPs could also be identified inside urbanized areas outside of New England, but these were required to have at least 10,000 residents. The Census Bureau modified the population threshold within urbanized areas to 5,000 in 1970, allowed for CDPs in urbanized areas in New England in 1980, and lowered the urbanized area threshold again to 2,500 in 1990. In time, other population thresholds were adopted for identification of CDPs in Alaska, as well as in Puerto Rico, the Island Areas, and on American Indian reservations. The Census Bureau eliminated all population threshold requirements for Census 2000, achieving consistency between CDPs and incorporated places, for which the Census Bureau historically has published data without regard to population size.

According to Census 2000, more than 35 million people in the United States,[3] Puerto Rico, and the Island Areas [4] lived in CDPs. The relative importance of CDPs varies from state-to-state depending on laws governing municipal incorporation and annexation, but also depending on local preferences and attitudes regarding the identification of places.

II. Summary of Comments Received in Response to Proposed Criteria

The April 6, 2007, **Federal Register** (72 FR 17326) notice requested comment on proposed criteria for CDPs. Specific proposed changes to the Census 2000 included:

- Requiring each CDP to contain, at a minimum, some population or housing;
- Eliminating the ability to delineate CDPs that were coextensive with governmental minor civil divisions (MCDs) in the six New England States, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and Wisconsin;
- Eliminating the use of hyphenated names for CDPs, except in situations in which two or more communities have grown together and share a common identity.

The Census Bureau received ten comments related to CDPs. Two commenters expressed general support for the proposed criteria. Two commenters (both from townships in New Jersey) opposed elimination of CDPs. It was unclear from their comments whether they mistook the Census Bureau's question regarding continued identification of census county divisions as applying to CDPs, or whether their comments were offered in response to a separate inquiry from a township in New Jersey to treat townships as places within the Census Bureau's geographic area hierarchy. Treatment of townships as places would result in the elimination of small CDPs defined to represent closely settled communities within townships. Due to the lack of information, the Census Bureau did not make any changes to the criteria.

The Nevada State Demographers' office commented on the characterization of CDPs as unincorporated communities lacking legally described boundaries, noting that many CDPs in Nevada are designated as ''special taxation areas'' and as such have legally described boundaries.[5] Nevertheless, the Census Bureau notes that Nevada's CDPs are not incorporated as municipalities in the same sense as cities in that state, and therefore it is still appropriate to identify Nevada's special taxation areas as CDPs. The Census Bureau will attempt to provide greater detail in its documentation and geographic attributes describing the various kinds of communities identified as CDPs.

The Census Bureau received two comments related specifically to the proposal to reduce the number of instances in which places were combined to form a single CDP and related use of hyphenated names. Both commenters were from California, and each noted the negative impact this proposed criterion might have on the accurate depiction of unincorporated communities in California. Both agreed with the criterion in principle, but requested that the Census Bureau clarify when it is acceptable for multiple communities to be defined as a single CDP (for instance, when two communities have grown together to the extent that it is difficult to discern where one ends and the other begins) and when it is not. The example of Arden-Arcade, California, was cited, noting that the identities of these once separate places have become so intertwined that it is more common to hear them referred to together, rather than apart. The Census Bureau agrees with this comment and will clarify in both published criteria and program guidelines when it is acceptable for multiple communities to be defined as a single CDP. Multiple communities may only be combined to form a single CDP when the identities of these communities have become so intertwined that the communities are commonly perceived and referenced as a single place, or when there is no distinguishable or suitable feature in the landscape that can be used as a boundary between the communities.

The Census Bureau received three comments related to the proposal to no longer allow CDPs in Connecticut, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Wisconsin to be defined as coextensive with governmentally active MCDs. Each of the three commenters had extensive experience working with and analyzing statistical data for places, MCDs, and other census geographic areas. One of the commenters supported the proposal. Two of the commenters did not support the proposal, noting that CDPs that are coextensive with governmentally active MCDs represent a relatively small proportion of all CDPs and MCDs; therefore, the creation of coextensive, ''whole-town'' CDPs does not represent a substantial problem. Both commenters noted that since ''place'' is in general a rather nuanced concept, with different meanings to different people, the Census Bureau should not be overly restrictive in how it applies its CDP concept in areas of the United States, such as the Northeast and Midwest in which residents commonly perceive MCDs to be places in the same sense that residents of other parts of the country use the term ''place.'' They concluded that if the goal of the proposal was to eliminate redundancy in place-based data tables for these 12 states, then that goal could be accomplished within the data tabulation program without requiring

[2] Known by various terms throughout the United States: cities, towns (except in the six New England States, New York, and Wisconsin), villages, and boroughs (except in New York and Alaska).

[3] For Census Bureau purposes, the United States includes the fifty states and the District of Columbia.

[4] For Census Bureau purposes, the Island Areas includes the U.S. Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and Guam. There are no CDPs in American Samoa because villages cover its entire territory and population.

[5] CDPs in Hawaii and zonas urbanas in Puerto Rico also have legally described boundaries.

modifications to geographic area criteria. The Census Bureau agrees that the elimination of redundant data should be accomplished through changes in the way in which place-level data tables are prepared rather than through changes to the CDP criteria. Therefore, the Census Bureau will review the way in which it presents data for places and MCDs in the states listed above, and seek to eliminate redundancy in place-level data tables through changes in data tabulation policy and procedures.

Changes to the Criteria From the Proposed Rule

The changes made to the final criteria (from the proposed criteria) in ''Section II, Census Designated Place Criteria and Characteristics for the 2010 Census,'' are as follows:

1. Section II, ''Census Designated Place Criteria and Characteristics for the 2010 Census,'' in the introductory paragraph to this section, removed the reference to American Indian reservations and off-reservation trust lands in the first sentence because these areas are, by definition, within the United States.

2. Section II, ''Census Designated Place Criteria and Characteristics for the 2010 Census,'' added a second paragraph to subsection 1, in response to comments received to clarify the circumstances under which it would be appropriate to combine multiple places to form a single CDP with a hyphenated name. This paragraph provides specific examples of CDPs that encompass multiple communities and are appropriately identified with a hyphenated name. We also have provided several questions for program participants to consider when determining whether to combine multiple communities as a single CDP and how to identify the CDP by name.

3. Section II, ''Census Designated Place Criteria and Characteristics for the 2010 Census,'' subsection 4. The Census Bureau deleted the criterion in subsection 4 of the proposed criteria, stating that a CDP may not be coextensive with governmentally functioning MCDs in the 12 ''strong-MCD'' states: Connecticut, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Wisconsin. The goal of this proposal was to eliminate redundancy in selected place-level data tables for these states, in which data appear for both the MCD and the coextensive CDP of the same name (for example, Framingham, Massachusetts MCD and Framingham CDP). While this practice occasionally creates confusion on the part of some data users, the number of CDPs that are coextensive with governmentally active MCDs represents a relatively small proportion of all CDPs and MCDs in these states. Further, the concept of ''place'' is nuanced and varies to some extent from one part of the country to another, and there are instances in which residents of an MCD identify it as a place, in the same sense as places are recognized throughout the country. Rather than adopt a restrictive criterion applicable to only a subset of states, we agreed with the commenters and concluded that the elimination of redundant data could be accomplished through changes in the way in which place-level data tables are prepared rather than through changes to the CDP criteria.

III. Census Designated Place Criteria and Characteristics for the 2010 Census

The criteria contained herein apply to the United States, Puerto Rico, and the Island Areas. In accordance with the final criteria, the Census Bureau may modify and, if necessary, reject any proposals for CDPs that do not meet the established criteria. In addition, the Census Bureau reserves the right to modify the boundaries and attributes of CDPs as needed to maintain geographic relationships before the final tabulation geography is set for the 2010 Census.

The Census Bureau will use the following criteria and characteristics to identify the areas that will qualify for designation as CDPs for use in tabulating data from the 2010 Census, the American Community Survey, the Puerto Rico Community Survey, the Economic Census, and potentially other Census Bureau censuses and surveys.

1. A CDP constitutes a single, closely settled center of population that is named. To the extent possible, individual unincorporated communities should be identified as separate CDPs. Similarly, a single community should be defined as a single CDP rather than multiple CDPs with each part referencing the community name and a directional term (i.e., north, south, east, or west). Since a CDP is defined to provide data for a single named locality, the Census Bureau does not encourage CDPs that comprise a combination of places or identified by hyphenated names. For example, CDPs such as Poplar-Cotton Center and Downieville-Lawson-Dumont are no longer acceptable. Communities were often combined as a single CDP in order to comply with the Census Bureau's minimum population requirements. The Census Bureau's elimination of population threshold criteria has made such combinations unnecessary. Other communities were combined because visible features were not available for use as boundaries for separate CDPs. The Census Bureau's new policy to allow the use of some nonvisible boundaries so that participants can separate individual communities has dispensed with the need to have multi-place CDPs.

Multiple communities may only be combined to form a single CDP when the identities of these communities have become so intertwined that the communities are commonly perceived and referenced as a single place. For example, the communities of Arden and Arcade in California have grown together over time and residents commonly use the place name Arden-Arcade. Further, because of the intertwined identity, residents would have difficulty identifying a boundary between the separate, historical communities of Arden and Arcade. Multiple communities also may be defined as a single CDP when there is no distinguishable or suitable feature in the landscape that can be used as a boundary between the communities, even if the two communities still have separate identities. For example, the CDP of Ashton-Sandy Spring in Maryland encompasses two communities that still maintain separate identities in common, daily usage. The two communities, however, have grown together to such an extent that a clear break between the two communities is no longer identifiable in the landscape. In general, when considering whether to combine multiple communities as a single CDP, the following questions should be taken into account: Do residents commonly perceive and refer to the communities as a single entity? Are there landscape elements, such as signs, that use a hyphenated name for the community? Can residents or other knowledgeable individuals identify clear, commonly accepted boundaries for the individual communities?

2. A CDP generally consists of a contiguous cluster of census blocks comprising a single piece of territory and containing a mix of residential and commercial uses similar to that of an incorporated place of similar size. Some CDPs, however, may be predominantly residential; such places should represent recognizably distinct, locally known communities, but not typical suburban subdivisions. Examples of such predominantly residential communities that can be recognized as CDPs are colonias found along the United States-Mexico border, small rural communities, and unincorporated resort and retirement communities.

3. A CDP may not be located, either partially or entirely, within an incorporated place or another CDP.

4. A CDP may be located in more than one county but must not cross state boundaries. It is important to note, however, that since county boundaries provide important demarcations for communities, CDPs that cross county lines should be kept to a minimum and identified only when the community clearly sees itself existing on both sides of a county boundary.

5. There are no minimum population or housing unit thresholds for defining CDPs; however, a CDP must contain some population or housing units or both. The Census Bureau recognizes that some communities, such as a resort or other kinds of seasonal communities, may lack population at certain times of the year. Nevertheless, there should be some evidence, generally in the form of houses, barracks, dormitories, commercial buildings and/or other structures, providing the basis for local perception of the place's existence. For the 2010 Census, the Census Bureau will not accept a CDP delineated with zero population and zero housing units. The Census Bureau will review the number of housing units within the place, as reported in the previous decennial census, and consider whether additional information is needed before recognizing the CDP. Participants submitting boundaries for places with less than ten housing units may be asked to provide additional information attesting to the existence of the CDP.

6. CDP boundaries should follow visible features, except in those circumstances when a CDP's boundary is coincident with the nonvisible boundary of a state, county, MCD (in the six New England states, Michigan, Minnesota, New Jersey, New York, Pennsylvania, and Wisconsin), or incorporated place. CDP boundaries may follow other nonvisible features in instances where reliance upon visible features will result in overbounding of the CDP in order to include housing units on both sides of a road or street feature. Such boundaries might include parcel boundaries and public land survey system lines; fence lines; national, state, or local park boundaries; ridgelines; or drainage ditches.

7. The CDP name should be one that is recognized and used in daily communication by the residents of the community. Because unincorporated communities generally lack legally defined boundaries, a commonly used community name and the geographic extent of its use by local residents is often the best identifier of the extent of a place, the assumption being that if residents associate with a particular name and use it to identify the place in which they live, then the CDP's boundaries can be mapped based on the use of the name. There should be features in the landscape that use the name, such that a non-resident would have a general sense of the location or extent of the community; for example, signs indicating when one is entering the community; highway exit signs that use the name; or businesses, schools, or other buildings that make use of the name. It should not be a name developed solely for planning or other purposes (including simply to obtain data from the Census Bureau) that is not in regular daily use by the local residents and business establishments.

8. A CDP may not have the same name as an adjacent or nearby incorporated place. If the community does not have a name that distinguishes it from other nearby communities, then the community is not a distinct place. The use of directional terms (''north,'' ''south,'' ''east,'' ''west,'' and so forth) to differentiate the name of a CDP from a nearby municipality where this name is not in local use is not acceptable. For example, the name ''North Laurel'' would be permitted if this name were in local use. The name ''Laurel North'' would not be permitted if it were not in local use. Again, this has much to do with the way in which people typically refer to the places in which they live. It is permissible to change the name of a 2000 CDP for the 2010 Census if the new name provides a better identification of the community.

IV. Definitions of Key Terms

Alaska Native regional corporation (ANRC)—A corporate geographic area established under the Alaska Native Claims Settlement Act (Public Law 92–203) to conduct both the business and nonprofit affairs of Alaska Natives. Twelve ANRCs cover the state of Alaska, except for the Annette Island Reserve.

American Indian reservation (AIR)—A federally recognized American Indian land area with boundaries established by final treaty, statute, executive order, and/or court order, and over which a federally recognized American Indian tribal government has governmental authority. Along with reservations, designations such as colonies, communities, pueblos, rancherias, and reserves apply to AIRs.

Census block—A geographic area bounded by visible and/or invisible features shown on a map prepared by the Census Bureau. A block is the smallest geographic entity for which the Census Bureau tabulates decennial census data.

Coextensive—Descriptive of two or more geographic entities that cover exactly the same area, with all boundaries shared.

Comunidad—A census designated place in Puerto Rico that is not related to a municipio's seat of government, called an aldea or a ciudad prior to the 1990 Census.

Contiguous—Descriptive of geographic areas that are adjacent to one another, sharing either a common boundary or point of contact.

Housing unit—A house, an apartment, a mobile home or trailer, or a group of rooms or a single room occupied as a separate living quarter or, if vacant, intended for occupancy as a separate living quarter. Separate living quarters are those in which the occupants live and eat separately from any other residents of the building and which have direct access from outside the building or through a common hall.

Incorporated place—A type of governmental unit established to provide governmental services for a concentration of people within legally prescribed boundaries, incorporated under state law as a city, town (except in New England, New York, and Wisconsin), borough (except in Alaska and New York), village, or other description.

Island areas—An entity, other than a state or the District of Columbia, under the jurisdiction of the United States. For the 2010 Census, these will include American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and several small islands in the Caribbean Sea and the Pacific Ocean. The Census Bureau treats each Island Territory as the statistical equivalent of a state.

Minor civil division—The primary governmental or administrative division of a county in 28 states, Puerto Rico, and the Island Areas having legal boundaries, names, and descriptions. MCDs represent many different types of legal entities with a wide variety of characteristics, powers, and functions depending on the state and type of MCD. In some states, some or all of the incorporated places also constitute MCDs.

Municipio—A type of governmental unit that is the primary legal subdivision of Puerto Rico. The Census Bureau treats the municipio as the statistical equivalent of a county.

Nonvisible feature—A map feature that is not visible, such as a city or county boundary, a property line running through space, a short

imaginary extension of a street or road, or a point-to-point line.

Statistical geographic entity—A geographic entity that is specially defined and delineated, such as block group, CDP, or census tract, so that the Census Bureau may tabulate data for it. Designation as a statistical entity neither conveys nor confers legal ownership, entitlement, or jurisdictional authority.

Urbanized area (UA)—An area consisting of a central place(s) and adjacent urban fringe that together have a minimum residential population of at least 50,000 people and generally an overall population density of at least 1,000 people per square mile. The Census Bureau uses published criteria to determine the qualification and boundaries of UAs at the time of each decennial census or from the results of a special census during the intercensal period.

Visible feature—A map feature that can be seen on the ground, such as a road, railroad track, major above-ground transmission line or pipeline, stream, shoreline, fence, sharply defined mountain ridge, or cliff. A nonstandard visible feature is a feature that may not be clearly defined on the ground (such as a ridge), may be seasonal (such as an intermittent stream), or may be relatively impermanent (such as a fence). The Census Bureau generally requests verification that nonstandard features pose no problem in their location during field work.

Zona urbana—In Puerto Rico, the settled area functioning as the seat of government for a municipio. A zona urbana cannot cross a municipio boundary.

Executive Order 12866

This notice has been determined to be not significant under Executive Order 12866.

Paperwork Reduction Act

This program notice does not represent a collection of information subject to the requirements of the Paperwork Reduction Act, 44 U.S.C., Chapter 35.

Dated: February 8, 2008.

Steve H. Murdock,

Director, Bureau of the Census.

[FR Doc. E8–2667 Filed 2–12–08; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Review and Partial Rescission of Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from interested parties, the Department of Commerce (''the Department'') is conducting an administrative review of the antidumping duty order on wooden bedroom furniture from the People's Republic of China (''PRC''). The period of review (''POR'') for this administrative review is January 1, 2006, through December 31, 2006. This administrative review covers multiple producers/exporters of the subject merchandise, three of which are being individually investigated as mandatory respondents. The Department is also conducting a new shipper review for an exporter/producer. The POR for the new shipper review is also January 1, 2006, through December 31, 2006.

We preliminarily determine that all three mandatory respondents in the administrative review made sales in the United States at prices below normal value (''NV''). With respect to the remaining respondents in the administrative review (herein after collectively referred to as the Separate-Rate Applicants), we preliminarily determine that 30 entities have provided sufficient evidence that they are separate from the state-controlled entity, and we have established a weighted-average margin based on the rates we have calculated for the three mandatory respondents, excluding any rates that are zero, *de minimis*, or based entirely on adverse facts available, to be applied to these separate rate entities. In addition, we have determined to rescind the review with respect to three entities in this administrative review. See ''Partial Rescission'' section below. Further, we preliminarily determine that the remaining separate-rate applicants have not demonstrated that they are entitled to a separate rate, and will thus be considered part of the PRC entity. Finally, we preliminarily determine that the new shipper made sales in the United States at prices below normal value. If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on entries of subject merchandise during the POR for which the importer-specific assessment rates are above *de minimis*.

We invite interested parties to comment on these preliminary results. Parties who submit comments are requested to submit with each argument a statement of the issue and a brief summary of the argument. We intend to issue the final results of this review no later than 120 days from the date of publication of this notice.

EFFECTIVE DATE: February 13, 2008.

FOR FURTHER INFORMATION CONTACT: Paul Stolz or Hua Lu, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4474 and (202) 482–6478, respectively.

Background

On January 4, 2005, the Department published in the **Federal Register** the antidumping duty order on wooden bedroom furniture from the PRC. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China,* 70 FR 329 (January 4, 2005). On January 3, 2007, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on wooden bedroom furniture from the PRC for the period January 1, 2006, through December 31, 2006. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review,* 72 FR 99 (January 3, 2007). On March 7, 2007, the Department initiated the second administrative review of the antidumping duty order on wooden bedroom furniture from the PRC. *See Notice of Initiation of Administrative Review of the Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China,* 72 FR 10159 (March 7, 2007) (''*Initiation Notice*''). Additionally, on March 7, 2007, the Department initiated new shipper reviews of the order with respect to the following two companies: Golden Well International (HK), Ltd. (''Golden Well'') and its supplier Zhangzhou XYM Furniture Product Co., Ltd. and Mei Jia Ju Furniture Industrial (Shenzhen) Co., Ltd. (''Mei Jia Ju''). *See Notice of Initiation of New Shipper Reviews on Wooden Bedroom Furniture from the*

People's Republic of China, 72 FR 10158 (March 7, 2007) (''*New Shipper Initiation Notice*''). Further, on May 30, 2007, the Department added one company to the administrative review which was inadvertently omitted from the *Initiation Notice. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 72 FR 29968 (May 30, 2007).

Between March 7 and March 14, 2007, the Department issued quantity and value (''Q&V'') questionnaires, separate-rate certifications, and separate-rate applications to the 197 named firms for which the Department initiated an administrative review. Between March 21 and May 7, 2007, the Department received separate-rate certifications from 124 entities, separate-rate applications from 25 entities, and Q&V questionnaire responses from 183 entities.

On April 5, 2007, Petitioners [1] requested that the Department determine whether antidumping duties have been absorbed by certain exporters or producers. Also, on April 5, 2007, Petitioners submitted comments with respect to respondent selection. On April 20, 2007, Shing Mark Enterprises Co. Ltd., Carven Industries Limited (VI), Carven Industries Limited (HK), Dongguan Zhenxin Furniture Co., Ltd. And Dongguan Yongpeng Furniture Co., Ltd. (collectively, ''Shing Mark'') submitted comments with respect to respondent selection.

Because of the large number of companies subject to this review, on June 20, 2007, the Department issued its respondent-selection memorandum, selecting the following three companies as mandatory respondents in this administrative review: (1) Shanghai Starcorp Furniture Co., Ltd., Starcorp Furniture (Shanghai) Co., Ltd., Orin Furniture (Shanghai) Co., Ltd., Shanghai Star Furniture Co., Ltd., and Shanghai Xing Ding Furniture Industrial Co., Ltd. (collectively, ''Starcorp''); (2) Jiangsu Dare Furniture Co., Ltd., Fujian Lianfu Forestry Co, Ltd. aka Fujian Wonder Pacific Inc., and Fuzhou Huan Mei Furniture Co., Ltd. (collectively ''Dare Group''); and (3) Teamway Furniture (Dong Guan) Co. Ltd., and Brittomart Inc. (collectively ''Teamway''). *See Antidumping Duty Administrative Review of Wooden Bedroom Furniture from the People's Republic of China: Selection of Respondents,* dated June 20, 2007.

[1] The Petitioners in this case are the American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company.

On June 21, 2007, the Department issued its questionnaire to the Dare Group, Starcorp and Teamway. On August 20, 2007, Starcorp withdrew its request for the Department to conduct the second administrative review and its participation in this review. On August 31, 2007, Petitioners requested that the Department conduct verification of the Dare Group and Teamway.

Between March 7 and June 6, 2007, several parties withdrew their requests for administrative review. On August 2, 2007, the Department published a notice rescinding the review with respect to the entities for whom all review requests had been withdrawn. *See Notice of Partial Rescission of the Antidumping Duty Administrative Review on Wooden Bedroom Furniture from the People's Republic of China,* 72 FR 42396 (August 2, 2007).

On May 29, 2007, Golden Well withdrew its request for a new shipper review. *See Notice of Partial Rescission of New Shipper Review on Wooden Bedroom Furniture from the People's Republic of China,* 72 FR 50933 (September 5, 2007).

On August 20, 2007, Leefu Wood (Dongguan) Co., Ltd. (''Leefu'') and King Rich International Ltd. (''King Rich'') sent a letter to the Department informing us that one of Leefu's shareholders had set up two companies which will export subject merchandise in the future and that all of Leefu's subject merchandise will be exported through King Rich, Unique Furniture Co., Ltd. (''Unique Furniture'') and Classic Furniture Co., Ltd. (''Classic Furniture''). None of the aforementioned firms, (*i.e.*, Unique Furniture, Classic Furniture, Leefu or King Rich) are being reviewed in this proceeding. On September 5, 2007, Petitioners responded to Leefu and King Rich's letter, stating that while Leefu and King Rich collectively have a separate-rate from the investigation, neither Unique Furniture nor Classic Furniture has been granted separate rate status, and therefore, entries should receive the cash deposit rate of 216.01 percent.

Additionally, Petitioners state that the proper venue to address a change in legal structure would be the next review period. Consistent with our normal practice, we find the proper place to address Leefu's change in ownership would be either a changed circumstances review or within the context of an administrative review. *See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review,* 72 FR 60812 (October 26, 2007). Because neither Leefu or King Rich are part of the current administrative review, we will not address whether Unique Furniture or Classic Furniture are part of the Leefu and King Rich group of companies.

On August 27, 2007, pursuant to 19 CFR 351.214(j)(3), Mei Jia Ju agreed to waive the time limits applicable to the new shipper review and to allow for the conduct of its new shipper review concurrently with the administrative review. *See* Memorandum to the file, *Wooden Bedroom Furniture from the People's Republic of China—Alignment of the 1/1/06–12/31/06 Annual Administrative and New Shipper Review,* dated August 27, 2007.

On September 28, 2007, Petitioners withdrew their review request of Zhangjiagang Zhen Yan Decoration Co. Ltd. (''Zheng Yan'') (see the ''Partial Rescission'' section of this notice, below).

On October 5, 2007, the Department issued a letter to interested parties seeking comments on surrogate country selection and surrogate values. On October 19, 2007, Petitioners, Teamway, and American Signature, Inc. (''ASI'') submitted comments regarding the selection of a surrogate country. Additionally, on October 29 and November 8, 19, and 29, 2007, Petitioners and ASI submitted rebuttal surrogate country comments. Also, on November 8, 2007, Teamway and Petitioners submitted surrogate value information.

On October 1, 2007, we extended the deadline for the issuance of the preliminary results of the administrative review and new shipper review until January 31, 2008. *See Wooden Bedroom Furniture from the People's Republic of China: Extension of Time Limits for the Preliminary Results of the Antidumping Duty Administrative Review and New Shipper Reviews,* 72 FR 57913 (October 11, 2007).

Between November 8 and November 29, 2007, ASI, Teamway and Petitioners submitted surrogate value information and comments regarding selection of surrogate values.

On November 19, 2007, Petitioners made submissions to the Department in which they argued that ASI, a U.S. importer of subject merchandise, does not have a stake in the outcome of this segment of the proceeding and, therefore, the Department should reject ASI's submissions concerning surrogate country selection and surrogate values. Moreover, Petitioners argued that the Department should deny ASI's representatives' access to business proprietary information under

administrative protective order (''APO'').[2]

On November 21, 2007, ASI submitted a rebuttal to Petitioners' comments. ASI argued that Petitioners' standing in this review could be challenged on the basis that Petitioners did not submit supporting documentation establishing that they produced subject merchandise during the POR. Moreover, ASI contended that Petitioners have not submitted any documentation supporting their arguments with respect to ASI's standing.

Pursuant to the Act, ASI, as an importer of subject merchandise, is an interested party to the proceeding. *See* Section 771(9)(A) of the Tariff Act of 1930, as amended (''the Act'') which defines an interested party as ''a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise * * *.'' Additionally, the Act does not further detail any specifications, conditions, or restrictions with respect to the eligibility of an importer of subject merchandise in terms of its designation as an interested party or its rights thereas. As Petitioners point out in their November 20, 2007, submission at 3–4, on July 26, 2007, ASI submitted a CBP form (*i.e.*, CF 7501 Entry Summary), confirming that ASI imported subject merchandise during the POR. Thus, we find that ASI is an interested party that is eligible to make submissions on the record of this review and whose representative is eligible to receive business proprietary information under APO as long as it meets the APO eligibility requirements.

Company-Specific Chronology

As described above, the Department issued its antidumping questionnaire to the three mandatory respondents. Upon receipt of the various responses, the Petitioners provided comments and the Department issued supplemental questionnaires. Because the chronology of this stage of the administrative review is extensive and varies by respondent, the Department has separated this portion of the background section by company.

Dare Group

On June 21, 2007, the Department issued its antidumping questionnaire to the Dare Group. The Dare Group submitted its response to section A of the Department's questionnaire on July 26, 2007, and submitted its responses to sections C and D of the Department's questionnaire on August 20, 2007. The Department issued supplemental questionnaires with respect to sections A and C to the Dare Group on November 7, 2007. The Department issued a supplemental questionnaire with respect to section D to the Dare Group on November 9, 2007. The Dare Group submitted its response to the sections A and C supplemental questionnaire on December 5, 2007, and to the section D supplemental questionnaire on December 14, 2007.

Teamway

On June 21, 2007, the Department issued its antidumping questionnaire to Teamway. On July 31, 2007, Teamway submitted its response to section A of the Department's questionnaire. On August 21 and August 23, 2007, Teamway submitted its response to sections C and D of the Department's questionnaire. The Department issued a supplemental questionnaire with respect to sections A, C, and D to Teamway on November 1, 2007, to which Teamway responded on December 4, 2007. On November 8, 2007, Teamway submitted surrogate value information. The Department issued a supplemental factors-of-production (''FOP'') questionnaire to Teamway on November 3, 2007, and received a response on November 26, 2007. On January 2 and January 4, 2008, Teamway submitted revised databases with the FOP information.

Mei Jia Ju and Starcorp

For a complete discussion of Mei Jia Ju's and Starcorp's company-specific chronologies, see the ''Facts Available'' section of this notice, below.

Period of Review

The POR is January 1, 2006, through December 31, 2006.

Scope of the Order

The product covered by the order is wooden bedroom furniture. Wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and approximately the same material and/or finish. The subject merchandise is made substantially of wood products, including both solid wood and also engineered wood products made from wood particles, fibers, or other wooden materials such as plywood, oriented strand board, particle board, and fiberboard, with or without wood veneers, wood overlays, or laminates, with or without non-wood components or trim such as metal, marble, leather, glass, plastic, or other resins, and whether or not assembled, completed, or finished.

The subject merchandise includes the following items: (1) Wooden beds such as loft beds, bunk beds, and other beds; (2) wooden headboards for beds (whether stand-alone or attached to side rails), wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds; (3) night tables, night stands, dressers, commodes, bureaus, mule chests, gentlemen's chests, bachelor's chests, lingerie chests, wardrobes, vanities, chessers, chifforobes, and wardrobe-type cabinets; (4) dressers with framed glass mirrors that are attached to, incorporated in, sit on, or hang over the dresser; (5) chests-on-chests,[3] highboys,[4] lowboys,[5] chests of drawers,[6] chests,[7] door chests,[8] chiffoniers,[9] hutches,[10] and armoires; [11] (6) desks, computer stands, filing cabinets, bookcases, or writing tables that are attached to or incorporated in the subject merchandise; and (7) other bedroom furniture consistent with the above list.

The scope of the order excludes the following items: (1) Seats, chairs, benches, couches, sofas, sofa beds, stools, and other seating furniture; (2) mattresses, mattress supports (including box springs), infant cribs, water beds, and futon frames; (3) office furniture, such as desks, stand-up desks, computer cabinets, filing cabinets, credenzas, and

[2] *See also* Petitioner's January 14, 2008, submission.

[3] A chest-on-chest is typically a tall chest-of-drawers in two or more sections (or appearing to be in two or more sections), with one or two sections mounted (or appearing to be mounted) on a slightly larger chest; also known as a tallboy.

[4] A highboy is typically a tall chest of drawers usually composed of a base and a top section with drawers, and supported on four legs or a small chest (often 15 inches or more in height).

[5] A lowboy is typically a short chest of drawers, not more than four feet high, normally set on short legs.

[6] A chest of drawers is typically a case containing drawers for storing clothing.

[7] A chest is typically a case piece taller than it is wide featuring a series of drawers and with or without one or more doors for storing clothing. The piece can either include drawers or be designed as a large box incorporating a lid.

[8] A door chest is typically a chest with hinged doors to store clothing, whether or not containing drawers. The piece may also include shelves for televisions and other entertainment electronics.

[9] A chiffonier is typically a tall and narrow chest of drawers normally used for storing undergarments and lingerie, often with mirror(s) attached.

[10] A hutch is typically an open case of furniture with shelves that typically sits on another piece of furniture and provides storage for clothes.

[11] An armoire is typically a tall cabinet or wardrobe (typically 50 inches or taller), with doors, and with one or more drawers (either exterior below or above the doors or interior behind the doors), shelves, and/or garment rods or other apparatus for storing clothes. Bedroom armoires may also be used to hold television receivers and/or other audio-visual entertainment systems.

bookcases; (4) dining room or kitchen furniture such as dining tables, chairs, servers, sideboards, buffets, corner cabinets, china cabinets, and china hutches; (5) other non-bedroom furniture, such as television cabinets, cocktail tables, end tables, occasional tables, wall systems, book cases, and entertainment systems; (6) bedroom furniture made primarily of wicker, cane, osier, bamboo or rattan; (7) side rails for beds made of metal if sold separately from the headboard and footboard; (8) bedroom furniture in which bentwood parts predominate; [12] (9) jewelry armoires; [13] (10) cheval mirrors; [14] (11) certain metal parts; [15] (12) mirrors that do not attach to, incorporate in, sit on, or hang over a dresser if they are not designed and marketed to be sold in conjunction with a dresser as part of a dresser-mirror set; and (13) upholstered beds.[16]

Imports of subject merchandise are classified under subheading 9403.50.9040 of the HTSUS as ''wooden * * * beds'' and under subheading 9403.50.9080 of the HTSUS as ''other * * * wooden furniture of a kind used in the bedroom.'' In addition, wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds may also be entered under subheading 9403.50.9040 of the HTSUS as ''parts of wood'' and framed glass mirrors may also be entered under subheading 7009.92.5000 of the HTSUS as ''glass mirrors * * * framed.'' This order covers all wooden bedroom furniture meeting the above description, regardless of tariff classification. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Partial Rescission of Administrative Review

On September 28, 2007, Petitioners withdrew their administrative review request with respect to Zheng Yan. Petitioners stated that although the regulatory deadline for withdrawal of requests for review had passed, the Department could still exercise its discretion to extend the time for accepting for withdrawal and therefore could rescind the review for Zheng Yan. We have determined to grant Petitioners' withdrawal of its request to review Zheng Yan. Although Petitioners submitted their withdrawal request after the 90-day regulatory deadline at 19 CFR 351.213(d)(1), the Department had already completed its selection of mandatory respondents and Zheng Yan was not selected as a mandatory respondent in this administrative review. Therefore, the Department's selection process of the mandatory respondents for this administrative review was not compromised by Petitioners' late withdrawal request. Furthermore, the Department had not expended significant resources as of the date of Petitioners' withdrawal request. Therefore, the Department is extending the time for accepting requests for withdrawal and is partially rescinding the administrative review with respect to Zheng Yan.

Further, the Department is partially rescinding this review with respect to Winny Universal, Ltd. and Zhongshan Winny Furniture Ltd. In Winny Overseas Ltd.'s separate-rate application, it stated that neither Winny Universal, Ltd. nor Zhongshan Winny Furniture Ltd. had exports of subject merchandise during the POR. *See* Winny Overseas Ltd. Separate Rate Application, dated April 5, 2007. Our review of the CBP import data did not reveal any contradictory information.

Duty Absorption

On April 5, 2007, Petitioners requested that the Department determine whether the mandatory respondents and separate-rate respondents had absorbed antidumping duties for U.S. sales of wooden bedroom furniture made during the POR. Section 751(a)(4) of the Act provides for the Department, if requested, to determine during an administrative review initiated two or four years after publication of the order, whether antidumping duties have been absorbed by a foreign producer or exporter, if the subject merchandise is sold in the United States through an affiliated importer. Pursuant to section 777A(f)(2)(B) of the Act, we selected three exporters (*i.e.*, the Dare Group, Starcorp, and Teamway) as mandatory respondents in this administrative review. Both the Dare Group and Teamway only sold subject merchandise as export price sales. Because neither of these companies sold subject merchandise through an affiliated U.S. importer, we did not investigate whether the Dare Group and Teamway absorbed duties. *See* section 751(a)(4) of the Act. Also, because Starcorp decided not to participate in this review, we did not have adequate information to investigate whether Starcorp absorbed duties. *See* section 751(a)(4) of the Act.

Petitioners also requested that the Department investigate whether separate-rate respondents had absorbed duties. Because of the large number of companies subject to this review, the Department only selected three companies as mandatory respondents in this administrative review and thus only issued its complete questionnaire to these companies. In determining whether antidumping duties have been absorbed, the Department requires certain specific data (*i.e.*, U.S. sales data) to ascertain whether those sales have been made at less than NV. Since U.S. sales data is only obtained from the

[12] As used herein, bentwood means solid wood made pliable. Bentwood is wood that is brought to a curved shape by bending it while made pliable with moist heat or other agency and then set by cooling or drying. See Customs' Headquarters' Ruling Letter 043859, dated May 17, 1976.

[13] Any armoire, cabinet or other accent item for the purpose of storing jewelry, not to exceed 24″ in width, 18″ in depth, and 49″ in height, including a minimum of 5 lined drawers lined with felt or felt-like material, at least one side door (whether or not the door is lined with felt or felt-like material), with necklace hangers, and a flip-top lid with inset mirror. *See* Issues and Decision Memorandum from Laurel LaCivita to Laurie Parkhill, Office Director, Concerning Jewelry Armoires and Cheval Mirrors in the Antidumping Duty Investigation of Wooden Bedroom Furniture from the People's Republic of China, dated August 31, 2004. *See also Wooden Bedroom Furniture from the People's Republic of China: Notice of Final Results of Changed Circumstances Review and Revocation in Part,* 71 FR 38621 (July 7, 2006).

[14] Cheval mirrors are any framed, tiltable mirror with a height in excess of 50″ that is mounted on a floor-standing, hinged base. Additionally, the scope of the order excludes combination cheval mirror/jewelry cabinets. The excluded merchandise is an integrated piece consisting of a cheval mirror, *i.e.*, a framed tiltable mirror with a height in excess of 50 inches, mounted on a floor-standing, hinged base, the cheval mirror serving as a door to a cabinet back that is integral to the structure of the mirror and which constitutes a jewelry cabinet lined with fabric, having necklace and bracelet hooks, mountings for rings and shelves, with or without a working lock and key to secure the contents of the jewelry cabinet back to the cheval mirror, and no drawers anywhere on the integrated piece. The fully assembled piece must be at least 50 inches in height, 14.5 inches in width, and 3 inches in depth. *See Wooden Bedroom Furniture From the People's Republic of China: Final Results of Changed Circumstances Review and Determination To Revoke Order in Part,* 72 FR 948 (January 9, 2007).

[15] Metal furniture parts and unfinished furniture parts made of wood products (as defined above) that are not otherwise specifically named in this scope (*i.e.*, wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds) and that do not possess the essential character of wooden bedroom furniture in an unassembled, incomplete, or unfinished form. Such parts are usually classified under the Harmonized Tariff Schedule of the United States (''HTSUS'') subheading 9403.90.7000.

[16] Upholstered beds that are completely upholstered, *i.e.*, containing filling material and completely covered in sewn genuine leather, synthetic leather, or natural or synthetic decorative fabric. To be excluded, the entire bed (headboards, footboards, and side rails) must be upholstered except for bed feet, which may be of wood, metal, or any other material and which are no more than nine inches in height from the floor. *See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Changed Circumstances Review and Determination to Revoke Order in Part,* 72 FR 7013 (February 14, 2007).

complete questionnaire (*i.e.*, only mandatory respondents submit U.S. sales data), and the separate-rate respondents were required only to provide information on their separate-rate status (*i.e.*, not required to provide any U.S. sales data), we do not have the information necessary to assess whether the separate-rate respondents absorbed duties. Accordingly, the separate-rate respondents were not selected as mandatory respondents and, therefore, we cannot make duty absorption determinations with respect to these companies.

Non-Market Economy Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non-market economy (''NME'') country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Preliminary Results 2001–2002 Administrative Review and Partial Rescission of Review,* 68 FR 7500 (February 14, 2003). None of the parties to this proceeding has contested such treatment. Accordingly, we calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

Surrogate Country

When the Department is investigating imports from an NME country, section 773(c)(1) of the Act directs it to base NV on the NME producer's FOPs. The Act further instructs that valuation of the FOPs shall be based on the best available information in a surrogate market economy country or countries considered to be appropriate by the Department. *See* section 773(c)(1) of the Act. When valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more market economy countries that are: (1) At a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise. *See* section 773(c)(4) of the Act. Further, the Department normally values all FOPs in a single surrogate country. *See* 19 CFR 351.308(c)(2). The sources of the surrogate values (''SV'') are discussed under the ''Normal Value'' section below and in the Memorandum to the File, *Factors Valuations for the Preliminary Results of the Administrative Review,* dated January 31, 2008 *(''Factor Valuation Memorandum''),* which is on file in the Central Records Unit (''CRU''), Room 1117 of the main Department building.

In examining which country to select as its primary surrogate for this proceeding, the Department first determined that India, Indonesia, Sri Lanka, the Philippines, and Egypt are countries comparable to the PRC in terms of economic development. *See* Memorandum to the File, *Administrative Review of Wooden Bedroom Furniture from the People's Republic of China (PRC): Request for a List of Surrogate Countries,* dated October 2, 2007 *(''Policy Memo''),* which is on file in the CRU.

On October 5, 2007, the Department issued a request for interested parties to submit comments on surrogate country selection. Petitioners submitted surrogate country comments on October 19, 2007 (''Petitioners' Surrogate Country Letter''). ASI also submitted surrogate country comments on October 19, 2007. Petitioners submitted rebuttal comments with respect to surrogate country selection on October 29 and November 19, 2007. ASI submitted rebuttal comments with respect to surrogate country selection on November 8 and November 29, 2007. In addition, Teamway submitted comments regarding surrogate country selection on October 19, 2007.

Teamway claims that India is not at a level of economic development comparable to that of the PRC. Teamway argues that the gross national incomes (''GNI'') of the Philippines and Indonesia are closer to the GNI of the PRC than the GNI of India. Additionally, Teamway argues that the Philippines and Indonesia are significant producers of wooden bedroom furniture. Finally, Teamway argues that the Philippines or Indonesia should be selected as the surrogate country; however, Teamway did not submit surrogate value data for either country.

ASI argues that India and the PRC are not at a comparable level of economic development because they are too dissimilar in terms of GNI. ASI contends that predictability is not a basis to continue to use India as the surrogate country if doing so results in inaccurate surrogate values. Additionally, ASI asserts that the Department has the authority to change surrogate countries during any segment of the proceeding, and cites two cases in which the Department used the Philippines as the surrogate country. Also, ASI claims that the Department's selection of economically comparable countries is flawed and unsupported by record evidence. Further, ASI argues that in determining whether countries are at a comparable level of economic development, the Department's regulations direct the Department to ''place primary emphasis on per capita GDP as the measure of economic comparability'' and contends that the Department ''skipped over'' 16 countries closer to the PRC in terms of GNI to include India on the Department's list of designated surrogate countries. Furthermore, ASI argues that [t]he Department's attempt to belittle the vast difference in GNI per capita between the PRC and India is unreasonable and inconsistent with the Department's obligation to use the ''best'' available information and to calculate dumping margins as accurately as possible. In addition, ASI cites reports and Infodrive data which it claims show that Indian import data are corrupted by mis-classifications and mis-valuations, thus arguing Indian import statistics are not reliable. Finally, ASI argues that the Philippines is the appropriate surrogate country and provided extensive SV data from the Philippines.

Petitioners argue that India satisfies the statutory requirements for the selection of the surrogate country because it is at a level of economic development comparable to that of the PRC and is a significant producer of comparable merchandise. Additionally, Petitioners argue that the Department is not required to select the country listed in the *Policy Memo* that is at a level of economic development most comparable to that of the PRC. Also, Petitioners contend that it is legally irrelevant that 16 countries may have a per-capita GNI closer to that of the PRC than the per-capita GNI of India. Further, Petitioners argue that other factors, such as total GNI should be used to determine economic comparability, and that India's total GNI is closer to that of the PRC than that of Indonesia or the Philippines. Furthermore, Petitioners cite a USTR [17] report that they claim demonstrates inconsistencies, mis-classification, and mis-valuation in the Philippine import statistics. In addition, Petitioners claim that corruption in the Philippine customs service renders the Philippine import statistics unreliable. Moreover, Petitioners contend that the Department has used India as the surrogate country for the PRC in recent cases. Finally, Petitioners argue that India is the appropriate surrogate country and submitted Indian SV data.

After evaluating interested parties' comments, the Department determined that the Philippines is the appropriate surrogate country to use in this review.

[17] USTR, *2006 National Trade Estimate Report on Foreign Trade Barriers,* at pages 524–525.

The Department based its decision on the following facts: (1) The Philippines is at a level of economic development comparable to that of the PRC; (2) the Philippines is a significant producer of comparable merchandise; and (3) the Philippines provides the best opportunity to use quality, publicly available data to value the FOPs. While both India and the Philippines are comparable and provide reliable sources of data, we find surrogate financial data from the Philippines better reflects the overall experience of producers of comparable merchandise in a surrogate country. Specifically, after examining the financial statements submitted for both countries, we have concluded that we have two useable financial statements from the Philippines, but only one from India. Generally, where available, we prefer to use more than one financial statement in order to obtain a broader industry representation. *See Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review,* 67 FR 72139 (December 4, 2002), and accompanying Issues and Decision Memorandum at Comment 5.

Therefore, because the Philippines better represents the experience of producers of comparable merchandise operating in a surrogate country, we have selected the Philippines as the surrogate country and, accordingly, have calculated NV using Philippine prices to value the respondents' FOPs, when available and appropriate. We have obtained and relied upon publicly available information wherever possible. *See Factor Valuation Memorandum.* In accordance with 19 CFR 351.301(c)(3)(ii), interested parties may submit publicly available information to value FOPs until 20 days after the date of publication of these preliminary results.

Affiliation

Section 771(33) of the Act directs that the following persons will be considered affiliated: (A) Members of a family, including brothers and sisters (whether by whole or half blood), spouse, ancestors, and lineal descendants; (B) Any officer or director of an organization and such organization; (C) Partners; (D) Employer and employee; (E) Any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting stock or shares of any organization and such organization; (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person; and (G) Any person who controls any other person and such other person.

For purposes of affiliation, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person. *See* Section 771(33) of the Act. In order to find affiliation between companies, the Department must find that at least one of the criteria listed above is applicable to the respondents. Moreover, stock ownership is not the only evidentiary factor that the Department may consider to determine whether a person is in a position to exercise restraint or direction over another person, *e.g.*, control may be established through corporate or family groupings, or joint ventures and other means as well. *See* The Statement of Administrative Action accompanying the Uruguay Round Agreements Act *(''SAA''),* H.R. Doc. 103–316, 838 (1994). *See also Certain Fresh Cut Flowers from Colombia; Final Results of Antidumping Duty Administrative Review,* 61 FR 42833, 42853 (August 19, 1996); and *Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review,* 62 FR 53808, 53810 (October 16, 1997).

To the extent that the affiliation provisions in section 771(33) of the Act do not conflict with the Department's application of separate rates and the statutory NME provisions in section 773(c) of the Act, the Department will determine that exporters and/or producers are affiliated if the facts of the case support such a finding. *See Certain Preserved Mushrooms From the People's Republic of China: Preliminary Results of Sixth New Shipper Review and Preliminary Results and Partial Rescission of Fourth Antidumping Duty Administrative Review,* 69 FR 10410, 10413 (March 5, 2004), unchanged in *Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review: Certain Preserved Mushrooms From the People's Republic of China,* 70 FR 54361 (September 14, 2005).

The Dare Group

Following these guidelines, we preliminarily determine that Fujian Lianfu Forestry Co. Ltd./Fujian Wonder Pacific Inc./Fuzhou Huan Mei Furniture Co., Ltd./Jiangsu Dare Furniture Co., Ltd., are affiliated pursuant to sections 771(33)(E) and (F) of the Act and that these companies should be treated as a single entity for the purposes of the antidumping administrative review of wooden bedroom furniture from the PRC. Based on our examination of the evidence presented in the Dare Group's questionnaire responses, we have determined that: (1) Fujian Lianfu Forestry Co. Ltd./Fujian Wonder Pacific Inc./Fuzhou Huan Mei Furniture Co., Ltd./Jiangsu Dare Furniture Co., Ltd. are affiliated producers of identical or similar merchandise; and (2) the potential for manipulation of price or production exists with respect to Fujian Lianfu Forestry Co. Ltd./Fujian Wonder Pacific Inc./Fuzhou Huan Mei Furniture Co., Ltd./Jiangsu Dare Furniture Co., Ltd. *See* Memorandum to Wendy Frankel, Director, Office 8, NME/China Group, through Robert Bolling, Program Manager, From Paul Stolz, Case Analyst, *Antidumping Duty Administrative Review of Wooden Bedroom Furniture from the People's Republic of China: Fujian Lianfu Forestry Co. Ltd./Fujian Wonder Pacific Inc./Fuzhou Huan Mei Furniture Co., Ltd./Jiangsu Dare Furniture Co., Ltd. and Treatment as a Single Entity,* dated January 31, 2008.

Separate Rates

In proceedings involving NME countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise in an NME country subject to review this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate. Two mandatory respondents, the Dare Group and Teamway, the new shipper, Mei Jia Ju, and 25 separate-rate respondents have provided company-specific separate-rate information and each has further stated that it meets the standards for the assignment of a separate rate.

We have examined the information submitted to determine whether each of these companies is eligible for a separate rate. The Department's separate-rate test to determine whether the exporters are independent from government control does not consider, in general, macroeconomic/border-type controls, *e.g.*, export licenses, quotas, and minimum export prices, particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision-making process at the individual firm level. *See, e.g., Certain Cut-to-Length Carbon Steel Plate from Ukraine: Final Determination of Sales at Less than Fair Value,* 62 FR 61754, 61758 (November 19, 1997); and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from*

the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 62 FR 61276, 61279 (November 17, 1997).

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China,* 56 FR 20588 (May 6, 1991) *(''Sparklers''),* as amplified by *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China,* 59 FR 22585 (May 2,1994) *(''Silicon Carbide'').* In accordance with the separate-rates criteria, the Department assigns separate rates in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

1. Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies. *See Sparklers,* 56 FR 20589.

Our analysis shows that, for mandatory respondents, the Dare Group and Teamway, and the new shipper, Mei Jia Ju, and certain separate-rate respondents, the evidence on the record supports a preliminary finding of *de jure* absence of government control based on record statements and supporting documentation showing the following: (1) An absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) the applicable legislative enactments decentralizing control of the companies; and (3) any other formal measures by the government decentralizing control of companies. *See* Memorandum to Wendy J. Frankel, Director, Office 8, Import Administration, from Robert Bolling, Program Manager, *Wooden Bedroom Furniture from the People's Republic of China: Separate Rates for Producers/ Exporters that Submitted Separate Rate Certifications and Applications (''Separate-Rates Memo''),* dated January 31, 2008.

2. Absence of De Facto Control

In previous cases, the Department learned that certain enactments of the PRC central government have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. *See e.g., Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China,* 63 FR 72255, 72257 (December 31, 1998). Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control which would preclude the Department from assigning separate rates. The Department considers four factors in evaluating whether each respondent is subject to *de facto* government control of its export functions: (1) Whether the exporter sets its own export prices independent of the government and without the approval of a government authority; (2) whether the respondent has the authority to negotiate and sign contracts, and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of its management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

We determine that, for mandatory respondents, the Dare Group and Teamway, and the new shipper, Mei Jia Ju, and certain separate-rate respondents, the evidence on the record supports a preliminary finding of *de facto* absence of government control based on record statements and supporting documentation showing the following: (1) Each exporter sets its own export prices independent of the government and without the approval of a government authority; (2) each exporter retains the proceeds from its sales and makes independent decisions regarding disposition of profits or financing of losses; (3) each exporter has the authority to negotiate and sign contracts and other agreements; and (4) each exporter has autonomy from the government regarding the selection of management.

Therefore, the evidence placed on the record of this administrative review by the mandatory respondents, the Dare Group and Teamway, and the new shipper, Mei Jia Ju, and certain separate-rate respondents demonstrates an absence of government control, both in law and in fact, with respect to each exporter's exports of the subject merchandise, in accordance with the criteria identified in *Sparklers* and *Silicon Carbide.* As a result, for the purposes of these preliminary results, we have granted separate, company-specific rates to the Dare Group, Teamway, Mei Jia Ju, and certain separate-rate respondents [18] that shipped wooden bedroom furniture to the United States during the POR. For a full discussion of this issue and list of separate-rate respondents, please see the *Separate-Rates Memo.*

Because Starcorp withdrew from participation in this segment of the proceeding and requested that all of its business proprietary submissions be returned or destroyed (including its April 4, 2007, proprietary version separate rate certification), the Department does not have any record evidence upon which to determine whether Starcorp is eligible for a separate rate for this review period. Thus, as Starcorp has not demonstrated its entitlement to a separate rate, it is considered to be part of the PRC-entity and will be subject to the PRC-wide rate. (*See* ''The PRC-Wide Entity'' section below.)

Furthermore, we have found that certain separate-rate applicants [19] have not demonstrated an absence of government control over their export activities, both in law and in fact, and are therefore, subject to the PRC-entity rate. *See Separate-Rates Memo.*

Margins for Separate-Rate Applicants

For the exporters subject to this review that were determined to be eligible for separate-rate status, but were not selected as mandatory respondents (''Separate-Rate Recipients''), we have established a weighted-average margin based on an average of the rates we calculated for the mandatory respondents, excluding any rates that are zero, *de minimis*, or based entirely on adverse facts available. That rate is 39.49 percent. Entities receiving this rate are identified by name in the ''Preliminary Results of Review'' section of this notice and our *Separate-Rates Memo.*

Application of Facts Available

Section 776(a)(1) and (2) of the Act provides that the Department shall apply ''facts otherwise available'' if, *inter alia,* necessary information is not

[18] For a complete listing entities receiving a separate rate, see preliminary results of review chart, below.

[19] Beijing Mingyafeng Furniture Co., Ltd.; Country Roots; Hong Yu Furniture (Shenzhen) Co., Ltd.; Kunwa Enterprise Company; and Shanghai Starcorp Furniture Co., Ltd., Starcorp Furniture (Shanghai) Co., Ltd., Orin Furniture (Shanghai) Co., Ltd., Shanghai Star Furniture Co., Ltd., and Shanghai Xing Ding Furniture Industrial Co., Ltd.

on the record or an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits and subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act provides that the Department ''shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all applicable requirements established by the administering authority'' if the information is timely, can be verified, is not so incomplete that it cannot be used, and if the interested party acted to the best of its ability in providing the information. Where all of these conditions are met, the statute requires the Department to use the information supplied if it can do so without undue difficulties.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Such an adverse inference may include reliance on information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as ''[i]nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise.'' *See SAA* at 870. Corroborate means that the Department will satisfy itself that the secondary information to be used has probative value. *Id.* To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used.

Application of Total Adverse Facts Available

Mei Jia Ju

As noted above, the Department initiated a new shipper review of Mei Jia Ju's exports of merchandise covered by the antidumping duty order on wooden bedroom furniture from the PRC. *See New Shipper Review Initiation Notice*. On April 11, 2007, the Department issued its antidumping duty questionnaire to Mei Jia Ju. Included in the Department's questionnaire are the Department's requirements and procedures for filing submissions. The Department's questionnaire specified that section A and sections C and D were due on May 2 and May 18, 2007, respectively. On April 28, 2007, Mei Jia Ju emailed the Department to ask for clarification of the due date of the response to the Original Questionnaire. On that same day the Department responded to Mei Jia Ju's email and specified to Mei Jia Ju that submissions were due in the CRU of the Department by close of business on the due date specified in the questionnaire. *See* Memorandum to the File, *Wooden Bedroom Furniture from the People's Republic of China: Email from Mei Jia Ju Furniture Industrial (Shenzhen) Co., Ltd. Regarding Deadlines* (December 5, 2007) (''*Mei Jia Ju Deadline Memo*''). On May 1, 2007, the Department received an extension request from Mei Jia Ju for the submission of its responses to sections C & D of the Department's questionnaire, and on May 10, 2007, the Department granted Mei Jia Ju's extension request. On May 3, 2007, the Department received Mei Jia Ju's section A response, and on May 18, 2007, the Department received Mei Jia Ju's response to sections C & D of the Department's questionnaire. On October 30, 2007, the Department issued its supplemental A, C & D questionnaire to Mei Jia Ju, with a due date of November 14, 2007. On November 19, 2007, the Department received Mei Jia Ju's Sections A, C & D supplemental response. On December 18, 2007, the Department rejected and returned Mei Jia Ju's Sections A, C & D supplemental response as untimely, and informed Mei Jia Ju that its November 19, 2007, submission would not be considered by the Department. *See* December 18, 2007, letter from Wendy J. Frankel to Dr. He Peihua.

Sections 776(a)(1) and (2) of the Act provides that the Department shall apply ''facts otherwise available'' if necessary information is not on the record or an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

The Department has preliminarily determined that the use of facts otherwise available is warranted for Mei Jia Ju pursuant to section 776(a)(2)(B) of the Act because Mei Jia Ju failed to provide information within the deadlines established by the Department. Specifically, Mei Jia Ju submitted its Sections A, C & D supplemental response to the Department five days after the deadline established for its submission, and did not request an extension prior to the deadline. The administration of antidumping reviews is conducted on a strict statutory time line. Provision is made to allow parties to notify the Department in writing prior to the established deadline, to request an extension if they are experiencing difficulty in meeting a given deadline. *See* 19 CFR 351.302(c). Effective allocation of administrative resources to conduct reviews within the statutory time line, however, is not possible if the Department is not informed of a party's need for an extension in a timely manner, and is left in the dark as to when, or if, parties will submit responses. In order for the Department to meet its own statutory deadlines and administer its cases effectively, parties must adhere to the due dates and deadlines the Department establishes for responding to questionnaires (*i.e.*, original or supplementals). It is further necessary that parties follow the Department's regulations should they need to request an extension.

Section 782(c)(1) of the Act provides that, if an interested party promptly notifies the Department that it is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the Department shall take into consideration the ability of the party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to

avoid imposing an unreasonable burden on that party. Section 782(c)(2) of the Act further provides that the Department shall consider the ability of the party submitting the information and shall provide such interested party assistance that is practicable. In this case, Mei Jia Ju did not notify the Department of any difficulty in submitting its response prior to the filing deadline. Further, the fact that Mei Jia Ju is aware of the Department's filing and service requirements and its right to request an extension is evident from the fact that Mei Jia Ju has properly requested an extension for filing a submission with the Department in the past. *See*, *e.g.*, Mei Jia Ju's May 1, 2007, sections C and D extension request. The Department's April 11, 2007, Original Questionnaire to Mei Jia Ju specified the filing and service requirements of all submissions to the Department. The October 30, 2007, sections A, C & D supplemental questionnaire reiterated these requirements. Additionally, the Department specifically instructed Mei Jia Ju on April 28, 2007, that submissions must be filed with the CRU on the due date specified in the questionnaire. *See*, *e.g.*, *Mei Jia Ju Deadline Memo*. Further, the Department specifically informed Mei Jia Ju in an April 25, 2007, email that no request for an extension will be considered by the Department unless it is officially filed in the CRU. *Id*. On December 26, 2007, after the Department had rejected Mei Jia Ju's supplemental questionnaire, Mei Jia Ju sent a letter by facsimile requesting an extension to file its supplemental questionnaire. On January 10, 2008, we rejected Mei Jia Ju's request to reconsider our determination not to accept the late supplemental response because the letter did not satisfy numerous filing and service requirements (*e.g.*, not properly filed, did not contain the requisite number of copies, etc.).

Section 782(d) of the Act provides that, in the case of a deficient response by the respondent, the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits and subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act provides that the Department ''shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all applicable requirements established by the administering authority'' if the information is timely, can be verified, is not so incomplete that it cannot be used, and if the interested party acted to the best of its ability in providing the information. Where all of these conditions are met, the statute requires the Department to use the information if it can do so without undue difficulties. The Department issued a supplemental sections A, C & D questionnaire to Mei Jia Ju noting numerous deficiencies in its response to the Original Questionnaire. *See* October 30, 2007, sections A, C & D supplemental questionnaire. The Department issued Mei Jia Ju an extensive supplemental questionnaire because its original questionnaire response did not provide any information or usable data that would allow the Department to accurately calculate an antidumping duty margin. For example, our supplemental questionnaire requested that Mei Jia Ju report numerous raw material inputs that it failed to report in its original response, that it report the total usage of one of its main inputs, ''plywood,'' and that it report its U.S. sales information on a control number-specific basis. Upon receipt of Mei Jia Ju's response, which was submitted five days late without an extension request, the Department rejected Mei Jia Ju's response without consideration. *See* December 18, 2007, letter from Wendy J. Frankel to Dr. He Peihua. Because we have only Mei Jia Ju's original questionnaire response on the record, and this response lacks any meaningful data, we do not have sufficient U.S. sales and FOP data on the record to calculate an accurate dumping margin for Mei Jia Ju. Accordingly, we preliminarily determine to base Mei Jia Ju's margin on facts otherwise available. *See* section 776 (a) of the Act.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Section 776(b) of the Act also authorizes the Department to use as adverse facts available (''AFA'') information derived from the petition, the final determination, a previous administrative review, or other information placed on the record. While the standard for cooperation does ''not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.'' *Nippon Steel Corp.* v. *United States,* 337 F. 3d 1373, 1382 (Fed. Cir. 2003).

From the record evidence, it is clear Mei Jia Ju was aware of its obligation to submit its response on time or to timely request an extension prior to the deadline for submission. The Department's April 11, 2007, Original Questionnaire to Mei Jia Ju specified the filing and service requirements of all submissions to the Department. The October 30, 2007, sections A, C & D supplemental questionnaire reiterated these requirements. Additionally, the Department specifically instructed Mei Jia Ju on April 28, 2007, that submissions must be filed with the CRU on the due date specified in the questionnaire. *See, e.g., Mei Jia Ju Deadline Memo*. Moreover, the Department specifically informed Mei Jia Ju on April 25, 2007, that no extension of a deadline for submission would be considered by the Department unless it was officially filed in the CRU. *See id*. Because Mei Jia Ju was aware of the deadline and did not request an extension prior to the deadline, we find that Mei Jia Ju failed to cooperate by not acting to the best of its ability to comply with the Department's request for information. Furthermore, the Department issued Mei Jia Ju an extensive supplemental questionnaire (*i.e.*, Sections A, C & D) because its original questionnaire response did not provide necessary information or usable data that would allow the Department to accurately calculate an antidumping duty margin. Because we only have Mei Jia Ju's original questionnaire response on the record, and this response lacks any meaningful data, we do not have sufficient U.S. sales and FOP data on the record to calculate an accurate dumping margin for Mei Jia Ju, we find that Mei Jia Ju failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. Accordingly, the Department preliminarily determines that, when selecting from among the facts otherwise available, an adverse inference is warranted for Mei Jia Ju pursuant to section 776(b) of the Act.

However, although we have determined to apply the AFA rate to Mei Jia Ju, we have also preliminarily determined to provide Mei Jia Ju with a separate rate. We based our determination on the fact that Mei Jia Ju provided a complete separate-rate response to our questionnaire that did not require further supplementation. *See* Mei Jia Ju's May 3, 2007, section A questionnaire response. Therefore, for the preliminarily results Mei Jia Ju will receive a separate rate.

The PRC-Wide Entity

The Department issued a letter to all respondents identified in the *Initiation Notice* informing them of the requirements to respond to both the Department's Q&V Questionnaire and either the separate-rate application or certification, as appropriate. The following companies did not respond to the Department's Q&V Questionnaire and the separate-rate application/certification: (*i.e.*, Deqing Ace Furniture & Crafts Ltd.; Donguan Qingxi Xinyi Craft Furniture Factory (Joyce Art Factory); Speedy International Ltd.; T.J. Maxx International Co., Ltd., Tianjin Sande Fairwood Furniture Co., Ltd., Top Art Furniture/Ngai Kun Trading, Triple J Furniture Enterprise Co., Mandarin Furniture (Shenzhen) Co., Ltd.; Xilinmen Group Co., Ltd.; and Zhejang Niannianhong Industrial Co., Ltd). Therefore, the Department determines preliminarily that there were exports of merchandise under review from PRC producers/exporters that did not respond to the Department's questionnaire and consequently did not demonstrate their eligibility for separate-rate status. As a result, the Department is treating these PRC producers/exporters as part of the countrywide entity.

Additionally, as Starcorp did not submit reliable information demonstrating that it operates free from government control, for purposes of this review, it is considered part of the PRC-wide entity. Both Petitioners and Starcorp requested the 2006 administrative review of Starcorp. On April 4, 2007, Starcorp submitted its separate-rate certification. On June 21, 2007, the Department issued its antidumping questionnaire to Starcorp. On July 26, 2007, Starcorp submitted its response to Section A of the Department's questionnaire. Although Starcorp responded to Section A of the questionnaire, Starcorp did not respond to Sections C and D. On August 20, 2007, Starcorp (1) withdrew its request for the Department to conduct the second administrative review, (2) stated it would no longer participate in this review, (3) requested that the Department and all parties destroy or return Starcorp's submissions containing business proprietary information, and (4) requested to be removed from both the APO and public service lists. Thus, no information remains on the record of this review with respect to Starcorp. However, as Petitioners did not withdraw their request for review, Starcorp remains subject to this review. Because Starcorp did not demonstrate its eligibility for separate-rate status, it remains subject to this review as part of the PRC-wide entity.

Because we have determined that the companies named above are part of the PRC-wide entity, the PRC-wide entity is now under review. Pursuant to section 776(a) of the Act, we further find that because the PRC-wide entity (including the companies discussed above) failed to respond to the Department's questionnaires, withheld or failed to provide information in a timely manner or in the form or manner requested by the Department, submitted information that cannot be verified, or otherwise impeded the proceeding, it is appropriate to apply a dumping margin for the PRC-wide entity using the facts otherwise available on the record. Additionally, because these parties failed to respond to our requests for information, we find an adverse inference is appropriate pursuant to section 776(b) of the Act for the PRC-wide entity.

Selection of the Adverse Facts Available Rate

In sum, because the PRC-wide entity failed to respond to our request for information, it has failed to cooperate to the best of its ability. Further, as discussed above, Mei Jia Ju also failed to cooperate to the best of its ability with respect to responding to the Department's requests for additional information (*i.e.*, Sections C and D information). Therefore, the Department preliminarily finds that, in selecting from among the facts available, an adverse inference is appropriate pursuant to section 776(b) of the Act for both the PRC-wide entity and Mei Jia Ju.

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) provide that the Department may rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any information placed on the record. In selecting a rate for AFA, the Department selects a rate that is sufficiently adverse ''as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.'' *See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8932 (February 23, 1998). It is further the Department's practice to select a rate that ensures ''that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See SAA* at 870. *See also, Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 FR 69937, 69939 (November 18, 2005).

Generally, the Department finds that selecting the highest rate in any segment of the proceeding as AFA, is appropriate. *See, e.g., Certain Cased Pencils from the People's Republic of China; Notice of Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part*, 70 FR 76755, 76761 (December 28, 2005). The Court of International Trade (''CIT'') and the Court of Appeals for the Federal Circuit (''Federal Circuit'') have affirmed decisions to select the highest margin from any prior segment of the proceeding as the AFA rate on numerous occasions. *See Rhone Poulenc, Inc.* v. *United States*, 899 F. 2d 1185, 1190 (Fed. Cir. 1990) (affirming the Department's presumption that the highest margin was the best information of current margins) (''*Rhone Poulenc*''); *NSK Ltd.* v. *United States*, 346 F. Supp. 2d 1312, 1335 (CIT 2004) (affirming a 73.55 percent total AFA rate, the highest available dumping margin from a different respondent in the investigation); *Kompass Food Trading International* v. *United States*, 24 CIT 678, 683 (2000) (affirming a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); and *Shanghai Taoen International Trading Co., Ltd.* v. *United States*, 360 F. Supp. 2d 1339, 1348 (CIT 2005) (affirming a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

In choosing the appropriate balance between providing respondents with an incentive to respond accurately and imposing a rate that is reasonably related to the respondents' prior commercial activity, selecting the highest prior margin ''reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less.'' *See Rhone Poulenc*, 899 F.2d at 1190.

As AFA, we have preliminarily assigned to the PRC-wide entity and to Mei Jia Ju a rate of 216.01 percent, the highest calculated rate from 2004–2005 new shipper reviews of wooden bedroom furniture from the PRC which is the highest rate on the record of all segments of this proceeding. The Department preliminarily determines

that this information is the most appropriate from the available sources to effectuate the purposes of AFA. The Department's reliance on the highest calculated rate from the 2004–2005 new shipper review to determine an AFA rate is subject to the requirement to corroborate secondary information. *See* the ''Corroboration of Secondary Information'' section below.

Corroboration

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise. *See SAA* at 870. Corroborate means that the Department will satisfy itself that the secondary information to be used has probative value. *Id.* To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from Japan, and Tapered Roller Bearings Four Inches or Less in Outside Diameter, and Components Thereof, from Japan: Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (Nov. 6, 1996) (unchanged in the final determination). Independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: High and Ultra-High Voltage Ceramic Station Post Insulators from Japan*, 68 FR 35627 (June 16, 2003) (unchanged in final determination); and, *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada*, 70 FR 12181 (March 11, 2005).

The AFA rate that the Department is now using was determined in a previously published final results of new shipper review. *See Wooden Bedroom Furniture from the People's Republic of China: Final Results of the 2004–2005 Semi-Annual New Shipper Reviews*, 71 FR 70739 (December 6, 2006). In the new shipper review, the Department calculated a company-specific rate, which was above the PRC-wide rate established in the investigation. Because this new rate is a company-specific calculated rate concerning subject merchandise, we have determined this rate to be reliable.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. *See Fresh Cut Flowers from Mexico: Final Results of Antidumping Administrative Review*, 61 FR 6812 (February 22, 1996) (where the Department disregarded the highest margin in that case as adverse best information available (the predecessor to facts available) because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin). Similarly, the Department does not apply a margin that has been discredited. *See D&L Supply Co.* v. *United States*, 113 F.3d 1220, 1221 (Fed. Cir. 1997) (ruling that the Department will not use a margin that has been judicially invalidated). To assess the relevancy of the rate used, the Department compared the margin calculations of the mandatory respondents in this administrative review with the calculated rate from the 2004–2005 new shipper review. The Department found that the margin of 216.01 percent was within the range of the highest margins calculated on the record of this administrative review. Because the record of this administrative review contains margins within the range of 216.01 percent, we determine that the rate from the 2004–2005 review continues to be relevant for use in this administrative review.

As the adverse margin is both reliable and relevant, we determine that it has probative value. Accordingly, we determine that this rate meets the corroboration criterion established in section 776(c) that secondary information have probative value. As a result, the Department determines that the margin is corroborated for the purposes of this administrative review and may reasonably be applied to Mei Jia Ju, and the PRC-wide entity as AFA.

Because these are preliminary results of review, the Department will consider all margins on the record at the time of the final results of review for the purpose of determining the most appropriate final adverse margin. *See Preliminary Determination of Sales at Less Than Fair Value: Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 65 FR 1139 (January 7, 2000).

Export Price

For the Dare Group and Teamway, we based the U.S. price on export price (''EP''), in accordance with section 772(a) of the Act, because EP is the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under section 772(c) of the Act. Additionally, we calculated EP based on the packed price from the exporter to the first unaffiliated customer in the United States.

For the Dare Group, we calculated EP based on delivered prices to unaffiliated purchaser(s) in the United States. We made deductions from the U.S. sales price for movement expenses in accordance with section 772(c)(2)(A) of the Act. These included foreign inland freight expenses for inter-factory shipping, inland freight from the plant to the port, foreign brokerage and handling, U.S. brokerage and handling, and import duties. We also deducted certain customer discounts from the gross unit price. *See* Memorandum to The File Through Robert Bolling, Program Manager, China/NME Group, from Paul Stolz, Case Analyst, *Analysis for the Preliminary Results of Wooden Bedroom Furniture from the People's Republic of China: Fujian Lianfu Forestry Co./Fujian Wonder Pacific Inc./ Fuzhou Huan Mei Furniture Co., Ltd./ Jiangsu Dare Furniture Co., Ltd. (''Dare Group'') (''Analysis Memo Dare Group'')*, dated January 31, 2008.

For Teamway, we calculated EP based on delivered prices to unaffiliated purchaser(s) in the United States. We made deductions from the U.S. sales price for a movement expense in accordance with section 772(c)(2)(A) of the Act. This expense was inland freight—plant/warehouse to port of exit, and we deducted this expense from the gross unit price, in accordance with section 772(c) of the Act. For a detailed description of all adjustments, see Memorandum to The File Through Robert Bolling, Program Manager, China/NME Group, from Hua Lu, Case Analyst, *Analysis for the Preliminary Results of Wooden Bedroom Furniture from the People's Republic of China: Teamway Furniture (Dong Guan) Co.*

Ltd., Brittomart Inc. (''Analysis Memo Teamway''), dated January 31, 2008.

Teamway reported in its original and supplemental questionnaires that it sold subject merchandise during the POR to a trading company located in Shenzhen, China. See August 23 and December 4, 2007, original and supplemental questionnaires, respectively. Teamway also stated that to the best of ifs knowledge this trading company is affiliated with a U.S. company that acted as a buying agent in transacting certain sales with Teamway. According to Teamway, the trading company instructed Teamway to deliver certain sales to a Chinese warehouse where the trading company kept its purchases of other Chinese suppliers which were being shipped to the United States. The title to the subject merchandise was transferred to the trading company when it was delivered to the trading company's warehouse. Additionally, Teamway stated that it does not have exact information as to whether all or which sale(s) of subject merchandise sold by the trading company to its U.S. affiliate were consolidated with goods of other suppliers. For the preliminary results, we have determined to include Teamway's sales to the trading company located in Shenzhen as U.S. sales as reported by Teamway. However, the Department will issue supplemental questionnaires and further analyze these transactions for the final results to determine whether they constitute sales to the United States or internal PRC transactions. If we conclude that such sales represent internal PRC transactions, we will disregard such sales for purposes of the final results of this review.

Normal Value

Section 773(c)(1) of the Act provides that the Department shall determine the NV using an FOP methodology if: (1) The merchandise is exported from an NME country; and (2) the information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. When determining NV in an NME context, the Department will base NV on FOPs, because the presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under our normal methodologies. Under section 772(c)(3) of the Act, FOPs include but are not limited to: (1) Hours of labor required; (2) quantities of raw materials employed; (3) amounts of energy and other utilities consumed; and (4) representative capital costs. We used FOPs reported by respondents for materials, energy, labor and packing.

In accordance with 19 CFR 351.408(c)(1), the Department will normally use publicly available information to find an appropriate SV to value FOPs, but when a producer sources an input from a market economy and pays for it in market-economy currency, the Department will normally value the factor using the actual price paid for the input. See 19 CFR 351.408(c)(1); *see also Lasko Metal Products, Inc.* v. *United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994). However, when the Department has reason to believe or suspect that such prices may be distorted by subsidies, the Department will disregard the market economy purchase prices and use SVs to determine the NV. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of the 1998–1999 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part*, 66 FR 1953 (January 10, 2001) (''*TRBs 1998*–1999''), and accompanying Issues and Decision Memorandum at Comment 1.

It is the Department's consistent practice that, where the facts developed in the U.S. or third-country countervailing duty findings include the existence of subsidies that appear to be used generally (in particular, broadly available, non-industry specific export subsidies), it is reasonable for the Department to find that it has a reason to believe or suspect that prices of the inputs from the country granting the subsidies may be subsidized. *See TRBs 1998–1999 at Comment 1; see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1999–2000 Administrative Review, Partial Rescission of Review, and Determination Not To Revoke Order in Part*, 66 FR 57420 (November 15, 2001), and accompanying Issues and Decision Memorandum at Comment 1; *see also China National Machinery Imp. & Exp. Corp.* v. *United States*, 293 F. Supp. 2d 1334, 1338–39 (CIT 2003).

In avoiding the use of prices that may be subsidized, the Department does not conduct a formal investigation to ensure that such prices are not subsidized, but rather relies on information that is generally available at the time of its determination. *See also* H.R. Rep. 100–576, at 590 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1623–24.

We have reason to believe or suspect that prices of inputs from Indonesia, South Korea, and Thailand may have been subsidized. Through other proceedings, the Department has learned that these countries maintain broadly available, non-industry-specific export subsidies and, therefore, finds it reasonable to infer that all exports to all markets from these countries may be subsidized. See, *e.g.*, *TRBs 1998–1999* at Comment 1. Accordingly, we have disregarded prices from Indonesia, South Korea and Thailand in calculating the Philippine import-based SVs because we have reason to believe or suspect such prices may be subsidized.

Factor Valuations

In accordance with section 773(c) of the Act, we calculated NV based on FOPs reported by respondents for the POR. To calculate NV, we multiplied the reported per-unit factor quantities by publicly available Philippine SVs (except as noted below). In selecting the SV, we considered the quality, specificity, and contemporaneity of the data. As appropriate, we adjusted input prices by including freight costs to make them delivered prices. Specifically, we added to Philippine import SVs a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory where appropriate (*i.e.*, where the sales terms for the market-economy inputs were not delivered to the factory). This adjustment is in accordance with the decision of the Federal Circuit in *Sigma Corp.* v. *United States*, 117 F.3d 1401 (Fed. Cir. 1997). Due to the extensive number of SVs it was necessary to assign in this administrative review, we present a discussion of the main factors. For a detailed description of all SVs used to value the respondent's reported FOPs, see *Factor*

Valuation Memorandum

The mandatory respondents reported that certain of their reported raw material inputs were sourced from a market-economy country and paid for in market-economy currencies.

Pursuant to 19 CFR 351.408(c)(1), when a mandatory respondent source inputs from a market-economy supplier in meaningful quantities (*i.e.*, not insignificant quantities), we use the actual price paid by respondents for those inputs, except when prices may have been distorted by findings of dumping by the PRC and/or subsidies. *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27366 (May 19, 1997). The Dare Group and Teamway reported information demonstrating that the quantities of certain raw materials purchased from market-economy suppliers are

significant. Where we found market-economy purchases to be in significant quantities, in accordance with our statement of policy as outlined in *Antidumping Methodologies: Market Economy Inputs*, we have used the actual purchases of these inputs to value the inputs. *See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716 (October 19, 2006). For a detailed description of all actual values used for market-economy inputs, see the company-specific analysis memoranda dated January 31, 2008. Where the quantity of the input purchased from market-economy suppliers is insignificant, the Department will not rely on the price paid by an NME producer to a market-economy supplier because it cannot have confidence that a company could fulfill all its needs at that price. For both the Dare Group and Teamway, the Department found certain of their inputs purchased from market-economy suppliers to be insignificant. *See Analysis Memo Dare Group* and the *Analysis Memo Teamway.* In these instances, for the preliminary results, we valued the market-economy purchase using the appropriate SV for this input. *See Analysis Memo Dare Group* and the *Analysis Memo Teamway.*

We used import values from the World Trade Atlas® online (''Philippine Import Statistics''), which were published by the Philippines National Statistics Office, which were reported in Philippine pesos and are contemporaneous with the POR, where market-economy purchases were not made in significant quantities, to value the following inputs: wood inputs (*e.g.*, lumber of various species), wood veneer of various species, processed woods (*e.g.*, fiberboard, particleboard, plywood, etc.), adhesives and finishing materials (*e.g.*, glue, paints, stains, lacquer, etc.), hardware (*e.g.*, nails, staples, screws, bolts, knobs, pulls, drawer slides, hinges, clasps, etc.), other materials (*e.g.*, mirrors, glass, leather, marble, cloth, foam, etc.), and packing materials (*e.g.*, cardboard, cartons, styrofoam, bubblewrap, labels, tape, etc.), *see Factor Valuation Memorandum.* For a complete listing of all the inputs and the valuation for each mandatory respondent *see Factor Valuation Memorandum.*

Where we could not obtain publicly available information contemporaneous with the POR with which to value FOPs, we adjusted the SVs using, where appropriate, the Philippines Wholesale Price Index (''WPI'') available at the Philippines National Statistics Office Web site *http://www.census.gov.ph/data/sectordata/datawpi.html.*

For the purposes of the preliminary results, the Department has used *http://www.allmeasures.com* and other publicly available information where interested parties did not submit alternative conversion values for specific FOPs. For the final results, the Department will continue to consider other appropriate conversion ratios.

Dare Group

The Dare Group reported certain of its inputs under common FOP categories which may not reflect an appropriate level of dis-aggregation based on its prior reporting methodology. Due to the proprietary nature of this issue, see Analysis Memo Dare Group for a complete explanation. For the preliminary results, we calculated certain surrogate values using the Dare Group's reported FOPs. However, the Department will issue a supplemental questionnaire to further analyze the Dare Group's FOP reporting. For the final results, we will consider whether the Dare Group's groupings of these FOPs contributes to the accuracy of our margin calculation and will make adjustments to these classifications and our calculation of SVs, as appropriate.

The Dare Group reported ''semifinished product'' as a factor of production in its FOP database. *See* the Dare Group's supplemental section D response dated December 17, 2007. Invoices for semifinished product on the record of this review indicate that the semifinished product is wooden bedroom furniture covered by the scope of the antidumping order. Therefore, for the preliminary results, we calculated the surrogate value of semifinished products using Philippine import statistics covering wooden bedroom furniture. The Department will issue a supplemental questionnaire to further analyze the Dare Group's semifinished product reporting.

Teamway

In its original and supplemental questionnaire responses, Teamway reported that it used subcontractors in the production of subject merchandise. However, in reporting the subcontractors' costs, Teamway only provided the subcontractors' FOPs in a particular format. *See* August 23 and December 4, 2007, original and supplemental questionnaires, respectively. Due to the proprietary nature of this issue, see Analysis Memo Teamway for a complete explanation. For the preliminary results, we have determined to use Teamway's subcontractor's FOPs as reported; however, the Department will issue a supplemental questionnaire to Teamway, and request Teamway to report its subcontractors' costs in a manner that differs from its current reporting, for purposes of the final results margin calculation.

For direct labor, indirect labor, and packing labor, consistent with 19 CFR 351.408(c)(3), we used the PRC regression-based wage rate as reported on Import Administration's Web site, Import Library, Expected Wages of Selected NME Countries, revised in January 2007, *http://ia.ita.doc.gov/wages/04wages/04wages-010907.html.* The source of these wage-rate data is the Yearbook of Labour Statistics 2006, ILO (Geneva: 2006), Chapter 5B: Wages in Manufacturing. The years of the reported wage rates range from 2004 and 2005. Because this regression-based wage rate does not separate the labor rates into different skill levels or types of labor, we have applied the same wage rate to all skill levels and types of labor reported by the respondent. See Factor Valuation Memorandum.

To value electricity, we used data from the 2006 edition of Doing Business in the Philippines, published by SGV & Co. Because the value for electricity was not contemporaneous with the POR, we adjusted the values for inflation. See Factor Valuation Memorandum.

To calculate the value for domestic brokerage and handling, the Department used brokerage fees available at the Web site of the Republic of the Philippines Tariff Commission, *http://www.tariffcommission.gov.ph/cao01–2001.html.* We calculated the SV for truck freight using Philippine data from three sources, (1) *The Cost of Doing Business in Camarines Sur,* available at the Philippine government's Web site for the province: *http://www.camarinessur.gov.ph*, (2) *Province of Misamis Oriental: Cost of Doing Business,* available at the Web site *http://www.orobpc.org.ph:8080/pdf/costmor.pdf*, and (3) a news article from the Manila Times entitled ''Government Mulls Cut in Export Target.'' *See Factor Valuation Memorandum.*

To value factory overhead, selling, general, and administrative expenses (''SG&A''), and profit, we used the audited financial statements for the fiscal year ending December 31, 2006, from the following producers: Calfurn MFG Philippines, Inc. and Insular Rattan and Native Products Corp., both of which are Philippine producers of comparable merchandise. From this information, we were able to determine factory overhead as a percentage of the total raw materials, labor and energy

(''ML&E) costs; SG&A as a percentage of ML&E plus overhead (*i.e.*, cost of manufacture); and the profit rate as a percentage of the cost of manufacture plus SG&A. For further discussion, see *Factor Valuation Memorandum.*

Preliminary Results of Review

We preliminarily determine that the following weighted-average dumping margins exist for the period January 1, 2006, through December 31, 2006:

WOODEN BEDROOM FURNITURE FROM THE PRC

Exporter	Weighted-average margin (percent)
Fujian Lianfu Forestry Co., Ltd., aka Fujian Wonder Pacific Inc. (Dare Group)	60.15
Fuzhou Huan Mei Furniture Co., Ltd. (Dare Group)	60.15
Jiangsu Dare Furniture Co., Ltd. (Dare Group)	60.15
Teamway Furniture (Dong Guan) Co. Ltd., Brittomart Inc.	9.81
BNBM Co., Ltd. (aka Beijing New Material Co., Ltd.)	39.49
Classic Furniture Global Co., Ltd.	39.49
Dalian Guangming Furniture Co., Ltd.	39.49
Decca Furniture Ltd., aka Decca	39.49
Dong Guan Golden Fortune Houseware Co., Ltd.	39.49
Dongguan Mingsheng Furniture Co., Ltd.	39.49
Dongguan Yihaiwei Furniture Limited	39.49
Fortune Furniture Ltd. and its affiliate, Dongguan Fortune Furniture Ltd.	39.49
Gaomi Yatai Wooden Ware Co., Ltd., Team Prospect International Ltd., Money Gain International Co.	39.49
Guangming Group Wumahe Furniture Co., Ltd.	39.49
Inni Furniture	39.49
Mei Jia Ju Furniture Industrial (Shenzhen) Co., Ltd.	216.01
Meikangchi (Nantong) Furniture Company Ltd.	39.49
Nanjing Nanmu Furniture Co., Ltd.	39.49
Po Ying Industrial Co.	39.49
Qingdao Beiyuan-Shengli Furniture Co., Ltd., Qingdao Beiyuan Industry Trading Co. Ltd.	39.49
Shenzhen Tiancheng Furniture Co., Ltd., Winbuild Industrial Ltd., Red Apple Furniture Co., Ltd. and Red Apple Trading Co., Ltd.	39.49
Shenyang Kunyu Wood Industry Co., Ltd.	39.49
Shenzhen Xingli Furniture Co., Ltd.	39.49
Tianjin First Wood Co., Ltd.	39.49
Union Friend International Trade Co., Ltd.	39.49
Winmost Enterprises Limited	39.49
Winny Overseas, Ltd.	39.49
Yangchen Hengli Co., Ltd.	39.49
Yichun Guangming Furniture Co., Ltd.	39.49
Zhong Cheng Furniture Co., Ltd.	39.49
PRC–Wide Rate	216.01

Disclosure

The Department will disclose calculations performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than 35 days after the date of publication. *See* 19 CFR 351.309(d). Further, parties submitting written comments are requested to provide the Department with an additional copy of those comments on diskette. Any interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). Any hearing, if requested, will be held two days after the scheduled date for submission of rebuttal briefs. *See* 19 CFR 351.310(d).

The Department will issue the final results of the administrative and new shipper reviews, which will include the results of its analysis of issues raised in the briefs, within 120 days of publication of these preliminary results, in accordance with 19 CFR 351.213(h)(1), unless the time limit is extended.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after the date of publication of the final results of these new shipper and administrative reviews. In accordance with 19 CFR 351.212(b)(1), we have calculated an exporter/importer or customer-specific assessment rate or value for merchandise subject to these reviews. For these preliminary results, we divided the total dumping margins for the reviewed sales by the total entered quantity of those reviewed sales for each applicable importer. In these reviews, if these preliminary results are adopted in our final results of review, we will direct CBP to assess the resulting rate against the entered customs value for the subject merchandise on each importer's/customer's entries during the POR.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of these reviews for shipments of subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(1)(C) and (a)(2)(C) of the Act: (1) For the Dare Group, Teamway, Mei Jia Ju, and the separate-rate applicants

being granted a separate rate, the cash deposit rate will be that established in the final results of these reviews; (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 216.01 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

The Department is issuing and publishing these preliminary results of administrative review and new shipper review in accordance with sections 751(a) and 777(i)(1) of the Act, and 19 CFR 351.221(b) and 351.214(h).

Dated: January 31, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–2648 Filed 2–12–08; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–929]

Small Diameter Graphite Electrodes from the People's Republic of China: Initiation of Antidumping Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: February 13, 2008.

FOR FURTHER INFORMATION CONTACT: Magd Zalok, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4162.

SUPPLEMENTARY INFORMATION:

The Petition

On January 17, 2008, the Department of Commerce (''Department'') received a petition concerning imports of small diameter graphite electrodes (''SDGE'') from the People's Republic of China (''PRC'') filed in proper form by SGL Carbon LLC and Superior Graphite Co. (collectively ''Petitioners''). *See* Petition on Small Diameter Graphite Electrodes from the People's Republic of China dated January 17, 2008 (''Petition''). On January 22 and 29, 2008, the Department issued a request for additional information regarding, and clarification of certain areas of, the Petition. Based on the Department's requests, the Petitioners filed additional information on January 25 and 30, 2008. The period of investigation (''POI'') is July 1 through December 31, 2007. *See* 19 CFR 351.204(b).

In accordance with section 732(b) of the Tariff Act of 1930, as amended (''the Act''), the Petitioners allege that imports of SDGE from the PRC are being, or are likely to be, sold in the United States at less than fair value, within the meaning of section 731 of the Act, and that such imports are materially injuring, or threaten material injury to, an industry in the United States.

The Department finds that the Petitioners filed this Petition on behalf of the domestic industry because the Petitioners are interested parties as defined in section 771(9)(C) of the Act, and have demonstrated sufficient industry support with respect to the antidumping duty investigation that the Petitioners are requesting that the Department initiate (*see* ''Determination of Industry Support for the Petition'' section below).

Scope of Investigation

The merchandise covered by this investigation includes all small diameter graphite electrodes of any length, whether or not finished, of a kind used in furnaces, with a nominal or actual diameter of 400 millimeters (16 inches) or less, and whether or not attached to a graphite pin joining system or any other type of joining system or hardware. Small diameter graphite electrodes are most commonly used in primary melting, ladle metallurgy, and specialty furnace applications in industries including foundries, smelters, and steel refining operations. Small diameter graphite electrodes subject to this investigation are currently classified under the Harmonized Tariff Schedule of the United States (''HTSUS'') subheading 8545.11.0000. The HTSUS number is provided for convenience and customs purposes, but the written description of the scope is dispositive.

Comments on Scope of Investigation

During our review of the Petition, we discussed the scope with the Petitioners to ensure that it is an accurate reflection of the products for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the regulations (*Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments within 20 days of signature of this notice. Comments should be addressed to Import Administration's Central Records Unit (''CRU''), Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, attention Magd Zalok, room 3067. The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determination.

Comments on Product Characteristics for Antidumping Duty Questionnaire

We are requesting comments from interested parties regarding the appropriate physical characteristics of SDGE to be reported in response to the Department's antidumping questionnaire. This information will be used to identify the key physical characteristics of the subject merchandise in order for respondents to accurately report the relevant factors of production, as well as develop appropriate product reporting criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate list of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as general product characteristics and product reporting criteria. We note that it is not always appropriate to use all product characteristics as product reporting criteria. We base product reporting criteria on meaningful differences among products. While there may be some physical product characteristics which manufacturers use to describe SDGE, it may be that only a select few product characteristics take into account meaningful physical characteristics. In

order to consider the suggestions of interested parties in developing the antidumping duty questionnaire, we must receive comments at the above–referenced address by February 26, 2008. Rebuttal comments must be received within 10 calendar days of the receipt of timely filed comments.

Determination of Industry Support for the Petition

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A), or (ii) determine industry support using a statistically valid sampling method if there is a large number of producers in the industry.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. *See USEC, Inc. v. United States*, 132 F. Supp. 2d 1, 8 (CIT 2001), *citing Algoma Steel Corp. Ltd. v. United States*, 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989), *cert. denied* 492 U.S. 919 (1989).

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation,'' (*i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the Petitioners do not offer a definition of domestic like product distinct from the scope of the investigation. Based on our analysis of the information submitted on the record, we have determined that SDGE constitute a single domestic like product and we have analyzed industry support in terms of that domestic like product. For a discussion of the domestic like product analysis in this case, *see* the *Antidumping Investigation Initiation Checklist: Small Diameter Graphite Electrodes from the People's Republic of China (PRC) (PRC Initiation Checklist)*, Industry Support at Attachment II, on file in the CRU.

On February 1, 2008, we received an industry support challenge from an importer of graphite electrodes from China. The Petitioners responded to this submission on February 4, 2008. *See PRC Initiation Checklist* at Attachment II (Industry Support). Our review of the data provided in the Petition, supplemental submissions, and other information readily available to the Department indicates that the Petitioners have established industry support. First, the Petition established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.*, polling). *See* section 732(c)(4)(D) of the Act. Second, the domestic producers have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petition account for at least 25 percent of the total production of the domestic like product. Finally, the domestic producers have met the statutory criteria for industry support under 732(c)(4)(A)(ii) because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition. Accordingly, the Department determines that the Petition was filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act. *See* PRC Initiation Checklist at Attachment II (Industry Support).

The Department finds that the Petitioners filed the Petition on behalf of the domestic industry because they are interested parties as defined in section 771(9)(C) of the Act and they have demonstrated sufficient industry support with respect to the antidumping investigation that they are requesting the Department initiate. *See PRC Initiation Checklist* at Attachment II (Industry Support).

Allegations and Evidence of Material Injury and Causation

The Petitioners allege that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at less than normal value (''NV''). The Petitioners contend that the industry's injured condition is illustrated by reduced market share, lost sales, reduced production, reduced capacity utilization rate, reduced shipments, underselling and price depressing and suppressing effects, lost revenue, reduced employment, decline in financial performance, and an increase in import penetration. We have assessed the allegations and supporting evidence regarding material injury and causation, and have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation. *See PRC Initiation Checklist* at Attachment III (Injury).

Allegation of Sales at Less Than Fair Value

The following is a description of the allegation of sales at less than fair value upon which the Department based its decision to initiate this investigation of imports of SDGE from the PRC. The sources of data for the deductions and adjustments relating to the U.S. price and the factors of production are also discussed in the checklist. *See Initiation Checklist*. Should the need arise to use any of this information as facts available under section 776 of the Act in our preliminary or final determinations, we will reexamine the information and revise the margin calculations, if appropriate.

Export Price

The Petitioners relied on 14 prices obtained from U.S. resellers for SDGE manufactured by Chinese producers/

exporters. The 14 prices were for POI sales of certain types of SDGE falling within the scope of the Petition. The Petitioners deducted from the quoted prices the costs associated with exporting and delivering the product to the customer in the United States, including foreign brokerage and handling, ocean freight and insurance, U.S. inland freight, U.S. port fees, and a reseller's mark–up. *See Initiation Checklist.* The Petitioners calculated foreign brokerage and handling based on the methodology used by the Department in the *Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China*, 72 FR 19690 (April 19, 2007), and the accompanying memorandum, Investigation of Certain Polyester Staple Fiber from the People's Republic of China: Surrogate Values for the Final Determination, dated April 10, 2007, at 2. *See also* the Petition at page 51 and Exhibit AD–5. The Petitioners calculated ocean freight and insurance based on the CIF data for imports of SDGE from the PRC under HTSUS number 8545.11.0000, which were reported in the official U.S. import statistics published by the U.S. International Trade Commission Dataweb. The Petitioners calculated U.S. port fees, including harbor maintenance and processing fees, based on standard charges applicable to SDGE imported under HTSUS number 8545.11.0000. Lastly, the Petitioners calculated U.S. inland freight and a reseller's mark–up based on their own experience and knowledge of the industry.

NV

The Petitioners stated that the Department has not revoked the non–market economy (''NME'') status of the PRC, and thus they treated the PRC as a NME country for purposes of their Petition. The Department examined the PRC's market status and determined that NME status should continue for the PRC. *See Memorandum from the Office of Policy to David M. Spooner, Assistant Secretary for Import Administration, Regarding The People's Republic of China Status as a Non–Market Economy*, dated May 15, 2006. (This document is available online at http://ia.ita.doc.gov/download /prc–nme-status/prc–nme-status–memo.pdf.) In addition, in every subsequent investigations, the Department treated the PRC as an NME country. *See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China*, 72 FR 9508 (March 2, 2007), and *Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China*, 72 FR 19690 (April 19, 2007). In accordance with section 771(18)(C)(i) of the Act, the presumption of NME status remains in effect until revoked by the Department. Because the presumption of NME status for the PRC has not been revoked by the Department it remains in effect for purposes of the initiation of this investigation. Accordingly, the NV of the product is appropriately based on factors of production valued in a surrogate market–economy country in accordance with section 773(c) of the Act. After initiation, all parties will have the opportunity to provide relevant information related to the issues of the PRC's NME status and the granting of separate rates to individual exporters.

The Petitioners selected India as the surrogate country arguing, pursuant to section 773(c)(4) of the Act, that India is an appropriate surrogate because it is a market–economy country that is at a level of economic development comparable to that of the PRC and is a significant producer and exporter of SDGE. *See* Petition at pages 52 through 54. Based on the information provided by the Petitioners, we find it appropriate to use India as a surrogate country for this initiation. After initiation, we will solicit comments regarding surrogate country selection.

The Petitioners calculated NVs for each of the U.S. prices discussed above using the Department's NME methodology that is required by 19 CFR 351.202(b)(7)(i)(C) and 19 CFR 351.408. Because the quantities of the factors of production that are consumed by Chinese companies in manufacturing SDGE are not available to the Petitioners, the Petitioners calculated NVs using consumption rates experienced by U.S. producers of SDGE. *See*≥ Petition at page 54. The Petitioners provided information which they claim demonstrates that Chinese and U.S. companies use the same process to produce SDGE. *See* the January 25, 2008, supplement to Petition at 11 and Enclosure 13. Additionally, the Petitioners provide an affidavit to support their use of U.S. production data. *See* the Petition at Exhibit AD–2. The Petitioners valued the factors of production as noted below.

The Petitioners valued material inputs using the most recently available six months of import data from the World Trade Atlas (data from December 2006 through May 2007). *See* the *PRC Initiation Checklist* and the Petition at page 56. In calculating surrogate values from Indian import data, the Petitioners excluded the values of imports from unspecified countries, NME countries, and countries which the Department has found to maintain broadly available, non–industry-specific export subsidies (i.e., Indonesia, the Republic of Korea and Thailand). *See Hand Trucks and Certain Parts Thereof From the People's Republic of China: Final Results of Administrative Review and Final Results of New Shipper Review*, 72 FR 27287 (May 15, 2007), and accompanying Issues and Decision Memorandum at Comment 23.

The Petitioners valued electricity using the cost of electricity for industrial use in India for 2000, obtained from *Energy Prices and Taxes, Quarterly Statistics, 3rd Quarter 2003*, published in the International Financial Statistics by the IMF. *See* Petition at pages 61–62 and Exhibit AD–7.

The Petitioners valued natural gas based on an article in *The Financial Express*, '' Gas Prices Hiked 12%,'' dated May 28, 2005. *See* Petition at pages 62–63 and Exhibit AD–7.

Where a surrogate value was in effect during a period preceding the POI, the Petitioners adjusted it using the Indian wholesale price index in the publication *International Financial Statistics*, which is published by the International Monetary Fund. *See* Petition at Exhibit AD–7. The surrogate values used by the Petitioners for the above–referenced inputs consist of information reasonably available to the Petitioners and are, therefore, acceptable for purposes of initiation.

The Petitioners based factory overhead expenses, selling, general and administrative expenses, and profit on data from an Indian SDGE producer, Graphite India Limited. The data come from the company's most recently available annual report which covers the period April 1, 2006, through March 31, 2007. *See* Petition at pages 63–64 and Exhibit AD–8, as well as Enclosure 1 of the January 30, 2008, supplement to the Petition. We find that the Petitioners' use of this company's information as surrogate financial data is appropriate for purposes of this initiation.

Fair Value Comparisons

Based on the data provided by the Petitioners, there is reason to believe that imports of SDGE from the PRC are being, or are likely to be, sold in the United States at less than fair value. Based on comparisons of export price to NV, calculated in accordance with section 773(c) of the Act, the estimated dumping margins for SDGE range from

119.09 percent to 159.34 percent. *See* Enclosure 4 of the January 30, 2008, supplement to the Petition.

Initiation of Antidumping Investigation

Based upon the examination of the Petition on SDGE from the PRC, the Department finds that the Petition meets the requirements of section 732 of the Act. Therefore, we are initiating an antidumping duty investigation to determine whether imports of SDGE from the PRC are being, or are likely to be, sold in the United States at less than fair value. In accordance with section 733(b)(1)(A) of the Act, unless postponed, we will make our preliminary determination no later than 140 days after the date of this initiation.

Separate Rates

In order to obtain separate–rate status in NME investigations, exporters and producers must submit a separate–rate status application. *See* Policy Bulletin 05.1: Separate–Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non–Market Economy Countries (April 5, 2005) (Separate Rates and Combination Rates Bulletin), available on the Department's website at http://ia.ita.doc.gov/policy/bull05–1.pdf. Based on our experience in processing the separate–rate applications in previous antidumping duty investigations, we have modified the application for this investigation to make it more administrable and easier for applicants to complete. *See, e.g., Initiation of Antidumping Duty Investigation: Certain New Pneumatic Off–the-Road Tires From the People's Republic of China*, 72 FR 43591, 43594–95 (August 6, 2007). The specific requirements for submitting the separate–rate application in this investigation are outlined in detail in the application itself, which will be available on the Department's website at http://ia.ita.doc.gov/ia–highlights-and–news.html on the date of publication of this initiation notice in the **Federal Register**. The separate–rate application will be due 60 days after publication of this initiation notice.

Respondent Selection

For this investigation, the Department intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports under HTSUS number 8545.11.0000 during the POI. We intend to make our decision regarding respondent selection within 20 days of publication of this **Federal Register** notice. The Department invites comments regarding the CBP data and respondent selection within seven days of publication of this **Federal Register** notice.

Use of Combination Rates in an NME Investigation

The Department will calculate combination rates for certain respondents that are eligible for a separate rate in this investigation. The Separate Rates and Combination Rates Bulletin, states:

> {w}hile continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non–investigated firms receiving the weighted–average of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash–deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation. (Emphasis in original.)

See Separate Rates and Combination Rates Bulletin at 6.

Distribution of Copies of the Petition

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public version of the Petition have been provided to the representatives of the Government of the PRC. We will attempt to provide a copy of the public version of the Petition to the foreign producers/exporters, consistent with 19 CFR 351.203(c)(2).

International Trade Commission Notification

We have notified the ITC of our initiation, as required by section 732(d) of the Act.

Preliminary Determination by the International Trade Commission

The ITC will preliminarily determine, no later than March 3, 2008, whether there is a reasonable indication that imports of SDGE from the PRC are materially injuring, or threatening material injury to, a U.S. industry. A negative ITC determination will result in the investigation being terminated; otherwise, this investigation will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: February 6, 2008.

Ronald K. Lorentzen,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–2646 Filed 2–12–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–469–814]

Chlorinated Isocyanurates from Spain: Initiation of Antidumping Duty New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) has received a request for a new shipper review under the antidumping duty order on chlorinated isocyanurates from Spain issued on June 24, 2005. *See Chlorinated Isocyanurates from Spain: Notice of Antidumping Duty Order*, 70 FR 36562 (June 24, 2005). In accordance with section 751(a)(2)(B) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.214(c), we are initiating an antidumping new shipper review of Inquide Flix, S.A., (Inquide). The period of review (POR) of this new shipper review is June 1, 2007 through November 30, 2007.

EFFECTIVE DATE: February 13, 2008.

FOR FURTHER INFORMATION CONTACT: Scott Lindsay, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC 20230; telephone: (202) 482–0780.

SUPPLEMENTARY INFORMATION:

Background

In accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214(c), the Department received a timely request from Inquide, a producer and exporter of chlorinated isocyanurates, for a new shipper review of the antidumping duty order on chlorinated isocyanurates from Spain. *See* December 28, 2007, submission

from Inquide requesting a new shipper review.

Pursuant to section 751(a)(2)(B)(i) of the Act and 19 CFR 351.214(b), Inquide certified that it is both an exporter and producer of the subject merchandise, that it did not export subject merchandise to the United States during the period of the investigation (POI) (April 1, 2003 through March 31, 2004), and that since the investigation was initiated, it has not been affiliated with any producer or exporter who exported the subject merchandise to the United States during the POI. It also submitted documentation establishing the date on which it first shipped the subject merchandise to the United States, the volume of that shipment, and the date of its first sale to an unaffiliated customer in the United States. It also certified it had no shipments to the United States during the period subsequent to its first shipment.

The Department conducted a Customs database query in an attempt to confirm that Inquide's shipments of subject merchandise entered the United States for consumption and that liquidation of such entries had been suspended for antidumping duties. *See* January 31, 2008 New Shipper Review Initiation Checklist, question 18. The Department also examined whether U.S. Customs and Border Protection (CBP) confirmed that such entries were made during the new shipper review period.

Initiation of Review

In accordance with section 751(a)(2)(B) of the Act and section 351.214(d) of the Department's regulations, we find that the request Inquide submitted meets the threshold requirements for initiation of a new shipper review. *See Memorandum to the File from Scott Lindsay, Trade Analyst, through Thomas Gilgunn, Program Manager, New Shipper Initiation Checklist*, dated, January 31, 2008. Accordingly, we are initiating a new shipper review of the antidumping duty order on chlorinated isocyanurates from Spain produced and exported by Inquide. Although Inquide's request meets the threshold requirements for initiation, there are a few issues of concern that the Department has with Inquide's new shipper review request. Therefore, immediately following the initiation of this review, the Department intends to issue a questionnaire to Inquide to clarify these issues. This review covers the period June 1, 2007 through November 30, 2007. We intend to issue the preliminary results of this review no later than 180 days after the date on which this review is initiated, and the final results within 90 days after the date on which we issue the preliminary results. *See* section 751(a)(2)(B)(iv) of the Act.

On August 17, 2006, the Pension Protection Act of 2006 (H.R. 4) was signed into law. Section 1632 of H.R. 4 temporarily suspends the authority of the Department to instruct U.S. Customs and Border Protection to collect a bond or other security in lieu of a cash deposit in new shipper reviews. Therefore, the posting of a bond under section 751(a)(2)(B)(iii) of the Act in lieu of a cash deposit is not available in this case. Importers of chlorinated isocyanurates produced and exported by Inquide must continue to post cash deposits of estimated antidumping duties on each entry of subject merchandise (i.e., chlorinated isocyanurates) at the current all–others rate of 24.83 percent.

Interested parties may submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 351.306.

This initiation and this notice are issued and published in accordance with section 751(a)(2)(B) of the Act and sections 351.214 and 351.221(c)(1)(i) of the Department's regulations.

Dated: January 31, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–2645 Filed 2–12–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–922]

Notice of Correction of Postponement of Preliminary Determination of Antidumping Duty Investigation: Raw Flexible Magnets from the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce

EFFECTIVE DATE: February 13, 2008.

FOR FURTHER INFORMATION CONTACT: Melissa Blackledge or Shawn Higgins, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC, 20230; telephone: (202) 482–3518 or (202) 482–0679, respectively.

SUPPLEMENTARY INFORMATION:

CORRECTION:

On January 31, 2008, the Department of Commerce (the ''Department'') published the notice of postponement of the preliminary determination of the antidumping duty investigation of raw flexible magnets from the People's Republic of China. *See Notice of Postponement of Preliminary Determination of Antidumping Duty Investigation: Raw Flexible Magnets from the People's Republic of China*, 73 FR 5794 (January 31, 2008) (''*Postponement Notice*''). Subsequent to the signature of the *Postponement Notice*, we identified two inadvertent errors in the above–referenced notice.

In the Postponement Notice, under the ''*Postponement of Preliminary Determination*'' section, the Department mistakenly identified October 18, 2007, rather than October 11, 2007, as the date the Department initiated this investigation. The *Postponement Notice* should have stated, ''On October 11, 2007, the Department of Commerce (the ''Department'') initiated the antidumping duty investigation of raw flexible magnets from the People's Republic of China. *See Notice of Initiation of Antidumping Duty Investigations: Raw Flexible Magnets from the People's Republic of China and Taiwan*, 72 FR 59071 (October 18, 2007) (''*Initiation Notice*'').'' Second, in the same section of the Postponement Notice, the Department incorrectly identified April 19, 2008, rather than April 18, 2008, as the extended due date of the preliminary determination. The *Postponement Notice* should have stated, ''For the reasons identified by the Petitioner, and because there are no compelling reasons to deny the request, the Department is postponing the preliminary determination under section 733(c)(1)(A) of the Tariff Act of 1930, as amended (the ''Act''), by fifty days from February 28, 2008 to April 18, 2008.''

Conclusion

This notice serves to correct both the date of initiation of this investigation and the extended due date of the preliminary determination as listed in the *Postponement Notice*. This notice is issued and published in accordance with section 777(i) of the Tariff Act of 1930, as amended.

Dated: February 7, 2008.

Gary Taverman,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–2647 Filed 2–12–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; National Marine Sanctuary Permits

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of 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 14, 2008.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Ave., 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 David Bizot, 301–713–7268 or *David.Bizot@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

National Marine Sanctuary Program (NMSP) regulations at 15 CFR part 922 list specific activities that are prohibited in national marine sanctuaries. These regulations also state that otherwise prohibited activities are permissible if a permit is issued by the NMSP. The persons desiring a permit must submit an application, and anyone obtaining a permit is generally required to submit one or more reports on the activity allowed under the permit.

The recordkeeping and reporting requirements at 15 CFR part 922 form the basis for this collection of information. This information is required by NMSP to protect and manage sanctuary resources as required by the National Marine Sanctuaries Act (16 U.S.C. 1431 et seq.)

II. Method of Collection

Depending on the permit being requested, various applications, reports, and telephone calls may be required from applicants. Applications and reports can be submitted via e-mail, fax, or traditional mail. Applicants are encouraged to use electronic means to apply for permits and submit reports whenever possible.

III. Data

OMB Number: 0648–0141.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations; individuals or households; not-for-profit institutions; Federal government; state, local or tribal government.

Estimated Number of Respondents: 424.

Estimated Time per Response: General permits, 1 hour, 30 minutes; special use permits, 8 hours; historical resources permits, 13 hours; baitfish permits, certifications and permit amendments, 30 minutes; voluntary registrations, 15 minutes; appeals, 24 hours; Tortugas access permits, 6 minutes.

Estimated Total Annual Burden Hours: 1,437.

Estimated Total Annual Cost to Public: $949 in reporting/recordkeeping costs.

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: February 7, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–2582 Filed 2–12–08; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Seafood Inspection and Certification Requirements

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of 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 14, 2008.

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 James Appel, (301) 713–2355 or *James.Appel@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Service (NMFS) operates a voluntary fee-for-service seafood inspection program (Program) under the authorities of the Agricultural Marketing Act of 1946, as amended, the Fish and Wildlife Act of 1956, and the Reorganization Plan No. 4 of 1970.

The regulations for the Program are contained in 50 CFR part 260. The Program offers inspection grading and certification services, including the use of official quality grade marks which indicate that specific products have been Federally inspected. Qualified participants are permitted to use the Program's official quality grade marks on their products to facilitate trade of fishery products.

The participants in the inspection program are requested to submit specific information pertaining to the type of inspection services requested [Section 260.15]. In all cases, applicants provide information regarding the type of products to be inspected, the quantity, and location of the product. There are also application requirements if there is

an appeal of previous inspection results [Section 260.36]. Participants requesting regular inspection services on a contractual basis also submit a contract [Section 260.96]. The participants interested in using official grade marks are required to submit product labels and specifications for review and approval to ensure compliance with mandatory labeling regulations established by the U.S. Food and Drug Administration as well as proper use of the Program's marks [Section 260.97 (12) and (13)].

Current regulations require approval of drawings and specifications prior to approval of facilities [Section 260.96 (b) and (c)]. There are no respondents under this section. The Program will amend this part of the regulations in a future action.

In July 1992, NMFS announced new inspection services, which were fully based on guidelines recommended by the National Academy of Sciences, known as Hazard Analysis Critical Control Point (HACCP). The information collection requirements fall under Section 260.15 of the regulations. These guidelines required that a facility's quality control system have a written plan of the operation, identification of control points with acceptance criteria and a corrective action plan, as well as identified personnel responsible for oversight of the system. The HACCP requires continuing monitoring and recordkeeping by the facility's personnel.

Although HACCP involves substantial self-monitoring by the industry, the HACCP-based program is not a self-certification program. It relies on unannounced system audits by NMFS. The frequency of audits is determined by the ability of the firm to monitor its operation. By means of these audits, NMFS reviews the records produced through the Program participant's self-monitoring. The audits determine whether the participant's HACCP-based system is in compliance by checking for overall sanitation, accordance with good manufacturing practices, labeling, and other requirements. In addition, in-process reviews, end-product sampling, and laboratory analyses are performed by NMFS at frequencies based on the potential consumer risk associated with the product and/or the firm's history of compliance with the Program's criteria.

The information collected is used to determine a participant's compliance with the program. The reported information, a HACCP plan, is needed only once. Other information is collected and kept by the participant as part of its routine monitoring activities. NMFS audits the participant's records on unannounced frequencies to further determine compliance.

II. Method of Collection

Information will be obtained via telephone, fax, hard-copy submission, or audit conducted by NMFS personnel.

III. Data

OMB Number: 0648–0266.

Form Number: NOAA Forms 89–800, 89–814, and 89–819.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 7,082.

Estimated Time per Response: 5 minutes for an application of inspection services; 5 minutes for an application for an appeal; 5 minutes for submitting a contract; 30 minutes to submit a label and specification; 105 hours for a Hazard Analysis Critical Control Point (HACCP) plan; and 80 hours for HACCP monitoring and recordkeeping.

Estimated Total Annual Burden Hours: 13,065.

Estimated Total Annual Cost to Public: $3,579.

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: February 7, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–2583 Filed 2–12–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF51

Marine Mammals; File No. 727–1915

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

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that the Scripps Institute of Oceanography [Responsible Party/Principal Investigator: John Hildebrand, Ph.D.] has been issued a permit to conduct scientific research on marine mammals.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment (See **SUPPLEMENTARY INFORMATION**).

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly or Kate Swails, (301)713–2289.

SUPPLEMENTARY INFORMATION: On May 3, 2007, notice was published in the **Federal Register** (72 FR 24564) that a request for a scientific research permit to take 31 species of cetaceans, including ESA-listed species, had been submitted by the above-named organization. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The permit authorizes close approach, biopsy sampling, suction-cup tagging, fecal sampling, skin collection, and passive acoustic recording of cetaceans in the Northern and Central Pacific Ocean. The purpose of the research is to improve baseline data on marine mammal status, abundance, stock structure, life history, seasonal distribution, and acoustic communication and behavior of non-ESA and ESA listed species. The permit is issued for five years.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an environmental assessment was prepared analyzing the effects of the permitted activities. After a Finding of No Significant Impact, the determination was made that it was not necessary to prepare an environmental impact statement.

Issuance of this permit, as required by the ESA, was based on a finding that such permit: (1) was applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Documents may be reviewed in the following locations:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521;

Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206)526–6150; fax (206)526–6426;

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018; and

Pacific Islands Region, NMFS, 1601 Kapiolani Blvd., Rm 1110, Honolulu, HI 96814–4700; phone (808)973–2935; fax (808)973–2941.

Dated: February 6, 2008.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–2603 Filed 2–12–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XF61

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Survey Advisory Panel in March, 2008 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Tuesday, March 4, 2008, at 9 a.m.

ADDRESSES: This meeting will be held at the NMFS Observer Training Center, Falmouth Technology Park, 25 Bernard Saint Jean Drive, East Falmouth, MA 02536; telephone: (508) 495–2397; fax: (508) 495–2124.

Council Address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The panel will review Scallop Survey Advisory Panel (SSAP) terms of reference; determine how previous SSAP work applies; determine scope of future SSAP work to meet the terms of reference. The panel will also discuss and approve new dredge gear deployment and use for the 2008 survey. The panel will discuss expansion of state or federal surveys into the Gulf of Mane and other unsurveyed areas. The panel will also discuss future development and integration of photographic/video and acoustic technology into the standard scallop surveys. Other business will be discussed if time allows.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: February 8, 2008.

Tracey L. Thompson,

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

[FR Doc. E8–2652 Filed 2–12–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XF60

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The North Pacific Fishery Management Council's (Council) Bering Sea/Aleutian Islands (BSAI) Crab Advisory Committee, in Anchorage, AK.

DATES: The meeting will be held on March 2, 2007, from 8:30 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Hilton Hotel, 500 West 3rd Avenue, King Salmon Room, Anchorage, AK 99501.

Council Address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Mark Fina, North Pacific Fishery Management Council; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The Committee will have discussions on the following items: purpose and need statement; potential elements and options; crew proposal and alternatives to those proposals; data issues; community protections; possible emergency relief from regionalization; arbitration issues.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen, (907) 271–2809, at least 5 working days prior to the meeting date.

Dated: February 8, 2008.

Tracey L. Thompson,

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

[FR Doc. E8–2651 Filed 2–12–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XF38

Western Pacific Regional Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The 97th meeting of the Western Pacific Regional Fishery Management Council's (Council) Scientific and Statistical Committee (SSC) will convene Monday, March 3, 2008, through Thursday March 6, 2008.

See **SUPPLEMENTARY INFORMATION** for specific times, dates, and agenda items.

ADDRESSES: The SSC meeting will be held at the Council Office Conference Room, 1164 Bishop St., Suite 1400, Honolulu, HI; telephone: (808) 522–8220.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director; telephone: (808)-522–8220.

SUPPLEMENTARY INFORMATION:

Dates and Times and Locations

The SSC meeting will be held between 9 a.m. and 5 p.m. on Monday, March 3, 2008, and between 8:30 a.m. and 5 p.m. on Tuesday, Wednesday and Thursday, March 4–6, 2008.

Monday, March 3, 2008, 9 a.m.

1. Introductions
2. Approval of Draft Agenda and Assignment of Rapporteurs
3. Approval of the Minutes of the 96th SSC Meeting
4. Report from the Pacific Fisheries Science Center Director
5. Insular Fisheries
A. Update on Status of Main Hawaiian Islands (MHI) Bottomfish Management and Monitoring
1. Data Collection, Processing and Analysis
a. Catch Reports
b. Dealer Reports
c. Delinquencies
2. Review annual data by month for last three years
3. Federal regulations
4. State rules and regulations
5. Report on economic performance
B. Bottomfish Risk Assessment Model (Action Item)
C. In-Situ Recording of Hawaiian Deep Reef Slopes and Seamounts
D. Hawaii Parrotfish Population Biology
E. Public Comment
F. Discussion and Action

Tuesday, March 4, 2008, 8:30 a.m.

6. Pelagic Fisheries
A. Longline Management
1. Hawaii Swordfish Fishery Effort (Action Item)
2. Mariana Archipelago Longline and Purse-Seine Closed Areas (Action Item)
3. American Samoa Longline Program Modifications (Action Item)
B. Non-Longline Management
1. American Samoa Purse-Seine Closed Area (Action Item)
2. Non-Longline Pelagic Fishery Management (Action Item)
C. American Samoa and Hawaii Longline Quarterly Reports
D. Bycatch reduction strategies in the Hawaii LL fleet
E. International Fisheries/Meetings
1. Climate Impacts on Oceanic Top Predators (CLIOTOP)
2. Western & Central Pacific Fisheries Commission (WCPFC)
3. Inter-American Tropical Tuna Commission (IATTC)
4. North Pacific Regional Fishery Management Organization
5. South Pacific Regional Fishery Management Organization
6. International Scientific Committee Billfish Working Group
F. Public Comment
G. Discussion and Action
7. Ecological Risk Assessment Workshop Report
8. Marine Recreational Fisheries Information Program (MRIP)
9. Protected Species
A. Loggerhead Petition
B. Loggerhead Workshop report
C. Pelagic Fisheries Research Program Albatross Population Dynamics Workshop Report
D. Potential Listing of Blackfooted Albatross under Endangered Species Act (ESA)
E. Update on ESA consultations

Wednesday, March 5, 2008, 8:30 a.m.

10. Maximum Sustainable Yield (MSY) Proxies Workshop

Thursday, March 6, 2008, 8:30 a.m.

11. Program Planning
A. 5 Year Research Plan
B. Cooperative Research Program
C. Pelagic Fisheries Research Program
D. Annual Catch Limits
E. Magnuson-Stevens Reauthorization Act (MSRA) Ecosystem-based Management Workshop
12. Other Business
A. 98th SSC Meeting
13. Summary of SSC Recommendations to the Council

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522–8220 (voice) or (808) 522–8226 (fax), at least 5 days prior to the meeting date.

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

Dated: February 8, 2008.

Tracey L. Thompson,

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

[FR Doc. E8–2650 Filed 2–12–08; 8:45 am]

BILLING CODE 3510–22–S

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review; Activities; Notice of Intent To Renew Collection 3038–0026, Gross Collection of ExChange-Set Margins for Omnibus Accounts

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden; it includes the actual data collection instruments [if any].

DATES: Comments must be submitted on or before March 14, 2008.

FOR FURTHER INFORMATION OR A COPY CONTACT: Barbara S. Gold, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581, (202) 418–5430; Fax: (202) 418–5528; e-mail: *bgold@cftc.gov* and refer to OMB Control No. 3038–0026.

SUPPLEMENTARY INFORMATION:

Title: Gross Collection of Exchange-Set Margins for Omnibus Accounts (OMB Control No. 3038–0026). This is a request for extension of a currently approved information collection.

Abstract: Commission Regulation 1.58 requires futures commission merchants to collect exchange-set margin for omnibus accounts on a gross, rather than a net, basis. This rule is promulgated pursuant to the Commission's rulemaking authority contained in sections 4c, 4d, 4f, 4g and 8a of the Commodity Exchange Act, 7 U.S.C. 6c, 6d, 6f, 6g and 12a (2000).

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 the CFTC's regulations were published on December 30, 1981. *See* 46 FR 63035 (Dec. 30, 1981). The **Federal Register** notice with a 60-day comment period soliciting comments on this collection of information was published on December 3, 2007 (72 FR 67919).

Burden statement: The respondent burden for this collection is estimated to average .08 hours per response. These estimates include 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; and transmit or otherwise disclose the information.

Respondents/Affected Entities: 150.

Estimated number of responses: 48.

Estimated total annual burden on respondents: 600 hours.

Frequency of collection: On occasion.

Send comments regarding the burden estimated or any other aspect of the information collection, including suggestions for reducing the burden, to the addresses listed below. Please refer to OMB Control No. 3038–0026 in any correspondence.

Barbara S. Gold, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581, and Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for CFTC, 725 17th Street, Washington, DC 20503.

Dated: February 7, 2008.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E8–2641 Filed 2–12–08; 8:45 am]

BILLING CODE 6351–01–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter the ''Corporation''), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, the Corporation is soliciting comments concerning application instructions designed to be used for grant competitions which the Corporation sponsors from time to time. These competitions are designed and conducted, when appropriations are available, to address the Corporation's strategic initiatives or other priorities. Applicants will respond to the questions included in these instructions in order to apply for funding in these Corporation competitions.

Copies of the information collection request can be obtained by contacting the office listed in the addresses section of this notice.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by April 14, 2008.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) *By mail sent to:* Corporation for National and Community Service; Attention Amy Borgstrom, Associate Director for Policy, Room 9515; 1201 New York Avenue, NW., Washington, DC, 20525.

(2) By hand delivery or by courier to the Corporation's mailroom at Room 8100 at the mail address given in paragraph (1) above, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays.

(3) *By fax to:* (202) 606–3476, Attention Amy Borgstrom, Associate Director for Policy.

(4) Electronically through the Corporation's e-mail address system: *aborgstrom@cns.gov.*

FOR FURTHER INFORMATION CONTACT: Amy Borgstrom, (202) 606–6930, or by e-mail at *aborgstrom@cns.gov.*

SUPPLEMENTARY INFORMATION: The Corporation is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submissions of responses).

Background:

These application instructions will be used by applicants for funding through Corporation competitions focusing on strategic initiatives or other priorities. The application is completed electronically using eGrants, the Corporation's web-based grants management system, or submitted via e-mail. This information collection instructs applicants to complete a three part narrative which includes program design, organizational capability, and budget.

Current Action: CNCS Application Instructions.

Type of Review: New.

Agency: Corporation for National and Community Service.

Title: CNCS Application Instructions.

OMB Number: None.

Agency Number: None.

Affected Public: Current/prospective recipients of Corporation funding.

Total Respondents: 600.

Frequency: Depending on the availability of appropriations.

Average Time per Response: Averages 8 hours.

Estimated Total Burden Hours: 4,800 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: February 5, 2008.

Elizabeth D. Seale,

Corporation for National and Community Service.

[FR Doc. E8–2658 Filed 2–12–08; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

[DoD–2008–OS–0010]

Privacy Act of 1974; System of Records

AGENCY: National Security Agency/Central Security Service.

ACTION: Notice to Add a System of Records.

SUMMARY: The National Security Agency/Central Security Service proposes to add a system of records notice to its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action would be effective without further notice on March 14, 2008 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the National Security Agency/ Central Security Service, Office of Policy, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248.

FOR FURTHER INFORMATION CONTACT: Ms. Anne Hill at (301) 688–6527.

SUPPLEMENTARY INFORMATION: The National Security Agency's record system notices for records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on February 6, 2008, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: February 7, 2008.

L.M. Bynum,

Alternative OSD Federal Register Liaison Officer, Department of Defense.

GNSA 24

SYSTEM NAME:

NSA/CSS Pre-Publication Review Records.

SYSTEM LOCATION:

National Security Agency/Central Security Service, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former NSA/CSS employee, advisor, military assignee, or Agency contractor; other authors obligated to submit writings or oral presentations for pre-publication review; and individuals involved in pre-publication review.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's full name, home telephone number, address, employment history, and possibly level of Education (type of degree), manuscripts and other writings submitted for pre-publication review, correspondence on pre-publication requests and appeals, and resumes.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

National Security Agency Act of 1959, as amended, 50 U.S.C. 402 note (Pub. L. 86–36), 50 U.S.C 403 (Pub. L. 80–253); 44 U.S.C. 3101; E.O. 12333; E.O. 12958; E.O. 12968; DoD Directive 5100.20, The National Security Agency and the Central Security Service; DoD Directive 5230.09, Clearance of DoD Information for Public Release; DoDI 5230.29, Security and Policy Review of DoD Information for Public Release; and NSA/CSS Policy 1–30, Review of NSA/CSS Information for Public Dissemination.

PURPOSE(S):

To maintain records relating to the pre-publication review of official NSA/CSS information intended for public dissemination.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To Federal agencies involved in a classification review of information containing National Security Agency as well as other agency and/or government information.

The DoD 'Blanket Routine Uses' published at the beginning of the NSA/CSS's compilation of record systems also apply to this record system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic media.

RETRIEVABILITY:

Individual's name, title of the pre-publication document, and the case number assigned to the FOIA request.

SAFEGUARDS:

Secured by a series of guarded pedestrian gates and checkpoints. Access to facilities is limited to security-cleared personnel and escorted visitors only. With the facilities themselves, access to paper and computer printouts are controlled by limited-access facilities and lockable containers. Access to electronic means is controlled by computer password protection.

RETENTION AND DISPOSAL:

Records are permanently retained and will be transferred to the NSA/CSS Archives when no longer needed for operations.

SYSTEM MANAGER(S) AND ADDRESS:

Director of Policy, National Security Agency/Central Security Service, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248.

NOTIFICATION PROCEDURE:

Individuals seeking to determine if records about themselves are contained in this record system should address written inquiries to the Director of Policy, National Security Agency/ Central Security Service, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248.

Written inquires should include individual's full name, address, and telephone number.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this record system should address written inquiries to the Deputy Director of Policy, National Security Agency/ Central Security Service, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248.

Written inquires should include individual's full name, address, and telephone number.

CONTESTING RECORD PROCEDURES:

The NSA/CSS rules for contesting contents and appealing initial determinations are published at 32 CFR part 322 or may be obtained by written request addressed to the Chief, Office of Policy, National Security Agency/ Central Security Service, Ft. George G. Meade, MD 20755–6000.

RECORD SOURCE CATEGORIES:

Individuals and other NSA personnel involved in the publications review process.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–2755 Filed 2–12–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Renewal of Department of Defense Federal Advisory Committees

AGENCY: DoD.

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of

1972, (5 U.S.C. Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.65, the Department of Defense gives notice that it is renewing the charter for the U.S. Air Force Scientific Advisory Board (hereafter referred to as the Board).

The Board is a discretionary federal advisory committee established by the Secretary of Defense to provide the Department of the Air Force independent advice and recommendations on science and technology for continued air and space dominance. The Board, in accomplishing its mission: (a) Provides independent technical advice to the U.S. Air Force leadership; (b) studies topics deemed critical by the Secretary of the Air Force and the Chief of Staff of the U.S. Air Force; (c) recommends applications of technology to improve U.S. Air Force capabilities; and (d) provides an independent review of the quality and relevance of U.S. Air Force science and technology programs.

The Board shall be composed of not more than 60 members, who are distinguished members of science and technology communities, industry and academia. Board members appointed by the Secretary of Defense, who are not federal officers or employees, shall serve as Special Government Employees under the authority of 5 U.S.C. 3109. Board members shall be appointed on an annual basis by the Secretary of Defense, and the Secretary of the Air Force shall select the Board's Chairperson from the total Board membership. In addition, the Secretary of the Air Force shall be authorized to appoint, as required, non-voting consultants to provide technical expertise to the Board.

Board members and consultants, if required, shall, with the exception of travel and per diem for official travel, serve without compensation. However, the Secretary of the Air Force, at his discretion, may authorize compensation to Board members and consultants in accordance with existing statutes, Executive Orders and regulations.

The Board shall be authorized to establish subcommittees, as necessary and consistent with its mission, and these subcommittees or working groups shall operate under the provisions of the Federal Advisory Committee Act of 1972, the Government in the Sunshine Act of 1976, and other appropriate federal regulations.

Such subcommittees or workgroups shall not work independently of the chartered Board, and shall report all their recommendations and advice to the Board for full deliberation and discussion. Subcommittees or workgroups have no authority to make decisions on behalf of the chartered Board nor can they report directly to the Department of Defense or any federal officers or employees who are not Board members.

SUPPLEMENTARY INFORMATION: The Board shall meet at the call of the Board's Designated Federal Officer, in consultation with the Board's chairperson. The Designated Federal Officer, pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with established DoD policies and procedures. The Designated Federal Officer or duly appointed Alternate Designated Federal Officer shall attend all committee meetings and subcommittee meetings.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the U.S. Air Force Scientific Advisory Board membership about the Board's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meetings of the U.S. Air Force Scientific Advisory Board.

All written statements shall be submitted to the Designated Federal Officer for the U.S. Air Force Scientific Advisory Board, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the U.S. Air Force Scientific Advisory Board's Designated Federal Officer can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the U.S. Air Force Scientific Advisory Board. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Deputy Committee Management Officer for the Department of Defense, 703–601–2554, extension 128.

Dated: February 7, 2008.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–2756 Filed 2–12–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[USN–2008–0005]

Privacy Act of 1974; System of Records

AGENCY: Department of Navy.

ACTION: Notice to add a system of records.

SUMMARY: The Department of Navy proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on March 14, 2008 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Privacy Act Officer, Mrs. Doris Lama, Department of the Navy, 2000 Navy Pentagon, Washington, DC 20350–2000.

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

SUPPLEMENTARY INFORMATION: The Department of Navy notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, were submitted on February 6, 2008, to the House Committee on Government Oversight and Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: February 7, 2008.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

NM05100–4

SYSTEM NAME:

Driver Record Monitoring System (DRMS).

SYSTEM LOCATION:

Primary Location: SAMBA Holdings, 1730 Montano Road NW., Albuquerque, NM 87101–3200.

Secondary Locations: Navy and Marine Corps activities. Official mailing addresses as published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx.*

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Navy and Marine Corps active duty and reserve personnel with a driver's license issued by a U.S. state or territory.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, date of birth, driver's license number, state of license, pay grade, sex, and state driving records/histories.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; and 18 U.S.C. 2721, Drivers Privacy Protection Act.

PURPOSE(S):

To identify Navy and Marine Corps members (officers and enlisted) whose driving habits may indicate they pose a threat to health/safety and identify required training, counseling, mentoring, etc., that would result in preventing future accidents.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To provide state department of motor vehicles offices with the full names, state of driver license, driving license numbers, sex, and dates of birth of Navy and Marine Corps personnel for purpose of identifying and collecting driving records/histories for use by Navy and Marine Corps personnel.

The DoD 'Blanket Routine Uses' that appear at the beginning of the Navy's compilation of system of record notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper and automated records.

RETRIEVABILITY:

Name and driver's license number.

SAFEGUARDS:

Computer facilities and terminals are located in areas accessible only by authorized personnel who are properly screened, cleared, and trained to work with automated systems of records. Computer terminals are protected by passwords, unique user IDs, and applicable layers of security access within the applications. Electronic and paper computer printouts and reports are made available only to authorized personnel having an official need-to-know.

RETENTION AND DISPOSAL:

Records are destroyed two years after individual completes program.

SYSTEM MANAGER(S) AND ADDRESS:

Marine Corps: Commandant of the Marine Corps, Safety Division, Ground Branch, 2 Navy Annex, Washington, DC 20380–1775.

Navy: Commander, Naval Surface Forces (N41IH), 2841 Rendova Road, San Diego CA 92155–5490.

Record Holders: Organizational elements of the Department of the Navy. Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx*.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to their commanding officer. Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx*.

Written requests should contain the member's full name and signature of the requester.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to their commanding officer. Official mailing addresses are published in the Standard Navy Distribution List that is available at *http://doni.daps.dla.mil/sndl.aspx*.

Written requests should contain the member's full name and signature of the requester.

CONTESTING RECORD PROCEDURES:

The Navy's rules for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the System of Records Manager.

RECORD SOURCE CATEGORIES:

Individual; driving records; and activity records.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8–2754 Filed 2–12–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before April 14, 2008.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues:

(1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: February 7, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Postsecondary Education

Type of Review: Reinstatement, with change, of a previously approved collection for which approval has expired.

Title: Upward Bound Annual Performance Report.

Frequency: Annually.

Affected Public: Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 1,143.

Burden Hours: 10,287.

Abstract: Grantees in the Upward Bound Programs (Upward Bound, Upward Bound Math-Science, and Veterans Upward Bound) must submit this report annually. The Department uses the reports to evaluate the performance of grantees prior to awarding continuation funding and to assess grantees' prior experience at the end of the budget period. The Department will also aggregate the data across projects to provide descriptive information on the programs and to analyze their outcomes in response to the Government Performance and Results Act. A System of Records Notice (SORN) for the Privacy Act System of Records associated with this information collection is underway. Privacy Data will not be retrieved until an approved SORN has been published in the **Federal Register** for 30 days, or is approved by OMB.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 3582. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 08–642 Filed 2–12–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before April 14, 2008.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues:

(1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: February 7, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Special Education and Rehabilitative Services

Type of Review: Revision.

Title: Report of Vending Facility Program.

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 52.

Burden Hours: 702.

Abstract: This information collection is used to satisfy the statutory and regulatory requirements for the periodic evaluation of the vending facility program on federal and other property throughout the U.S. The data collected provides information regarding the program's fulfillment of its purposes including income generated through the program, funds expended in support of program activities, the establishment of vending facilities on federal property, and training to persons who are blind in the operation of vending facilities. The respondents are state agencies designated by the Secretary of Education to administer the program in the states and territories.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3579. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 08–643 Filed 2–12–08; 8:45am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before April 14, 2008.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues:

(1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: February 7, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of the Chief Financial Officer

Type of Review: Revision.

Title: U.S. Department of Education Supplemental Information for the SF–424.

Frequency: Other: For new awards.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs (primary), Individuals or household, Businesses or other for-profit, Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 26,000.

Burden Hours: 7,860.

Abstract: In the previous clearance of the 1890–0017 collection in 2004, the U.S. Department of Education (ED) cleared the Application for Federal Education Assistance or ED 424 under this collection number. Since that time, ED has discontinued use of the ED 424 Form and has begun using the SF–424, Application for Federal Assistance, together with the U.S. Department of Education Supplemental Information for the SF–424 form. ED made a policy decision to switch to the SF–424 in keeping with Federal-wide forms standardization and streamlining efforts, especially with widespread agency use of Grants.gov. There were several data elements/questions on the ED 424 that were required for ED applicants that were not included on the SF–424. Therefore, ED put these questions that were already cleared as part of the 1890–0017 collection on a form entitled the U.S. Department of Education Supplemental Information for the SF–424.

The forms in the SF–424 forms family (e.g., the SF–424 Core Form, SF–424M and SF–424R&R) have already been cleared for use by Federal agencies to collect certain identifying information and other data from grant applicants. In this renewal for the collection package for 1890–0017, ED is requesting clearance only for the U.S. Department of Education Supplemental Information for the SF–424 form. The questions on this form deal with the following areas: Project Director identifying and contact information; Novice Applicants; and Human Subjects Research. The ED supplemental information form could be used with any of the SF–424 forms in the SF–424 forms family, as applicable.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3589. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 08–644 Filed 2–12–08; 8:45am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before March 14, 2008.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response: ''Comment: [insert OMB number], [insert abbreviated collection name, e.g., ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public

participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: February 7, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.

Title: Federal Family Education Loan Program and William D. Ford Federal Direct Loan Program Teacher Loan Forgiveness Forms.

Frequency: On occasion.

Affected Public: Businesses or other for-profit (primary), Individuals or household, Not-for-profit institutions, Federal Government, State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 8,700.

Burden Hours: 2,871.

Abstract: These forms serve as the means by which eligible borrowers in the Federal Family Education Loan Program and the William D. Ford Federal Direct Loan Program apply for teacher loan forgiveness and request forbearance on their loans while performing qualifying teaching service.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3533. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 08–647 Filed 2–12–08; 8:45am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before April 14, 2008.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues:

(1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: February 7, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Vocational and Adult Education

Type of Review: New Collection.

Title: Consolidated Annual Report (CAR) For the Carl D. Perkins Career and Technical Education Act of 2006 (Perkins IV) (as reauthorized by Pub. L. 109–270).

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 55.

Burden Hours: 11,825.

Abstract: The purpose of this information collection package—the Consolidated Annual Report (CAR)— is to gather narrative, financial, and performance data as required by the newly reauthorized Carl D. Perkins Career and Technical Education Act of 2006 (Perkins IV) (20 U.S.C. 2301 *et. seq.* as amended by Pub. L. 109–270). OVAE staff will determine each State's compliance with basic provisions of Perkins IV and the Education Department General Administrative Regulations (34 CFR Part 80.40 [Annual Performance Report] and Part 80.41 [Financial Status Report]). OVAE staff will review performance data to determine whether, and to what extent, each State has met its State adjusted levels of performance for the core indicators described in section 113(b)(4) of Perkins IV. Perkins IV requires the Secretary to provide the appropriate committees of Congress copies of annual reports received by the department from each eligible agency that receives funds under the Act.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3576. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be

electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 08–648 Filed 2–12–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meeting

AGENCY: Department of Education, National Assessment Governing Board.

ACTION: Notice of Open Meeting and Partially Closed Meetings.

SUMMARY: The notice sets forth the schedule and proposed agenda of a forthcoming meeting of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify members of the general public of their opportunity to attend. Individuals who will need special accommodations in order to attend the meeting (i.e., interpreting services, assistive listening devices, materials in alternative format) should notify Munira Mwalimu at 202–357–6938 or at *Munira.Mwalimu@ed.gov* no later than February 22, 2008. We will attempt to meet requests after this date, but cannot guarantee availability of the requested accommodation. The meeting site is accessible to individuals with disabilities.

DATES: March 6–8, 2008.

Times:

March 6:

Committee Meeting:

Executive Committee: Open Session—4:30 p.m. to 5:15 p.m.; Closed Session—5:15 p.m. to 6 p.m.

March 7:

Full Board: Open Session—8 a.m. to 9 a.m..; Closed Sessions—9 a.m. to 9:45 a.m. and 12:45 p.m. to 2 p.m.; Open Session—2 p.m. to 4:30 p.m.

Committee Meetings:

Assessment Development Committee: Open Session—10 a.m. to 12:30 p.m.;

Committee on Standards, Design and Methodology: Open Session—10 a.m. to 11 a.m.; Closed Session—11 a.m. to 12:30 p.m.

Reporting and Dissemination Committee: Open Session—10 a.m. to 12:30 p.m.

March 8:

Nominations Committee: Closed Session—7:15 a.m. to 8:15 a.m.

Full Board: Closed Session—9 a.m. to 9:30 a.m.; Open Session—9:30 a.m. to 11 a.m.

Location: Albuquerque Marriott Hotel, 2101 Louisiana Boulevard, NE., Albuquerque, NM 87110.

FOR FURTHER INFORMATION CONTACT: Munira Mwalimu, Operations Officer, National Assessment Governing Board, 800 North Capitol Street, NW., Suite 825, Washington, DC 20002–4233, *Telephone:* (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 412 of the National Education Statistics Act of 1994, as amended.

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress (NAEP). The Board's responsibilities include selecting subject areas to be assessed, developing assessment specifications and frameworks, developing appropriate student achievement levels for each grade and subject tested, developing standards and procedures for interstate and national comparisons, developing guidelines for reporting and disseminating results, and releasing initial NAEP results to the public.

On March 6, the Executive Committee will meet in open session from 4:30 p.m. to 5:15 p.m. and in closed session from 5:15 p.m. to 6 p.m. During the closed session, the Executive Committee will receive a briefing from the National Center for Education Statistics on contract options for the National Assessment of Educational Progress (NAEP) 2008–2012 assessment years, based on funding for Fiscal Years 2008–2009. The discussion of contract options and costs will address the implications for congressionally mandated goals and adherence to Board policies on NAEP assessments. This part of the meeting must be conducted in closed session because public discussion of this information would disclose independent government costs estimates and contract options, adversely impacting the confidentiality of the contracting process. The meeting must therefore be conducted in closed session as disclosure of technical and cost data would significantly impede implementation of the NAEP contract awards, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

On March 7, the full Board will meet in open session from 8 a.m. to 9 a.m. The Board will approve the agenda and a new Board member will be administered the Oath of Office. The Governing Board will receive a report from the Executive Director and hear an update on the work of the National Center for Education Statistics (NCES).

On March 7, the full Board will meet in closed session from 9 a.m. to 9:45 a.m. to receive a briefing on confidential student test results and secure test questions from the NAEP 2007 Puerto Rico Mathematics Assessment at grades 4 and 8. The Governing Board will be provided with confidential test data that has not been released to the public and cannot be discussed in an open meeting prior to their official release. The meeting must therefore be conducted in closed session as premature disclosure of data would significantly impede implementation of the NAEP program, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

On March 7, the Assessment Development Committee and the Reporting and Dissemination Committee will meet in open session from 10 a.m. to 12:30 p.m. The Committee on Standards, Design and Methodology will meet in open session from 10 a.m. to 11 a.m. and in closed session from 11 a.m. to 12:30 p.m. During the closed session, the Committee on Standards, Design and Methodology will discuss contract options for setting achievement levels on the 2009 NAEP reading, mathematics and science. The meeting must be conducted in closed session as the Committee will discuss confidential procurement options and independent government cost estimates. Public disclosure of this information, prior to release of the Request for Proposals would release confidential information and provide unfair advantage to potential bidders present at the meeting. This would significantly impede implementation of the NAEP program, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

On March 7, the full Board will meet in closed session from 12:45 p.m. to 2 p.m. to receive a briefing from the National Center of Education Statistics on results of the 2007 NAEP Writing Report Card. The Governing Board will be provided with embargoed data on the results of the 2007 Writing Report Card that cannot be discussed in an open meeting prior to their official release. The meeting must therefore be conducted in closed session as premature disclosure of data would significantly impede implementation of the NAEP program, and is therefore

protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.

Upon conclusion of the closed session, from 2 p.m. to 3:15 p.m. on March 7, the full Board will discuss budgets and matters impacting the NAEP Schedule of Assessments. The Board will take action on the NAEP Schedule of Assessments. From 3:30 p.m. to 4:30 p.m. the full Board will discuss Board operations and meeting agendas. The March 7 session of the Board meeting is scheduled to adjourn at 4:30 p.m.

On March 8, the Nominations Committee will meet in closed session from 7:15 a.m. to 8:15 a.m. to review and discuss confidential information regarding nominees received for Board vacancies for terms beginning on October 1, 2008. The Committee will recommend a final slate of candidates for Board discussion and action. Following the Committee meeting, on March 8, the full Board will meet in closed session from 9 a.m. to 9:30 a.m. to receive and discuss the final list of nominees to be submitted to the Secretary of Education for Board appointments. These discussions pertain solely to internal personnel rules and practices of an agency and will disclose information of a personal nature where disclosure would constitute an unwarranted invasion of personal privacy. As such, the discussions are protected by exemptions 2 and 6 of section 552b(c) of Title 5 U.S.C.

The full Board will meet in open session on March 8 from 9:30 a.m. to 11 a.m. to take final action on the list of candidates to be submitted to the Secretary for appointment, for Board member terms beginning October 1, 2008, and to receive and take action on Committee reports. The March 8, 2008 session of the Board meeting will adjourn at 11 a.m.

Detailed minutes of the meeting, including summaries of the activities of the closed sessions and related matters that are informative to the public and consistent with the policy of section 5 U.S.C. 552b(c) will be available to the public within 14 days of the meeting. Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite #825, 800 North Capitol Street, NW., Washington, DC, from 9 a.m. to 5 p.m. Eastern Standard Time, Monday through Friday.

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister/index.html*. To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1-888-293-6498; or in the Washington, DC, area at (202) 512-1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

Dated: February 8, 2008.

Charles E. Smith,

Executive Director, National Assessment Governing Board, U.S. Department of Education.

[FR Doc. E8–2736 Filed 2–12–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Advanced Scientific Computing Advisory Committee

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Advanced Scientific Computing Advisory Committee (ASCAC). Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, February 26, 2008, 9 a.m. to 5:15 p.m.; Wednesday, February 27, 2008, 9 a.m. to 12 p.m.

ADDRESSES: American Geophysical Union, (AGU), 2000 Florida Avenue, NW., Washington, DC 20009–1277.

FOR FURTHER INFORMATION CONTACT: Melea Baker, Office of Advanced Scientific Computing Research; SC–21/Germantown Building; U.S. Department of Energy; 1000 Independence Avenue, SW., Washington, DC 20585–1290; Telephone (301) 903–7486, (E-mail: *Melea.Baker@science.doe.gov*).

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The purpose of this meeting is to provide advice and guidance with respect to the advanced scientific computing research program.

Tentative Agenda: Agenda will include discussions of the following:

Tuesday, February 26, 2008

View from Washington and the FY09 Science Budget by the Under Secretary for Science
View from Germantown
Report Discussion on Charge—Networking
Infrastructure Scaling for Performance
ASCAC Balance Report Discussion
Parallel Math Libraries and Solver Algorithms
Report Discussion on Charge—Joint Panel with BERAC on Climate
Programming Models
Public Comment

Wednesday, February 27, 2008

Report on Discussion on Charge—Joint Panel with BERAC on GTL
Community Planning for Cyber Security
DARPA Exascale Study
OMB Perspectives
Public Comment

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 Melea Baker via FAX at 301–903–4846 or via e-mail (*Melea.Baker@science.doe.gov*). You must make your request for an oral statement at least 5 business days prior to 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. This notice is being published less than 15 days before the date of the meeting due to programmatic issues.

Minutes: The minutes of this meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room; 1E–190, Forrestal Building; 1000 Independence Avenue, SW., Washington, DC 20585; between 9 a.m. and 4 p.m., Monday through Friday, except holidays.

Issued in Washington, DC, on February 8, 2008.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8–2629 Filed 2–12–08; 8:45 am]

BILLING CODE 6450–01–P

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 (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, February 19, 8:30 a.m. to 6:30 p.m. and Wednesday, February 20, 2008, 8:30 a.m. to noon.

ADDRESSES: The Gaithersburg Hilton, 620 Perry Parkway, 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:* During the coming year, the Office of Science (SC) will be developing a new strategic plan for the Fusion Energy Sciences (FES) program. The Fusion Energy Sciences Advisory Committee (FESAC) recently completed addressing a charge on the magnetic fusion portion of the FES program. At this meeting, FESAC will be charged to address the remaining portions of the FES program—alternate concepts, high energy density laboratory plasmas and inertial fusion energy, and plasma sciences. In addition, the committee will discuss how it plans to approach each of the new charges and schedules to complete them. Once the recommendations and advice from FESAC on all of these portions of the program are complete, the Office of Science will be prepared to write the new strategic plan that will carry the FES program through the next important period in establishing the knowledge base for an economically and environmentally attractive fusion energy source.

Tentative Agenda

Tuesday, February 19, 2008

- DOE Perspective.
- OFES Perspective.
- ITER Project Status.
- Discussion of the Charge on High Energy Density Laboratory Plasmas.
- Presentation on the Low Temperature Plasma Physics Workshop.
- Discussion of the Charge on Non-Tokamak Confinement Concepts.
- Public Comments.

Wednesday, February 20, 2008

- Discussion of Strategic Plan Development.
- Adjourn.

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). 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. This notice is being published less than 15 days before the date of the meeting due to programmatic issues.

Minutes: The minutes of the meeting will be available on the U.S. Department of Energy's *Office of Fusion Energy Sciences* Web site (*http://www.science.doe.gov/ofes/*).

Issued at Washington, DC, on February 8, 2008.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8–2642 Filed 2–12–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[Certification Notice—216]

Office Electricity Delivery and Energy Reliability; Notice of Filings of Self-Certifications of Coal Capability Under the Powerplant and Industrial Fuel Use Act

AGENCY: Office Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of filings.

SUMMARY: On December 31, 2007, The WCM Group, Inc., on behalf of two owners and operators of new base load electric powerplants, and Conectiv Mid Merit, LLC, as owner and operator of a new base load electric powerplant, submitted coal capability self-certifications to the Department of Energy (DOE) pursuant to section 201(d) of the Powerplant and Industrial Fuel Use Act of 1978 (FUA), as amended, and DOE regulations in 10 CFR 501.60, 61. Section 201(d) of FUA requires DOE to publish a notice of receipt of self-certifications in the **Federal Register**.

ADDRESSES: Copies of coal capability self-certification filings are available for public inspection, upon request, in the Office of Electricity Delivery and Energy Reliability, Mail Code OE–20, Room 8G–024, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Ellen Russell at (202) 586–9624.

SUPPLEMENTARY INFORMATION: Title II of FUA, as amended (42 U.S.C. 8301 *et seq.*), provides that no new base load electric powerplant may be constructed or operated without the capability to use coal or another alternate fuel as a primary energy source. Pursuant to FUA section 201(d), in order to meet the requirement of coal capability, the owner or operator of such a facility proposing to use natural gas or petroleum as its primary energy source shall certify to the Secretary of Energy (Secretary) prior to construction, or prior to operation as a base load electric powerplant, that such powerplant has the capability to use coal or another alternate fuel. Such certification establishes compliance with FUA section 201(a) as of the date it is filed with the Secretary. The Secretary is required to publish a notice in the **Federal Register** reciting that the certification has been filed.

The following owners of proposed new base load electric powerplants have filed self-certifications of coal-capability with DOE pursuant to FUA section 201(d) and in accordance with DOE regulations in 10 CFR 501.60, and 501.61:

Owner: J. L. Bates, LP.
Capacity: 290 Megawatts (MW).
Plant Location: Mission, Hidalgo County, Texas.
In-Service Date: May, 2009.

Owner: Victoria Wle, LP.
Capacity: 273 MW.
Plant Location: Victoria, Victoria County, Texas.
In-Service Date: March, 2008.

Owner: Conectiv Mid Merit, LLC.
Capacity: 1100 MW.
Plant Location: York County, Peach Bottom Township, Pennsylvania.
In-Service Date: May, 2011.

Issued in Washington, DC on February 6, 2008.

Anthony J. Como,

Director, Permitting and Siting, Office of Electricity Delivery and Energy Reliability.

[FR Doc. E8–2638 Filed 2–12–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

February 6, 2008.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER02–1633–005; ER04–1099–004; ER03–25–004; ER00–38–007; ER08–530–000; ER03–290–005; ER00–1115–006; ER04–1080–004; ER00–3562–006; ER03–209–005; ER05–816–003; ER05–1422–005; ER05–819–

003; ER05–820–003; ER05–48–003; ER04–831–005; ER03–36–007; ER02–1367–005; ER03–446–005; ER08–531–000; ER03–341–005; ER03–342–005; ER02–1959–005; ER08–532–000; ER02–2227–007; ER06–441–002; ER02–600–008; ER99–1983–006; ER08–533–000; ER01–2688–010; ER02–2229–006; ER02–1257–005; ER03–24–006; ER04–1221–002; ER05–67–003; ER01–480–006; ER08–534–000; ER05–68–003; ER04–1081–004; ER03–838–006; ER03–49–004; ER99–970–006; ER08–529–000 ER03–1288–004; ER01–2887–007; ER04–1100–004; ER02–1319–006; ER06–754–004; ER06–755–003; ER06–749–003; ER06–751–004; ER06–753–003; ER06–741–003; ER06–756–003; ER06–750–003; ER06–742–003; ER06–752–003

Applicants: Auburndale Peaker Energy Center, L.L.C.; Bethpage Energy Center 3, LLC; Blue Spruce Energy Center, LLC; BROAD RIVER ENERGY LLC; Calpine California Equipment Finance Company, LLC; Calpine Construction Finance Company, LP; Calpine Energy Management, L.P.; Calpine Energy Services, L.P.; CES Marketing Vi, LLC; Calpine Merchant Services Company, Inc.; CES Marketing V, L.P.; CES Marketing IX, LLC; CES Marketing X, LLC; Calpine Bethpage 3, LLC; Calpine Newark, LLC; Calpine Northbrook Energy Marketing, LLC; Calpine Oneta Power, LP; Calpine Philadelphia, Inc; Calpine Power America—OR, LLC; Calpine Power America—CA, LLC; CPN Bethpage 3rd Turbine Inc.; CPN Bethpage 3rd Turbine Inc.; Creed Energy Center, LLC; Decatur Energy Center, LLC; Delta Energy Center, LLC; Geyers Power Company, LLC; Gilroy Energy Center, LLC; Goose Haven Energy Center, LLC; HERMISTON POWER PARTNERSHIP; Los Esteros Critical Energy Facility LLC; Mankato Energy Center, LLC; Metcalf Energy Center, LLC; MOBILE ENERGY LLC; Pastoria Energy Center, LLC; PCF2, LLC; Power Contract Financing, L.L.C.; Riverside Energy Center, LLC; RockGen Energy LLC; Rocky Mountain Energy Center, LLC; South Point Energy Center, LLC; Zion Energy LLC; Auburndale Power Partners LP; Calpine Gilroy Cogen, L.P.; Carville Energy LLC; Columbia Energy LLC; CPN Pryor Funding Corporation; KIAC PARTNERS; Los Medanos Energy Center LLC; Morgan Energy Center, LLC; NISSEQUOGUE COGEN PARTNERS; Pine Bluff Energy, LLC

Description: Order 697 Compliance Filing and Application for Authority to Sell Services at Market-Based Rates re Auburndale Peaker Energy Center LLC et al.

Filed Date: 02/05/2008.

Accession Number: 20080205–0293.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 26, 2008.

Docket Numbers: ER07–1105–004.

Applicants: Cedar Creek Wind Energy, LLC.

Description: Cedar Creek Wind Energy, LLC's Notice of a Change in Facts.

Filed Date: 02/05/2008.

Accession Number: 20080205–5012.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 26, 2008.

Docket Numbers: ER07–1285–004.

Applicants: Niagara Mohawk Power Corporation.

Description: National Grid submits a refund report.

Filed Date: 01/31/2008.

Accession Number: 20080206–0168.

Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

Docket Numbers: ER08–501–000.

Applicants: American Electric Power Service Corporation.

Description: AEP Operating Companies submit First Revised Interconnection and Local Delivery Service Agreement 1436.

Filed Date: 01/31/2008.

Accession Number: 20080201–0119.

Comment Date: 5 p.m. Eastern Time on Thursday, February 21, 2008.

Docket Numbers: ER08–519–000.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits Amendments to enable the implementation of the Congestion Revenue Right Contingency Plan.

Filed Date: 01/31/2008.

Accession Number: 20080204–0115.

Comment Date: 5 p.m. Eastern Time on Friday, February 15, 2008.

Docket Numbers: ER08–527–000.

Applicants: Public Service Company of Colorado.

Description: Public Service Compay of Colorado submits changes in base rates applicable to service with Aquila Inc et al to be effective 4/1/08.

Filed Date: 02/01/2008.

Accession Number: 20080205–0217.

Comment Date: 5 p.m. Eastern Time on Friday, February 22, 2008.

Docket Numbers: ER08–535–000.

Applicants: Xcel Energy Services Inc.

Description: Public Service Co of Colorado submits the Renewable Energy Certificate Rider with Intermountain Rural Electric Association.

Filed Date: 01/30/2008.

Accession Number: 20080205–0323.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 20, 2008.

Docket Numbers: ER08–536–000.

Applicants: Polytop Corporation.

Description: Polutop Corporation submits their FERC Electric Tariff, Original Volume 1.

Filed Date: 02/05/2008.

Accession Number: 20080206–0167.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 26, 2008.

Docket Numbers: ER08–538–000.

Applicants: ISO New England Inc.

Description: ISO New England Inc submits its revised tariff sheets reflecting proposed revisions to Section III.E.2.2 of Market Rule 1 etc & testimony of Henry Y Yoshimura.

Filed Date: 02/05/2008.

Accession Number: 20080206–0231.

Comment Date: 5 p.m. Eastern Time on Friday, February 15, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an

eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–2609 Filed 2–12–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008-0046; FRL–8351–5]

Notice of Filing of Pesticide Petitions for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of pesticide petitions proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before March 14, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to the docket identification (ID) number and the pesticide petition number of interest. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. 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, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: The person listed at the end of the pesticide petition summary of interest.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the pesticide petition summary of interest.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Docket ID Numbers

When submitting comments, please use the docket ID number and the pesticide petition number of interest, as shown in the table.

PP Number	Docket ID Number
PP 6F7094	EPA–HQ–OPP–2006-0855
PP 6F7095	EPA–HQ–OPP–2006-0855
PP 7F7246	EPA–HQ–OPP–2007–1065
PP 5F6986	EPA–HQ–OPP–2005-0145

III. What Action is the Agency Taking?

EPA is printing notice of the filing of pesticide petitions received under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petitions described in this notice contain data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. Additional data may be needed before EPA rules on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions included in this notice, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov*.

New Tolerances

1. *PP 6F7094*. (EPA–HQ–OPP–2006–0855). BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 27709–3528, proposes to establish a tolerance for residues of the fungicide metconazole, 5-[(4-chlorophenyl)-methyl]-2,2-dimethyl-1-(1H-1,2,4-triazol-1-ylmethyl)cyclopentanol, measured as the sum of cis- and trans- isomers in or on food commodities barley, grain at 2.0 parts per million (ppm); barley, hay at 7.0 ppm, barley straw at 7.0 ppm; beet, sugar, root at 0.1 ppm; beet, sugar, tops at 2.0 ppm; beet, sugar, pulp, dry at 1.9 ppm; beet, sugar, molasses at 0.2 ppm; beet, sugar, raw at 0.25 ppm; oat, grain at 1.0 ppm; oat, straw at 6.0 ppm; oat, hay at 17 ppm; rye, grain at 0.25 ppm; rye, straw at 14.0 ppm; soybean, forage at 3.0 ppm; soybean, hay at 6.0 ppm; soybean, seed at 0.10 ppm; soybean, aspirated grain fractions at 1.0 ppm; soybean, hulls at 0.2 ppm; triticale at 0.25 ppm, wheat, grain at 0.15 ppm; wheat, hay at 16.0 ppm; wheat, straw at 18.0 ppm; wheat, aspirated grain fractions at 10.0 ppm; wheat, milled byproducts at 1.0 ppm. Independently validated analytical method have been submitted for analyzing parent metconazole residues with appropriate sensitivity in all the crop and processed commodities for soybean, sugar beet, barley, wheat, oats, and rye for which tolerances are being requested. Contact: Tracy Keigwin, telephone number: (703) 305–6605; e-mail address: *keigwin.tracy@epa.gov*.

2. *PP 6F7095*. (EPA–HQ–OPP–2006–0855). Valent U.S.A. Company, 1600 Riviera Ave., Suite 200, Walnut Creek, CA 94596–8025, proposes to establish a tolerance for residues of the fungicide metconazole, 5-[(4-chlorophenyl)-methyl]-2,2-dimethyl-1-(1H-1,2,4-triazol-1-ylmethyl)cyclopentanol, measured as the sum of cis- and trans-isomers in or on food commodities fruits, stone (crop group 12) at 0.2 ppm ; nuts, tree (crop group 14) including pistachio at 0.02 ppm; almond hulls at 5.0 ppm; and peanut at 0.02 ppm. Independently validated analytical method have been submitted for analyzing parent metconazole residues with appropriate sensitivity in all the crop and processed commodities for stone fruit (crop group 12), tree nuts (crop group 14), and peanuts for which tolerances are being requested. Contact: Tracy Keigwin, telephone number: (703) 305–6605; e-mail address: *keigwin.tracy@epa.gov*.

3. *PP 7F7246*. (EPA–HQ–OPP–2007–1065). KIM-C1, LLC, c/o Siemer and Associates, Inc., 135 W. Shaw, Suite 102, Fresno, CA 93704, proposes to establish a time-limited tolerance for residues of the fungicide forchlorfenuron (KT-30), in or on food commodities almond, cherry, fig, pear, pistachio, plum/prune at 0.01 ppm. Two analytical methods, both based on high performance liquid chromatography (HPLC) procedures have been developed. The first method used a visible ultraviolet (UV) detector, while the second method used a mass spectrophotometer (MS) detector. Since the MS detector is capable of both qualitative as well as quantitative measurement, it is the preferred method. The lowest level of quantification (LOQ) in all of the crops (i.e. almond, cherry, fig, pear, pistachio and prune) was 0.01 ppm. Contact: Tawanda Maignan, telephone number: (703) 308–8050; e-mail address: *maignan.tawanda@epa.gov*.

Revised Notice of Filing of a Pesticide Petition

PP 5F6986. (EPA–HQ–OPP–2005–00145). BASF Corporation, Research Triangle Park, NC 27709, submitted a revised notice of filing for their pesticide petition which supersedes/replaces the previous notice published in the **Federal Register** of February 15, 2006 (71 FR 7951) (FRL–7759–3). This revised notice proposes to establish a tolerance for residues of the fungicide boscalid (BAS 510F), 3-pyridinecarboxamide, 2-chloro-N-(4'-chloro[1,1'-biphenyl]-2-yl) in or on food commodities caneberry, crop group 13A at 6.0 ppm; bushberry, crop group 13B at 10.0 ppm; cucumber at 0.5 ppm; and vegetable, root, subgroup 1A, except sugar beet, garden beet, radish and turnip at 1.0 ppm. In plants, the parent residue is extracted using an aqueous organic solvent mixture followed by liquid/liquid partitioning and a column clean up. Quantitation is by gas chromatography using mass spectrometry (GC/MS). In livestock, the residues are extracted with methanol. The extract is treated with enzymes in order to release the conjugated glucuronic acid metabolite. The residues are then isolated by liquid/liquid partition followed by column chromatography. The hydroxylated metabolite is acetylated followed by a column clean up. The parent and acetylated metabolite are quantitated by gas chromatography with electron capture detection. Contact: Bryant Crowe, telephone number: (703) 305–0025; e-mail address: *crowe.bryant@epa.gov*.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: February 4, 2008.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. E8–2551 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2008–1080; FRL–8352–6]

Endocrine Disruptor Screening Program; Second Workshop to Discuss Draft Policies and Procedures; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is convening a half-day public workshop to discuss the Agency's draft administrative policies and procedures for completing the initial screening and testing under EPA's Endocrine Disruptor Screening Program (EDSP). In the **Federal Register** issue of December 13, 2007 (72 FR 70842) (FRL–8340–3), EPA announced the availability for public review and comment of the draft policies and procedures EPA is considering adopting for conducting the initial screening and testing under EDSP. A 1–day public workshop was held on December 17, 2007, in Arlington, VA to help the public understand the draft policies and procedures. Subsequently, EPA extended the public comment period for the draft policies and procedures by 30 days in the **Federal Register** issue of February 6, 2008 (73 FR 6963) (FRL–8351–2). The public comment period now ends March 12, 2008. The purpose of the second public workshop, announced in this notice, is to provide another opportunity for the public to ask questions about the draft EDSP policies and procedures.

DATES: The meeting will be held on Thursday, February 28, 2008, from 9 a.m. to noon.

Special accommodations: For information on access or services for individuals with disabilities, and to request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held at the Environmental Protection Agency, Conference Center–Lobby Level, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: William Wooge, Office of Science Coordination and Policy (OSCP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 546–8476; e-mail address: *wooge.william@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. Who Should Attend?

You may be interested in attending this workshop if you produce, manufacture, use, or import pesticide/agricultural chemicals and other chemical substances; or if you are or may otherwise be involved in the testing of chemical substances for potential endocrine effects. To determine whether you or your business may have an interest in this workshop, you should carefully examine section 408(p) of the Federal, Food, Drug, and Cosmetic Act (FFDCA) (21 U.S.C. 346a(p)).

II. Why Hold a Second Workshop?

EPA is holding a half-day workshop to facilitate the public's comments on the draft policies and procedures that EPA is considering for conducting the initial screening and testing of chemicals under the EDSP. The workshop is a second opportunity for the public, stakeholders, and the regulated community to discuss the draft EDSP policies and procedures currently available for public comment. Although the workshop is not intended to collect oral comments, the Agency intends to consider the discussion and will be documenting the discussion for the public docket.

In addition to attending this workshop, EPA invites you to provide comments on the draft policies and procedures for initial EDSP screening and testing. The December 13, 2007 **Federal Register** document that announced the availability of draft policies and procedures for public comment included a specific list of questions on which the Agency is specifically seeking comment. This list, along with an agenda for the workshop, will be posted on the Agency's website at*http://www.epa.gov/scipoly/oscpendo/index.htm* and provided at the workshop. EPA will consider all comments received, and EPA will announce the availability of the final versions of the policies and procedures for the initial EDSP screening and testing in the **Federal Register**.

List of Subjects

Environmental protection, Chemicals, Endocrine disruptors, Pesticides and pests, Reporting and recordkeeping.

Dated: February 7, 2008.

James B. Gulliford,

Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

[FR Doc. E8–2701 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8528–3]

Notice of Availability of the Nanomaterial Research Strategy External Review Draft and Expert Peer Review Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of document availability and external peer review meeting.

SUMMARY: The U.S. Environmental Protection is announcing the availability of a draft report titled, Draft Nanomaterial Research Strategy (EPA/600/S–08/002), which was prepared by EPA's Office of Research and Development (ORD). EPA is also announcing that Versar, Inc., an EPA contractor for external peer review, will convene a panel of experts and will organize and conduct an independent expert external peer meeting April 11, 2008, to review the draft document. Versar, Inc. invites the public to register to attend this meeting as observers. In addition, Versar, Inc. invites the public to give oral comments or provide written comments at the external peer review meeting regarding the draft document under review. The expert panel will review the draft document and consider public comments received prior to the meeting in the official public docket for this activity under docket ID number EPA–HQ–ORD–2008–0114 as well as comments made by the public at the meeting. The draft document is available through *http://www.regulations.gov* and at *http://es.epa.gov/ncer/nano/publications/index.html*. In preparing a final document, EPA will consider Versar, Inc.'s report of the comments and recommendations from the external peer-review meeting, as well as public comments. EPA plans to issue a final research strategy for nanomaterials in 2008.

The public release of this draft document is solely for the purpose of seeking public comment and external peer review. This draft research strategy does not represent and should not be construed to represent any EPA policy, viewpoint, or determination.

DATES: The peer review panel meeting will begin on April 11, 2008, at 9 a.m. and end at 5 p.m. The public comment period begins on February 7, 2008, and ends 30-days after publication in the **Federal Register**. Technical comments should be in writing and must be received by EPA 30-days after publication of the **Federal Register** Notice.

ADDRESSES: The independent expert external peer review meeting will be held at the Westin Alexandria, located at 400 Courthouse Square, Alexandria, VA; telephone 703–253–8600. Members of the public may attend the meeting as observers, and there will be a limited time for comments from the public in the afternoon. Space is limited, and reservations will be accepted on a first-come-first-served basis. To attend this meeting, register by April 4, 2008, by visiting *http://epa.versar.com/nanostrategy* or contact Ms.Gina Casciano of Versar, Inc., 6850 Versar Center, Springfield, VA, 22151, at 703–642–6813, and via e-mail at *GCasciano@Versar.com.* You will be asked for your name, contact information, the organization you represent, and your title. Please indicate if you intend to make an oral statement during the public comment period at the meeting.

You may also submit comments prior to the meeting, identified by Docket ID No. EPA–HQ–ORD–2008–0114, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *ORD.Docket@epa.gov.*
- Mail: ORD Docket, Environnemental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- Hand Delivery: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–ORD–2008–0114. Deliveries are only accepted from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information. If you provide comments by mail or hand delivery, please submit three copies of the comments. For attachments, provide and index, number pages consecutively with the comments, and submit an unbound original and three copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2008–0114. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through *http://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.

Docket: All documents in the docket are listed in the *http://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. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the ORD Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: Questions regarding logistics for the external peer review meeting should be directed to Ms. Gina Casciano, Versar, Inc., 6850 Versar Center, Springfield, VA, 22151; telephone: 703–642–6813; or via e-mail at *GCasciano@Versar.com.* For questions regarding the draft document, please contact Dr. Nora Savage, Office of Research and Development, Mailcode 8722F, Telephone 202–343–9858, fax number 202–233–0678, *savage.nora@epa.gov;* or Dr. Randy Wentsel Office of Research & Development, Mail Code 8101R, Telephone 202–564–3214, fax number 202–564–3214, email *wentsel.randy@epa.gov;* Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: EPA is submitting the Draft Nanomaterial Research Strategy for independent, external peer review. Public comments received in the docket will be shared with the external peer review panel for their consideration. Although EPA is under no obligation to do so, EPA may consider comments received after the close of the comment period. The public release of this draft document is solely for the purpose of seeking public comment and peer review. This draft research strategy does not represent and should not be construed to represent any EPA policy, viewpoint, or determination.

The Draft Nanomaterial Research Strategy identifies research needs and outlines research for environmental implications; recognizing the latter need for exploring environmental applications of nanotechnology that can inform the appropriate regulatory and policy decisions for nanotechnology. The draft research strategy provides a discussion of research to be conducted both in-house and extramurally to understand the impact of engineered nanomaterials. The purpose of this strategy is to guide the EPA's Office of Research and Development (ORD) program in nanomaterial research. The strategy builds on and is consistent with the foundation of scientific needs identified in the report by the Nanotechnology Environmental and Health Implications (NEHI) Workgroup (NSTC, 2006), and on the EPA White Paper on Nanotechnology (EPA, 2007). Special attention is given to EPA's role among Federal Agencies in addressing data needs for hazard assessment, risk assessment, and risk management relevant to the EPA mission and regulatory responsibilities. ORD will use the NRS and incorporate these research activities into the multi-year planning process.

ORD has identified four key research themes and seven key scientific questions addressing each of the research themes where we can provide leadership for the Federal government research program and support the science needs of the Agency. The themes are: (1) Sources, fate, transport, and exposure; (2) human health and

ecological research; (3) risk assessment methods and case studies; and (4) preventing and Mitigating Risks. Supplemental information is provided in a number of appendices. Following the expert external peer review, EPA plans to issue a final research strategy on nanotechnology in mid-2008.

Dated: February 1, 2008.

Kevin Teichman,

Acting Deputy Assistant Administrator for Science, Office of Research and Development.

[FR Doc. E8–2697 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0021; FRL–8349–5]

Notice of Filing of a Pesticide Petition for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before March 14, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0021. and the pesticide petition number (*PP 7F7262*), by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2008–0021. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. 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, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Cheryl Greene, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308–0352; e-mail address: *greene.cheryl @epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What Action is the Agency Taking?

EPA is printing notice of the filing of a pesticide petition received under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petition described in this notice contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the pesticide petition. Additional data may be needed before EPA rules on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition included in this notice, prepared by the petitioner, is included in a docket EPA has created for this rulemaking. The docket for this petition is available on-line at *http://www.regulations.gov*.

New Exemption from Tolerance

PP 7F7262. BioSafe Systems, 22 Meadow Street, East Hartford, CT 06108, proposes to establish an exemption from the requirement of a tolerance for residues of the fungicide peroxyacetic acid, in or on all agricultural commodities when used as a biochemical pesticide. Because this petition is a request for an exemption from the requirement of a tolerance without numerical limitations, no analytical method is required.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: February 5, 2008.

W. Michael McDavit,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E8–2708 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–1187; FRL–8349–2]

Notice of Filing of a Pesticide Petition for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before March 14, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–1187 and the pesticide petition number (*PP 7F7296*), by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007–1187. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. 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, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Todd Peterson, Biopesticides and Pollution Prevention Division (7511P),

Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: 703–308–7224; e-mail address: *peterson.todd@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What Action is the Agency Taking?

EPA is printing notice of the filing of a pesticide petition received under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petition described in this notice contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the pesticide petition. Additional data may be needed before EPA rules on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition included in this notice, prepared by the petitioner, is included in a docket EPA has created for this rulemaking. The docket for this petition is available on-line at *http://www.regulations.gov*.

New Exemption from Tolerance

PP 7F7296. Repar Corporation, c/o Mandava Associates, LLC, 1730 M St., NW., Suite 906, Washington, DC 20036, proposes to establish an exemption from the requirement of a tolerance for residues of the plant growth regulator homobrassinolide, in or on food commodities including all raw agricultural commodities food and non-food crops including forage crops, and animal feed as well as the residues of homobrassinolide in meat, milk and eggs. Because this petition is a request for an exemption from the requirement of a tolerance without numerical limitations, no analytical method is required.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: February 5, 2008.

W. Michael McDavit,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E8–2712 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2006-0075; FRL–8360–9]

Pesticide Products; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register pesticide products containing new active ingredients not included in any currently registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Comments must be received on or before March 14, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–2006–0075, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–2006–0075. EPA's policy is that all comments received will be included in the docket

without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. 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, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT:

Daniel Peacock, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5407; e-mail address: *peacock.dan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Registration Applications

EPA received applications as follows to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

File Symbols: 10163-EOL and 10163-EOT. *Applicant*: Gowan Company, 370 S. Main Street, Yuma, AZ 85364. *Product Names*: Fenazaquin Technical and GWN-1708. *Active Ingredient*: Fenazaquin (4-tert-butylphenethyl quinazolin-4-yl ether) at 97.5% and 18.79%. *Proposed Classification/Use*: Unclassified—to control mites and whiteflies on foliage crops, Christmas tree plantations and ornamental plants; Non-Bearing tree fruits and nuts; and established ornamental landscape plantings.

List of Subjects

Environmental protection, Pesticides and pest.

Dated: February 4, 2008.

Lois Rossi,

Director, Registration Division,

[FR Doc. E8–2699 Filed 2–12–08; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

February 8, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995, Public Law No. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Pursuant to the PRA, no person shall be subject to any penalty for failing to comply with a collection of information that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written PRA comments should be submitted on or before April 14, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Interested parties may submit all PRA comments by email or U.S. mail. To submit your comments by email, send them to PRA@fcc.gov. To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, send an email to *PRA@fcc.gov* or contact Cathy Williams at 202–418–2918.

SUPPLEMENTARY INFORMATION:

OMB Number: 3060–0568.

Title: Commercial Leased Access.

Form Number: Not applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities, Not-for-profit institutions.

Number of Respondents: 4,001

Estimated Time per Response: 20 minutes to 40 hours.

Frequency of Response: Annual reporting requirement; On occasion reporting requirement; Recordkeeping requirement; Third party disclosure requirement.

Total Annual Burden: 76,819.

Total Annual Cost: $105,000.

Nature of Response: Required to obtain or retain benefits.

Confidentiality: No need for confidentiality required.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On February 1, 2008, the Commission released a Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Leased Commercial Access, MB Docket No. 07–42, FCC 07–42. In this Report and Order, we modify the leased access rules. With respect to leased access, we modify the leased access rate formula; adopt customer service obligations that require minimal standards and equal treatment of leased access programmers with other programmers; eliminate the requirement for an independent accountant to review leased access rates; and require annual reporting of leased access statistics. We also adopt expedited time frames for resolution of complaints and improve the discovery process.

The commercial leased access requirements are set forth in Section 612 of the Communications Act of 1934, as amended. The statute and corresponding leased access rules require a cable operator to set aside channel capacity for commercial use by unaffiliated video programmers. The Commission's rules implementing the statute require that cable operators with 36 or more channels calculate rates for leased access channels, maintain and provide on request information pertaining to leased access channels, and provide billing and collection services as required. The Commission may be required to resolve complaints about rates, terms and conditions of leased access. Changes to the rules increased the quantity of information maintained and provided, increase the information needed to calculate rates and require the filing of an annual report with the Commission on the status of leased access channels.

In addition, the Commission is consolidating information collection OMB Control Number 3060–0569 (Commercial leased access dispute resolution) into this collection OMB Control Number 3060–0568.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–2663 Filed 2–12–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Office of Agreements (202–523–5793 or *tradeanalysis@fmc.gov*).

Agreement No.: 012027.

Title: The Hoegh/Maersk Ancillary Agreement.

Parties: Aequitas Holdings A/S; A.P. Moller-Maersk A/S; and Hoegh Autoliners A/S.

Filing Party: Wayne R. Rohde, Esq., Sher & Blackwell LLP, 1850 M Street, NW., Suite 900, Washington, DC 20036.

Synopsis: The Agreement relates to the acquisition of Maersk Shipping Singapore Ltd.'s stock by Hoegh Autoliners and provides that A.P. Moller-Maersk will not compete with Hoegh's car carrier services in the U.S. trades.

Agreement No.: 201132–009.

Title: New York/New Jersey-Port Newark Container Terminal LLC Lease (Lease No. L–PN–264).

Parties: The Port Authority of New York and New Jersey and Port Newark Container Terminal LLC.

Filing Party: Patricia W. Duemig, Senior Property Representative, the Port Authority of New York and New Jersey, New Jersey Marine Terminals, 260 Kellogg Street, Port Newark, NJ 07114.

Synopsis: The amendment provides for the Port Authority's approval to transfers and changes in ownership of Port Newark Container Terminal LLC.

By Order of the Federal Maritime Commission.

Dated: February 8, 2008.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8–2675 Filed 2–12–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR part 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicants:

FedEx International Freight Forwarding Agency Services, No. 300 Xikang Road, 10th Floor Ben Ben Mansion, Shanghai 200040 China, *Officers:* George E. Clark, President, (Qualifying Individual), Ronald W. Berger, Vice President.

Chatelain Cargo Services, Inc., 16312 SW 45 Terrace, Miami, FL 33185, *Officers:* Jesus M. Dominguez, President, (Qualifying Individual), Phillippe V. Chatclain, Vice President.

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants:

Flamingo International, Inc., 10481 NW 36 Street, Doral, FL 33178, *Officers:* Michael O. Archer, President, (Qualifying Individual), Dawn M. Pierce, Vice President.

Encargo Export Corporation dba Encargo Lines, dba Encargo Logistics, 8500 NW 72 Street, Miami, FL 33166, *Officers:* Alberto Paniagua, Vice President, (Qualifying Individual), Carlos Nadal, President.

Dated: February 8, 2008.

Karen V. Gregory,

Assistant Secretary.

[FR Doc. E8–2657 Filed 2–12–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuance

Notice is hereby given that the following Ocean Transportation Intermediary license has been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/address	Date reissued
016874N	7M Transport, Inc., 18602 Spring Heather Court, Spring, TX 77379	November 22, 2007.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E8–2669 Filed 2–12–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Rescission of Order of Revocation

Notice is hereby given that the Order revoking the following license is being rescinded by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License Number: 004114F.

Name: Faith Freight Forwarding.

Address: 6701 NW 7th Street, Ste. 190/199, Miami, FL 31176.

Order Published: FR: 01/16/08 (Volume 73, No. 11, Pg. 2921).

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E8–2670 Filed 2–12–08; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

License Number: 017097N.
Name: Asian Development (NY) Int'l Transportation Corp.
Address: 168–01 Rockaway Blvd., Ste. 203, Jamaica, NY 11434.
Date Revoked: January 3, 2008.
Reason: Failed to maintain a valid bond.

License Number: 003672N.
Name: Astral Freight Services, Inc.
Address: 1418 NW 82nd Ave., Doral, FL 33126–1508.
Date Revoked: November 22, 2007.
Reason: Failed to maintain a valid bond.

License Number: 017871F.
Name: D & D Worldwide, Inc.
Address: 96 Linwood Plaza, #391, Fort Lee, NJ 07024.
Date Revoked: January 12, 2008.
Reason: Failed to maintain a valid bond.

License Number: 003134F
Name: Enterprise Forwarders, Inc.
Address: 2350 NW 93rd Ave., Miami, FL 33172
Date Revoked: January 2, 2008.
Reason: Failed to maintain a valid bond.

License Number: 003595NF.
Name: International Cargo Systems, Inc. dba ICS Oceanfreight.
Address: 440 McClellan Highway, E. Boston, MA 02128.
Date Revoked: October 19, 2007.
Reason: Surrendered license voluntarily.

License Number: 002688F.
Name: International Import Export Service Inc.
Address: 147–04 176th Street, Ste. 2W, Jamaica, NY 11434.
Date Revoked: January 21, 2008.
Reason: Surrendered license voluntarily.

License Number: 003387F.
Name: M. Bowers & Co., Inc.
Address: 521 Ala Moana Blvd., Ste. 210, Honolulu, HI 96813.
Date Revoked: December 26, 2007.
Reason: Failed to maintain a valid bond.

License Number: 013401N.
Name: Marco Polo Express International Inc.
Address: 2411 Santa Fe Ave., Ste. B, Redondo Beach, CA 90278.
Date Revoked: January 12, 2008.
Reason: Failed to maintain a valid bond.

License Number: 016126N.
Name: Motorvation Services Inc.
Address: P.O. Box 348, Tonawanda, NY 14151–0348.
Date Revoked: January 22, 2008.
Reason: Surrendered license voluntarily.

License Number: 003963N.
Name: Natural Freight Ltd. dba Bronco Container Lines.
Address : 225 Broadway, Ste. 2406, New York, NY 10007.
Date Revoked: January 3, 2008.
Reason: Failed to maintain a valid bond.

License Number: 013479N.
Name: Parthenon International Shipping, Inc.
Address: 439 20th Street, Brooklyn, NY 11215.
Date Revoked: January 5, 2008.
Reason: Failed to maintain a valid bond.

License Number: 016242NF.
Name: Pro Logistics, Inc.
Address: 1500 Midway Court, Ste. W–9, Elk Grove Village, IL 60007.
Date Revoked: January 9, 2008.
Reason: Failed To Maintain Valid Bonds.

License Number: 002535F.
Name: Pro Security Services, Inc.
Address: 3333 New Hyde Park Rd., Ste. 301, New Hyde Park, NY 11042.
Date Revoked: January 15, 2008.
Reason: Surrendered license voluntarily.

License Number: 017543F.
Name: Rank Shipping of Puerto Rico, Inc.
Address: Caribbean Airport Facilities Bldg., Ste. 216, LMM Int'l Airport Cargo Area, Carolina, PR 00979.
Date Revoked: December 26, 2007.
Reason: Failed to maintain a valid bond.

License Number: 010577N.
Name: Traders Freight Systems (U.S.A.) Inc. dba TFS Container Line.
Address: 516 North Diamond Bar Blvd., Ste. 386, Diamond Bar, CA 91765.
Date Revoked: January 5, 2008.
Reason: Failed to maintain a valid bond.

License Number: 003633F.
Name: Transcend Services, Inc.
Address: 10401 South Ashley Lane, Oak Creek, WI 53154–7910.
Date Revoked: December 26, 2007.
Reason: Surrendered license voluntarily.

License Number: 018113N.
Name: UFO International Freight Forwarder Corporation.
Address: 15224 West State Street, Westminster, CA 92683
Date Revoked: August 10, 2007.
Reason: Failed to maintain a valid bond.

License Number: 008404F.
Name: Ultimate Media Express Inc.
Address: 182–08 149th Ave., Springfield Gardens, NY 11434.
Date Revoked: January 2, 2008.
Reason: Failed to maintain a valid bond.

License Number: 018883NF.
Name: Wastaki Freight International, Inc.
Address: 9820 Atlantic Drive, Miramar, FL 33025.
Date Revoked: December 29, 2007.
Reason: Failed to maintain valid bonds.

Sandra L. Kusumoto,
Director, Bureau of Certification and Licensing.
[FR Doc. E8–2674 Filed 2–12–08; 8:45 am]
BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than March 7, 2008.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) 411 Locust Street, St. Louis, Missouri 63166-2034:

1. DKB Bancshares, Inc., Birch Tree, Missouri; to become a bank holding company by acquiring 100 percent of the voting shares of Bank of Birch Tree, Birch Tree, Missouri.

Board of Governors of the Federal Reserve System, February 8, 2008.

Robert deV. Frierson,
Deputy Secretary of the Board.
[FR Doc. E8–2615 Filed 2–12–08; 8:45 am]
BILLING CODE 6210–01–S

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act; Notice of Meeting

TIME AND DATE: 9 a.m. (Eastern Time).

PLACE: 4th Floor Conference Room, 1250 H Street, NW., Washington, DC 20005.

STATUS: Parts will be open to the public and parts closed to the public.

MATTERS TO BE CONSIDERED:

Parts Open to the Public

1. Approval of the minutes of the January 22, 2008 Board member meeting.
2. Thrift Savings Plan activity report by the Executive Director.
a. Monthly Participant Activity Report.
b. Monthly Investment Performance Report.
c. Legislative Report.
d. Review of FRTIB Office Space Use.
3. Department of Labor Audit Report.
4. TSP Systems Modernization Update.
5. Review of 2008 Board Meeting Calendar.

Parts Closed to the Public

6. Review of Confidential Vendor Financial Data.
7. Personnel.

CONTACT PERSON FOR MORE INFORMATION: Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: February 11, 2008.

Thomas K. Emswiler,
Secretary to the Board, Federal Retirement Thrift Investment Board.
[FR Doc. 08–698 Filed 2–11–08; 3:50 pm]
BILLING CODE 6760–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Confidentiality, Privacy, and Security Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 18th meeting of the American Health Information Community Confidentiality, Privacy, and Security Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, U.S.C., App.).

DATES: March 3, 2008, from 1 p.m. to 5 p.m. [Eastern Time].

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090 (please bring photo ID for entry to a Federal building).

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/confidentiality/.*

SUPPLEMENTARY INFORMATION: The Workgroup Members will continue discussing and evaluating the confidentiality, privacy, and security protections and requirements for participants in electronic health information exchange environments.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/cps_instruct.html.*

Dated: January 30, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 08–620 Filed 2–12–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Population Health and Clinical Care Connections Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 24th meeting of the American Health Information Community Population Health and Clinical Care Connections Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.).

DATES: March 5, 2008, from 1 p.m. to 4 p.m. [Eastern Time].

ADDRESSES: Mary C. Switzer Building (330 C Street SW., Washington, DC 20201), Conference Room 4090 (please bring photo ID for entry to a Federal building).

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/population/.*

SUPPLEMENTARY INFORMATION: The Workgroup will continue its discussion on how to facilitate the flow of reliable health information among population health and clinical care systems necessary to protect and improve the public's health.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/population/pop_instruct.html.*

Dated: January 30, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 08–621 Filed 2–12–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Chronic Care Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 23rd meeting of the American Health Information Community Chronic Care Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.).

DATES: March 11, 2008, from 1 p.m. to 4 p.m., Eastern Time.

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090. Please bring photo ID for entry to a Federal building.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/chroniccare/.*

SUPPLEMENTARY INFORMATION: The workgroup will hear testimony on ways to use information technology to better coordinate care for patients with chronic conditions and will discuss this information in light of opportunities to better facilitate patient care coordination.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/chroniccare/cc_instruct.html.*

Dated: January 30, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 08–622 Filed 2–12–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Quality Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 16th meeting of the American Health Information Community Quality Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.).

DATES: March 13, 2008, from 1 p.m. to 4 p.m. [Eastern].

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090 (please bring photo ID for entry to a Federal building).

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/quality/.*

SUPPLEMENTARY INFORMATION: The Workgroup will continue its discussion on how health information technology can provide the data needed for the development of quality measures that are useful to patients and others in the health care industry, automate the measurement and reporting of a comprehensive current and future set of quality measures, and accelerate the use of clinical decision support that can improve performance on those quality measures.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/quality/quality__instruct.html.*

Dated: January 30, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 08–623 Filed 2–12–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Personalized Healthcare Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 13th meeting of the American Health Information Community Personalized Healthcare Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.).

DATES: March 17, 2008, from 1 p.m. to 4 p.m. [Eastern Time].

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090. Please bring photo ID for entry to a Federal building.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/healthcare/.*

SUPPLEMENTARY INFORMATION: The Workgroup will discuss possible common data standards to incorporate interoperable, clinically useful genetic/genomic information and analytical tools into Electronic Health Records (EHRs) to support clinical decision-making for clinician and consumer.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/healthcare/phc_instruct.html.*

Dated: January 30, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 08–624 Filed 2–12–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; American Health Information Community Consumer Empowerment Workgroup Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the 24th meeting of the American Health Information Community Consumer Empowerment Workgroup in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.).

DATES: March 18, 2008, from 1 p.m. to 4 p.m. [Eastern].

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 4090. Please bring photo ID for entry to a Federal building.

FOR FURTHER INFORMATION CONTACT: *http://www.hhs.gov/healthit/ahic/consumer/.*

SUPPLEMENTARY INFORMATION: The Workgroup will continue its discussion on how to encourage the widespread adoption of a personal health record that is easy-to-use, portable, longitudinal, affordable, and consumer-centered.

The meeting will be available via Web cast. For additional information, go to: *http://www.hhs.gov/healthit/ahic/consumer/ce_instruct.html.*

Dated: January 30, 2008.

Judith Sparrow,

Director, American Health Information Community, Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. 08–625 Filed 2–12–08; 8:45 am]

BILLING CODE 4150–45–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–08–08AO]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Children's Peer Relations and the Risk for Injury at School—New—National Center for Injury Prevention and Control (NCIPC), Coordinating Center for Environmental Health and Injury Prevention (CCEHIP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Injuries are responsible for more deaths than all other causes combined for people under 19. In 2003, the Centers for Disease Control and Prevention (CDC) estimated that, annually, one in four children sustain an injury severe enough to warrant medical care, school absence, or bed rest. An investigation of modifiable risk factors for childhood injuries is necessary to improve the health of children.

The Division of Unintentional Injury Prevention at the CDC will investigate the relation between children's social behaviors and experiences at school and school injuries. Peer nominated and teacher rated social behaviors will be collected and compared to injury rates measured in the school health room of 3rd-5th graders at one public elementary school with an ethnically diverse and lower socioeconomic status student body. From this data, a behavioral risk profile for injury will be derived. By learning which children are at risk based on various behavioral characteristics, successful secondary injury prevention strategies may be targeted when resources do not allow universal prevention. The main hypothesis of the study is that children with maladaptive behaviors and social experiences (e.g., aggression, bullying, social withdrawal, peer rejection) will be more at risk for injury than their well-adapted peers.

Information collected will include one-time peer nominations of social behaviors and peer relationships and one-time teacher report data of children's behavior that will reflect children's behavior across a school year as well as injury event reports from that school year as determined by school health room visits for injury. Injury event reports will be compiled by the school health room aide. By learning

about risk factors for injuries at school, interventions may be created, which can reduce the burden of injuries to children and the disruption to children's classroom time, and may even impact the amount of time parents must take off from work to pick up their children.

There is no cost to respondents except for their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Teachers	11	1	3	33
School Health Room Aide	1	1	30	30
Students	276	1	45/60	207
Total				270

Dated: February 5, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–2585 Filed 2–12–08; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number NIOSH–126]

Notice of Public Meeting and Availability for Public Comment

AGENCY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

SUMMARY: The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC) announces the following meeting and request for public comment on the Emergency Preparedness and Response Research Portfolio. The document and instructions for submitting comments can be found at *http://www.cdc.gov/niosh/review/public/126/.* Comments may be given orally at the following meeting, as well as provided to the NIOSH Docket Office.

Public Meeting Time and Date: 8:30 a.m.–5 p.m., March 25, 2008.

Place: Hyatt Regency Crystal City, 2799 Jefferson Davis HWY, Arlington, Virginia 22202.

Purpose of Meeting: NIOSH has developed strategic goals to address important issues surrounding the health and safety of emergency responders. The full list of goals can be accessed through the NIOSH Web site at: *http://www.cdc.gov/niosh/programs/epr/goals.html.*

The eight overarching goals are:

1. SAFETY CLIMATE: Improve the organization of emergency response work to reduce exposure to risks and to enhance the health and safety of emergency responders.

2. PERSONAL PROTECTIVE EQUIPMENT (PPE): Improve PPE assortment, proper selection and wear, and decontamination.

3. ENGINEERING/TECHNOLOGICAL INTERVENTIONS AND CONTROLS: Improve engineering controls, technology, and tools to minimize responders' exposures to hazards associated with chemical, biological, radiation or nuclear (CBRN), toxic industrial compound (TIC), and other hazardous materials.

4. CHARACTERIZATION/ASSESSMENT OF POTENTIAL HAZARDS: Develop methods to evaluate the spatial and temporal distribution of gases, vapors, and aerosols, as well as liquids or particulates associated with surface contamination.

5. SUBGROUP-SPECIFIC STRATEGIES: Improve subgroup awareness, develop targeted messages, and expand subgroup-preferred channels.

6. SURVEILLANCE: Develop surveillance reporting systems to improve emergency responder safety and health through the systematic collection, analysis, and interpretation of exposure, hazard, injury, and illness data.

7. ENVIRONMENTAL MICROBIOLOGY: Improve the understanding of environmental microbiology of threat agents, including environmental factors that influence the introduction, spread, and control of these agents.

8. ENVIRONMENTAL AND BIOLOGICAL MONITORING OF TERRORISM AGENTS: Improve the identification and characterization of terror agents to reduce exposures to response and remediation workers.

Stakeholders are encouraged to review the strategic goals on the NIOSH Web site (*http://www.cdc.gov/niosh/programs/epr/goals.html*) in order to prepare their comments/feedback around the following topics to be discussed. Written responses can be submitted in person at the meeting or by emailing *nioshdocket@cdc.gov.* Please reference Docket Number NIOSH–126 in your response.

- Give your opinion about the top three goals needed to improve the safety and health of emergency responders.
- Discuss why these are the top goals. Address any obstacles in achieving these goals.
- Talk about how research can help the nation address the top goals that you have identified. Provide a couple of examples of research ideas for each of your top goals identified.
- Discuss opportunities you see on the horizon that could lead to improvements in emergency responder safety and health.

Please include as much information as might be useful for understanding the safety or health research priority you identify. Such information could include characterization of the frequency and severity with which the injury, illness, or hazardous exposure is occurring and of the factors you believe might be causing the health or safety issue. Input is also requested on the types of research that you believe might make a difference and which partners (e.g., specific industry associations, labor organizations, research organizations, government agencies) should be involved in informing research efforts and solutions.

Status: The public meeting is open to everyone, including all workers, professional societies, organized labor, employers, researchers, health professionals, government officials, and elected officials. The public meeting

will address priorities for emergency preparedness and response research during both morning and afternoon public comment periods. Participants are invited to speak for 5 minutes about the discussion topics listed above. Participants may register to speak during either the morning or afternoon session, though they are encouraged to stay for both sessions.

Broad participation is desired. All participants are requested to register for the free meeting by e-mailing *nioshdocket@cdc.gov* or on site the day of the meeting, space permitting. Participants wishing to speak are encouraged to register early. This meeting is open to the public, limited only by the space available.

Background: The mission of the NIOSH Emergency Preparedness and Response (EPR) Program portfolio is to advance research and collaborations to protect the health and safety of emergency response providers and recovery workers by preventing diseases, injuries, and fatalities in anticipation of and during responses to natural and man-made disasters and novel emergent events.

The EPR Program research portfolio cuts across the eight sectors that are the focus of the National Occupational Research Agenda (NORA). NORA is a partnership program to stimulate innovative research and improved workplace practices. Unveiled in 1996, NORA has become a research framework for NIOSH and the nation. Diverse parties collaborate to identify the most critical issues in workplace safety and health.

Public Comment Period: Those unable to attend the public meeting may submit input to the NIOSH Docket Office within 60 days after the date of publication of this notice in the **Federal Register**. Reference NIOSH Docket 126 in comments.

Contact Person for Technical Information: Dr. Renee Funk, EPR Portfolio Coordinator at (404) 498–2499 or e-mail *rfunk@cdc.gov.*

Comments may be e-mailed to *nioshdocket@cdc.gov* or sent via postal mail to: Centers for Disease Control and Prevention, NIOSH Docket–126, Robert A. Taft Laboratories (C–34), 4676 Columbia Parkway, Cincinnati, OH 45226.

Additional Information: A limited number of rooms have been reserved in the same hotel as the meeting for participants who require lodging for the night of March 24th. Please contact the hotel reservations desk for rooms under ''NIOSH Town Hall Meeting'' by the March 3rd deadline at (703) 418–7233.

Reference: More information about NIOSH/EPR can be found on the NIOSH Web page at: *http://www.cdc.gov/niosh/programs/epr/.*

Dated: February 5, 2008.

James D. Seligman,

Chief Information Officer, Centers for Disease Control and Prevention.

[FR Doc. E8–2743 Filed 2–12–08; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Community Based Child Abuse Prevention Program (CBCAP).

OMB No.: 0970–0155.

Description: The Program Instruction, prepared in response to the enactment of the Community-Based Grants for the Prevention of Child Abuse and Neglect (administratively known as the Community Based Child Abuse Prevention Program, (CBCAP), as set forth in Title II of Pub. L. 108–36, Child Abuse Prevention and Treatment Act Amendments of 2003, and in the process of reauthorization, provides direction to the States and Territories to accomplish the purposes of (1) supporting community-based efforts to develop, operate, expand, and where appropriate to network, initiatives aimed at the prevention of child abuse and neglect, and to support networks of coordinated resources and activities to better strengthen and support families to reduce the likelihood of child abuse and neglect, and; (2) fostering an understanding, appreciation, and knowledge of diverse populations in order to be effective in preventing and treating child abuse and neglect. This Program Instruction contains information collection requirements that are found in (Pub. L. 108–36) at sections 201; 202; 203; 205; 206; 207; and pursuant to receiving a grant award. The information submitted will be used by the agency to ensure compliance with the statute, complete the calculation of the grant award entitlement, and provide training and technical assistance to the grantee.

Respondents: State Governments.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Application	52	1	40	2,080
Annual Report	52	1	24	1,248

Estimated Total Annual Burden Hours: 3,328.

Additional Information:

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov*.

OMB Comment:

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–6974, Attn: Desk Officer for the Administration for Children and Families.

Dated: February 6, 2008.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 08–630 Filed 2–12–08; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Commission on Childhood Vaccines; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92–463), notice is hereby given of the following meeting:

Name: Advisory Commission on Childhood Vaccines (ACCV).

Date and Time: March 6, 2008, 1 p.m. to 5:30 p.m. EST March 7, 2008, 9 a.m. to 12 p.m. EST.

Place: Parklawn Building (and via audio conference call), Conference Rooms G & H, 5600 Fishers Lane, Rockville, MD 20857.

The ACCV will meet on Thursday, March 6 from 1 p.m. to 5:30 p.m. (EST) and Friday, March 7 from 9 a.m. to 12 p.m. (EST). The public can join the meeting via audio conference call by dialing 1–888–455–3612 on March 6 & 7 and providing the following information:

Leader's Name: Dr. Geoffrey Evans.

Password: ACCV.

Agenda: The agenda items for the March meeting will include, but are not limited to: a report from the ACCV Futures II Workgroup, updates from the Division of Vaccine Injury Compensation (DVIC), Department of Justice, National Vaccine Program Office, Immunization Safety Office (Centers for Disease Control and Prevention), National Institute of Allergy and Infectious Diseases (National Institutes of Health), and Center for Biologics Evaluation and Research (Food and Drug Administration). Agenda items are subject to change as priorities dictate.

Public Comments: Persons interested in providing an oral presentation should submit a written request, along with a copy of their presentation to: Michelle Herzog, DVIC, Healthcare Systems Bureau (HSB), Health Resources and Services Administration (HRSA), Room 11C–26, 5600 Fishers Lane, Rockville, Maryland 20857 or e-mail: *mherzog@hrsa.gov*. Requests should contain the name, address, telephone number, and any business or professional affiliation of the person desiring to make an oral presentation. Groups having similar interests are requested to combine their comments and present them through a single representative. The allocation of time may be adjusted to accommodate the level of expressed interest. DVIC will notify each presenter by mail or telephone of their assigned presentation time. Persons who do not file an advance request for a presentation, but desire to make an oral statement, may announce it at the time of the comment period. These persons will be allocated time as it permits.

FOR FURTHER INFORMATION CONTACT: Anyone requiring information regarding the ACCV should contact Michelle Herzog, DVIC, HSB, HRSA, Room 11C–26, 5600 Fishers Lane, Rockville, MD 20857; telephone (301) 443–6593 or e-mail: *mherzog@hrsa.gov*.

Dated: February 7, 2008.

Alexandra Huttinger,

Acting Director, Division of Policy Review and Coordination.

[FR Doc. E8–2737 Filed 2–12–08; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Office of Clinical and Preventive Services; Demonstration Project for Healthy Lifestyles in Youth

Announcement Type: New.

Funding Opportunity Number: HHS–2008–IHS–HLY–0001

Catalog of Federal Domestic Assistance Number: 93.933

Key Dates: Application Deadline Date: April 18, 2008.

Review Date: May 2, 2008.

Earliest Anticipated Start Date: May 16, 2008.

I. Funding Opportunity Description

The Indian Health Service (IHS) announces a cooperative agreement, HHS–2008–IHS–HLY–0001 for Tribes or Tribal organizations to promote healthy lifestyles among American Indian and Alaska Native (AI/AN) youth using the curriculum ''Together Raising Awareness for Indian Life'' (TRAIL) among selected Boys and Girls Club sites. This program is authorized under the authority of the Snyder Act, 25 U.S.C. 13; section 301 of the Public Health Service Act, as amended; and the Indian Health Care Improvement Act, 25 U.S.C. 1652 and 1621(b). This program is described at 93.933 in the Catalog of Federal Domestic Assistance (CFDA).

Under this grant opportunity, IHS proposes to enter into a collaborative effort/initiative with an eligible Tribal entity that has experience in addressing healthy lifestyle techniques in AI/AN youth. The purpose of the initiative is to address healthy lifestyle development with a focus on nutrition and physical activity for children and youth 6 through 17 years of age. The eligible Tribal entity will work with Tribal Boys and Girls Club sites to provide health and physical education by helping youth: Achieve and maintain healthy lifestyles through fitness programs; acquire a range of physical skills; and develop a sense of teamwork and cooperation. These early intervention opportunities may reduce and/or halt the increasing trend of obesity and diabetes among youth and young adults. Clubs that develop a health promotion program that includes the TRAIL curriculum may curtail the effects of unhealthy eating behaviors and lack of physical activity that can lead to obesity, diabetes, and other chronic diseases later in life.

The TRAIL curriculum was developed to provide information on good nutrition and promoting physical activity among adolescents participating in Tribal Boys and Girls Clubs. This work will support the IHS mission to improve the health of AI/AN youth through health promotion and health education programs. Boys and Girls Club sites that are located outside of Tribal communities will not be considered by the grantee.

TRAIL was piloted at 40 AI/AN Boys and Girls Club of America (BGCA) sites located in 19 states where the overall results showed improvement in participant knowledge. For all eligible applicants that want to obtain additional information regarding the TRAIL curriculum, contact the IHS program official (see section VII).

To support this project, the awarded grantee will select and assist 35 AI/AN Boys and Girls Club sites to establish and implement this curriculum project. The selected sites must serve 100% Federally-recognized AI/AN youth. The Boys and Girls Club sites selected by the grantee must not support State-recognized or non-natives using IHS grant funds. The grantee will be expected to: Provide technical consultation; train; monitor; evaluate; as well as provide funds to support these activities.

II. Award Information

Type of Award: Cooperative Agreement.

Estimated Funds Available: The IHS intends to commit approximately $1,000,000 each year. Total project period is three years in duration. The award that is issued under this announcement is subject to availability of funds.

Anticipated Number of Awards: One award will be issued under this announcement.

Project Period: May 16, 2008—May 15, 2011 (three year project period).

Award Amount: $1,000,000 per year for three years and all future support is subject to the availability of funds.

Programmatic Involvement:

It is expected that the grantee will:

1. Develop a written plan for the planning, implementation, and evaluation of this project to include selection of at least 35 demonstration sites as agreed upon with the IHS. The selected sites must serve 100% Federally recognized AI/AN youth. The Boys and Girls Club sites selected by the grantee must not support State-recognized Tribes or non-natives using IHS grant funds. This task will be completed within 30 days from award and approved by the IHS. A start-up planning meeting will be conducted within 3 months of the initial (first year) award.

(a) Develop selection criteria, announce, evaluate, and select sites. Sites must submit documentation verifying they serve only AI/AN youth from Federally recognized Tribes as a requirement for selection by the grantee.

(b)Develop, in consultation with the IHS, the implementation of the TRAIL curriculum, and technical assistance plan for the coordination of the 35 sites. Submit criteria to the IHS for approval. Grantee will work with sites to develop measurements to assess physical activity and nutrition behaviors among club participants.

(c) Each site will implement the TRAIL program, emphasizing healthy behaviors such as physical activity and nutrition. Each program plan will also include a parent component describing approaches for involving the families of participants.

(d) Each site will implement a 6-minute walk test three times, six to eight weeks apart. Physical activity data will be collected and summarized.

2. Promote and facilitate local, state, and national partnerships for the purpose of establishing or enhancing program support that involves increasing physical activity and good nutrition for the Tribally-managed Boys and Girls Club sites. This includes but is not limited to establishing other partners such as American Indian-Alaska Native Program Branch (AI-ANPB) of Head Start Programs, Wings of America, United National Indian Tribal Youth, Inc. (UNITY), Tribal colleges, BGCA, Tribal organizations, local community health providers and other private organizations as appropriate.

3. Implement evaluation processes in consultation with the IHS on an agreed upon evaluation plan for the TRAIL project. At a minimum, the evaluation will include:

(a) Training attendance (gender, age, grade level); and

(b) Pre- and post-tests to assess participant knowledge. Submit summarized data to the IHS.

4. Collect, collate, and submit monthly activity logs from each site on the physical activity portion of their program. Daily data to be collected includes the date, number of minutes of physical activity, and number of children participating. Submit collated and summarized data to the IHS.

5. Work with the IHS in drafting an evaluation summary at the end of the project period for publication.

6. Provide ongoing technical support to the sites for the duration of the initiative. The planning, design and delivery of training and technical assistance will support the local organization's long-term planning and outreach efforts. The training will be customized based on sites' capability and experience. Technical assistance will also be provided on program planning and implementation.

(a) Plan and facilitate an orientation and training meeting for the sites within 60 days of selection. Submit agenda, training goals and objectives, and participant list to IHS within 30 days of completion.

(b) Provide technical consultation to the sites in developing a written work plan, with measurable goals, objectives and activities. Each site will include activities for the individual child and family, community involement and an identifiable community health partner.

(c) Establish a formal agreement with Tribal Boys and Girls Club sites which involves minimal fiscal assistance but substantial technical support to make sure clubs successfully implement the TRAIL project.

(d) Conduct on-site technical assistance visits to each of the selected sites. Visits will be initiated within 30 days of selection.

(e) Submit to the IHS a written work plan and report describing each site's demographics, information on the number of youth in the eligible age range in the catchment area, the number that attend the Boys and Girls Clubs regularly, and the number served by this project, demonstrated need, community assessment data, goals, objectives, activities, partnerships, and proposed outcomes within 60 days of site selection.

(f) Provide training and technical assistance in all forms, i.e., on-site, on-line, by phone, and mail. Collaborate with IHS to provide services to club sites. Maintain records and reports.

(g) Provide IHS written quarterly reports on the evaluation outcomes, activity reports at each site, any parent involvement activities and other participation, description of the community partnerships, and other activities as appropriate.

(h) Conduct quarterly conference calls with IHS to review project status.

(i) Provide quarterly reports (feedback) to each site on how their data compare to data (mean, median, and range) from other selected sites.

IHS will:

1. Identify a core group of IHS staff to work with the grantee in providing technical assistance and guidance.

2. Meet with the grantee to review grantee work plan and provide guidance on implementation and data collection tools. The IHS will be able to share information on lessons learned from implementing the curriculum with the pilot sites.

3. Participate in quarterly conference calls. Work with the grantee to showcase the results of this project by publishing on shared websites as well as in jointly authored publications.

III. Eligibility Information

1. Federally recognized Tribes,

2. Tribal organizations, and

3. Non-profit Urban Indian organizations.

Applicant must provide proof of Federal recognition status.

Cost Sharing or Matching—This program does not require matching funds or cost sharing.

IV. Application and Submission Information

1. Applicant package may be found in Grants.gov (*http://www.grants.gov*) or at: *http://www.ihs.gov/NonMedicalPrograms/gogp/gogp_funding.asp* Web sites. Information regarding the electronic application process may be directed to Michelle G. Bulls, at (301) 443–6290. Detailed application instructions for this announcement are downloadable from Grants.gov. Please see section VII for agency contacts regarding programmatic and/or business-related questions.

2. *Content and Form of Application Submission:*

- Be single spaced.
- Be typewritten.
- Have consecutively numbered pages.
- Use black type not smaller than 12 characters per one inch.
- Contain a narrative that does not exceed 15 typed pages that includes the other submission requirements below. The 15 page narrative does not include the work plan, standard forms, table of

contents, budget, budget justifications, narratives, and/or other appendix items.

• Contain two letters of support that demonstrate past working experiences in promoting the health and well-being of AI/AN youth at a national level.

Public Policy Requirements: All Federal-wide public policies apply to IHS grants.

3. *Submission Dates and Times:*

The application must be submitted electronically through Grants.gov by April 18, 2008 by 12 midnight Eastern Standard Time (EST). If technical challenges arise and you are unable to successfully complete the 9 electronic application process, you must contact Michelle G. Bulls, Grants Policy Staff *15 days* prior to the application deadline and advise of the difficulties that you are experiencing. You must obtain prior approval, in writing (e-mails are acceptable), from Ms. Bulls allowing the paper submission. If submission of a paper application is requested and approved, the original and two copies must be sent to the appropriate grants contact that is listed in section IV. 1 above. Applications not submitted through Grants.gov, without an approved waiver, may be returned without review or consideration. Telecommunication for the hearing impaired is available at 301–443–6394. A late application will be returned without review or consideration.

4. *Intergovernmental Review:*

Executive Order 12372 requiring intergovernmental review is not applicable to this program.

5. *Funding Restrictions:*

A. Pre-award costs are allowable pending prior approval from the awarding agency. However, in accordance with 45 CFR Part 92, all pre-award costs are incurred at the recipient's risk. The awarding office is under no obligation to reimburse such costs if for any reason applicant does not receive an award or if the award to the recipient is less than anticipated.

B. The available funds are inclusive of direct and applicable indirect costs.

C. Only one grant will be awarded.

6. *Other Submission Requirements:*

Electronic Submission—You must submit through Grants.gov. However, should any technical challenges arise regarding the submission, please contact Grants.gov Customer Support at 1–800–518–4726 or *support@grants.gov*. The Contact Center hours of operation are Monday-Friday from 7 a.m. to 9 p.m. EST. If you require additional assistance, please call (301) 443–6290 and identify the need for assistance regarding your Grants.gov application. Your call will be transferred to the appropriate grants staff member. You must seek assistance at least 15 days prior to the application deadline. If you do not adhere to the timelines for Central Contractor Registry (CCR), Grants.gov registration and request timely assistance with technical issues, paper application submission may not be granted.

To submit an application electronically, please use the *http://www.Grants.gov* Web site. Download a copy of the application package on the Grants.gov Web site, complete it offline and then uploaded and submit to application via the Grants.gov site. You may not e-mail an electronic copy of a grant application to IHS.

Please be reminded of the following:

• Under the new IHS application submission requirements, paper applications are not the preferred method. However, if there are technical problems submitting the application on-line, you should contact directly Grants.gov Customer Support at: *http://www.grants.gov/CustomerSupport.*

• Upon contacting Grants.gov, obtain a Grants.gov tracking number as proof of contact. The tracking number is helpful if there are technical issues that cannot be resolved and a waiver request from Grants Policy Staff (GPS) must be obtained. If you are still unable to successfully submit the application on-line, please contact Michelle G. Bulls, GPS, at (301) 443–6290 at least 15 days prior to the application deadline to advise her of the difficulties experienced.

• If it is determined that a formal waiver is necessary, you must submit a request, in writing (emails are acceptable), to *Michelle.Bulls@ihs.gov* providing a justification for the need to deviate from the standard electronic submission process. Upon receipt of approval, a hard-copy application package must be downloaded from Grants.gov, and sent directly to the Division of Grants Operations, 801 Thompson Avenue, TMP 360, Rockville, MD 20852 by April 18, 2008.

• Upon entering the Grants.gov Web site, there is information available that outlines the requirements regarding electronic submission of application and hours of operation. We strongly encourage that applicants do not wait until the deadline date to begin the application process as the registration process for CCR and Grants.gov could take up to 15 working days.

• To use Grants.gov, applicants must have a Dun and Bradstreet (DUNS) Number and be registered in the CCR. You should allow a minimum of 10 working days to complete CCR registration. See below on how to apply.

• You must submit all documents electronically, including all information typically included on the SF–424 and all necessary assurances and certifications.

• Please use the optional attachment feature in Grants.gov to attach additional documentation that may be requested by IHS.

• You must comply with any page limitation requirements described in the program announcement.

• After the application is submitted electronically, you will receive an automatic acknowledgment from Grants.gov that contains a Grants.gov tracking number. The Division of Grants Operations (DGO) will retrieve applications from Grants.gov. The DGO will notify applicants that their application has been received.

• You may access the electronic application for this program on *http://www.Grants.gov.*

• You may search for the downloadable application package using either the CFDA number or the Funding Opportunity Number. Both numbers are identified in the heading of this announcement.

• To receive an application package, you must provide the Funding Opportunity Number: HHS–2008–IHS–HLY–0001.

E-mail applications will not be accepted under this announcement.

DUNS Number

Applicants are required to have a DUNS number to apply for a grant or cooperative agreement from the Federal Government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy, and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. Interested parties may wish to obtain their DUNS number by phone to expedite the process.

Applications submitted electronically must also be registered with the CCR. A DUNS number is required before CCR registration can be completed. Many organizations may already have a DUNS number. Please use the number listed above to investigate whether or not your organization has a DUNS number. Registration with the CCR is free of charge.

Applicants may register by calling 1–888–227–2423. Please review and complete the CCR Registration Worksheet located on *http://www.grants.gov.*

More detailed information regarding these registration processes can be found at *http://www.grants.gov.*

V. Application Review Information

1. The instructions for preparing the application narrative also constitute the evaluation criteria for reviewing and scoring the application. Weights assigned to each section are noted in parentheses. The narrative should include the first year of activities; information for multi-year projects should be included as an appendix (see D. Categorical Budget and Budget Justification at the end of this section for more information). The narrative should be written in a manner that is clear to outside reviewers unfamiliar with prior related activities of your organization. It should be well organized, succinct, and contain all information necessary for reviewers to understand the project fully.

A. Understanding of the Need and Necessary Capacity (30 points)

Applicant should demonstrate knowledge in:

(1) Health concerns of AI/AN youth.

(2) Health promotion activities in Tribal communities such as BGCA.

(3) Working with Tribes and Tribal organizations.

B. Work Plan (20 points)

This section should demonstrate the soundness and effectiveness of the applicant's proposal. The annual work plan should reflect deliverables and milestones of the TRAIL project. The work plan should be designed to:

(1) Describe how and when the sites will be selected.

(2) Describe how the sites will be trained on the curriculum and provided technical assistance.

(3) Describe the plan for collecting data, monitoring, and assuring quality and quantity of data.

(4) Describe the plan for evaluating and reporting.

(5) Describe how sites will be supported for a physical activity program with equipment and participant incentives.

Organizational Capabilities and Qualifications (40 points)

This section outlines the broader capacity of the organization to complete the project outlined in the work plan. It includes the identification of personnel responsible for completing tasks and the chain of responsibility for successful completion of the project outline in the work plan.

(1) Describe the structure of the organization.

(2) Describe the ability of the organization to manage the proposed project. Include information regarding similarly sized projects in scope and financial assistance as well as other grants and projects successfully completed.

(3) Describe what equipment (i.e., phone, Web sites, etc.) and facility space (i.e., office space) will be available for use during the proposed project. Include information about any equipment not currently available that will be purchased throughout the agreement.

(4) List key personnel who will work on the project.

a. Identify existing personnel and new program staff to be hired or contracted.

b. In the appendix, include position descriptions and resumes for all key personnel. Position descriptions should clearly describe each position and duties indicating desired qualifications experience, requirements related to the proposed project and how they will be supervised. Resumes must indicate that the proposed staff member is qualified to carry out the proposed project activities and who will determine if the work of a contractor is acceptable.

c. Note who will be writing the progress reports.

d. If a position is to be filled, indicate that information on the proposed position description.

e. If the project requires additional personnel beyond those covered by the cooperative agreement funds, (i.e., IT support, volunteers, interviewers, etc.), note these and address how these positions will be filled and, if funds are required, the source of these funds.

f. If personnel are to be only partially funded by this cooperative agreement, indicate the percentage of time to be allocated to this project and identify the resources used to fund the remainder of the individual's salary.

Applicant should demonstrate knowledge in:

(1) Financial and project management.

(2) Nationwide experience in providing administrative and support services to Tribal youth organizations, education agencies and other Tribal programs for the benefit of children and youth.

(3) AI/AN youth and Tribal communities. Indicate experience in national partnerships or national support efforts on behalf of AI/AN communities especially as it pertains to health concerns.

(4) Applicant should have at least two years of specialized experience working with Tribal Boys and Girls Club sites and the TRAIL curriculum program.

Categorical Budget and Budget Justification (10 points)

This section should provide a clear estimate of the project program costs and justification for expenses for the entire cooperative agreement period. The budget and budget justification should be consistent with the tasks identified in the work plan.

(1) Categorical budget (Form SF 424A, Budget Information Non-Construction Programs) completing each of the budget periods requested.

(2) Narrative justification for all costs, explaining why each line item is necessary or relevant to the proposed project. Include sufficient details to facilitate the determination of cost allowability.

(3) Indication of any special start-up costs.

(4) Budget justification should include a brief program narrative for the second and third years.

(5) If indirect costs are claimed, indicate and apply the current negotiated rate to the budget. Include a copy of the rate agreement in the appendix.

2. Review and Selection Process

In addition to the above criteria/requirements, the application will be considered according to the following:

A. *The submission deadline:* April 18, 2008. The application submitted in advance of or by the deadline and verified by the postmark will undergo a preliminary review to determine that:

(1) The applicant is eligible in accordance with this announcement.

(2) The application is not a duplication of a previously funded project.

(3) The application narrative, forms, and materials submitted meet the requirements of the announcement allowing the reviewers to undertake an in-depth evaluation; otherwise, it may be returned.

3. Anticipated Award Dates

Anticipated Award Date: May 16, 2008.

VI. Award Administration Information

1. Award Notices

The Notice of Award (NoA) will be initiated by the DGO and will be mailed via postal mail. The NoA will be signed by the Grants Management Officer and this is the authorizing document for which funds are dispersed. The NoA is the legal binding document, will serve as the official notification of the cooperative agreement award and will reflect the amount of Federal funds awarded for the purpose of the cooperative agreement, the terms and conditions of the award, the effective date of the award, and the budget/project period.

2. Administrative Requirements

Grants are administered in accordance with the following documents:

• This Program Announcement.
• 45 CFR part 74, ''Uniform Administrative Requirements for Awards to Institutions of Higher Education, Hospitals, Other Non-Profit Organizations, and Commercial Organizations.''
• Grants Policy Guidance: HHS Grants Policy Statement, January 2007.
• ''Non-profit Organizations'' (title 2, part 230).
• Audit Requirements: OMB Circular A–133, ''Audits of States, Local Governments, and Non-profit Organizations.''

3. Indirect Costs

This section applies to all grant recipients that request reimbursement of indirect costs in their grant application. In accordance with HHS Grants Policy Statement, Part II–27, IHS requires applicants to have a current indirect cost rate agreement in place prior to award. The rate agreement must be prepared in accordance with the applicable cost principles and guidance as provided by the cognizant agency or office. A current rate means the rate covering the applicable activities and the award budget period. If the current rate is not on file with the Division of Grants Operations at the time of the award, the indirect cost portion of the budget will be restricted and not available to the recipient until the current rate is provided to the DGO.

If you have questions regarding the indirect cost policy, please contact the DGO at (301) 443–5204.

4. Reporting

A. *Progress Report.* Program progress reports are required semiannually. These reports will include a brief comparison of actual accomplishments to the goals established for the period, reasons for slippage (if applicable), and other pertinent information as required. A final report must be submitted within 90 days of expiration of the budget/project period.

B. *Financial Status Report.* Semi-annual financial status reports must be submitted within 30 days of the end of the half year. Final financial status reports are due within 90 days of expiration of the budget period. Standard Form 269 (long form) will be used for financial reporting.

C. *Reports.* Grantee is responsible and accountable for accurate reporting of the Progress Reports and Financial Status Reports which are generally due semi-annually. Financial Status Reports (SF–269) are due 90 days after each budget period and the final SF–269 must be verified on how the value was derived. Grantee must submit reports in a reasonable period of time.

Failure to submit required reports within the time allowed may result in suspension or termination of an active agreement, withholding of additional awards for the project, or other enforcement actions such as withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in one or both of the following: (1) The imposition of special award provisions; and (2) the non-funding or non-award of other eligible projects or activities. This applies whether the delinquency is attributable to the failure of the organization or the individual responsible for preparation of the reports.

5. Telecommunication for the hearing impaired is available at: TTY 301–443–6394.

VII. Agency Contacts

For program-related information (including TRAIL curriculum): Leeanna Travis, Indian Health Service, 1700 Cerrillos Rd., Santa Fe, New Mexico 87505, (505) 946–9541 or *Leeanna.travis@ihs.gov*.

For specific grant-related and business management information: Norma Jean Dunne, Grants Management Specialist, 801 Thompson Avenue, TMP 360, Rockvillle, MD 20852, 301–443–5204 or *normajean.dunne@ihs.gov*.

Dated: January 31, 2008.

Robert G. McSwain,

Acting Director, Indian Health Service.

[FR Doc. 08–626 Filed 2–12–08; 8:45 am]

BILLING CODE 4165–16–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Health/National Institute of Environmental Health Sciences; Proposed Collection; Comment Request

The Parkinson's, Genes and Environment (PAGE) Study II

Summary: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the National Institute of Environmental Health Sciences (NIEHS), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: The Parkinson's, Genes and Environment (PAGE) Study II. *Type of Information Collection Request:* NEW. *Need and Use of Information Collection:* We propose a large case-control study to evaluate roles of environmental exposures, genes, and gene-environment interactions in the etiology of late-onset sporadic Parkinson's disease (PD). This project, the Parkinson's, Genes and Environment Study II (PAGE II), will be developed based on the infrastructure that was set up for the ongoing PAGE I project. PAGE I was designed to prospectively evaluate diet and lifestyle exposures in relation to PD risk. In PAGE I, we expect to recruit approximately 1,200 incident PD cases and 2,800 controls from the NIH–AARP Diet and Health (DH) cohort. The dietary and lifestyle data were collected as part of the NIH–AARP DH baseline surveys in the mid-1990s by investigators from the National Institute of Cancer. The cases in PAGE I were PD cases who reported a physician diagnosed PD during the 10 year follow-up of NIH–AARP DH cohort and controls were appropriately selected by frequency matching from participants without PD in the same cohort. As part of PAGE I, we are confirming PD diagnoses for self-identified PD cases by contacting their neurologists and reviewing medical records and are collecting saliva samples for genetic testing from both cases and appropriately selected controls. As the NIH–AARP DH study was designed to examine dietary and lifestyle exposures important in the etiology of cancer, many environmental exposures key to PD research were not collected. Examples include pesticide use, occupational history, history of infections, and use of statins. Therefore the primary aim of the PAGE II project is to retrospectively collect these important environmental exposures from PD cases and appropriately selected controls. Cases and controls identified from PAGE I will be re-contacted and interviewed for data collection in PAGE II. Assuming a 70% response rate from cases and controls, we expect to obtain this information from approximately 850 PD cases and 1960 controls. This data collection, together with the dietary and lifestyle data and genetic samples obtained in PAGE I, will make the PAGE study one of the largest and most comprehensive studies to date to examine environmental and genetic causes of PD. *Frequency of Response:* One 90 minute long telephone interview. *Affected Public:* Individuals. *Type of Respondents:* We will enroll men and women who participated in the PAGE I study. The annual reporting burden is as

follows: *Estimated Number of Respondents:* 2810. *Estimated Number of Responses per Respondent:* 1 computer assisted telephone interview (CATI). *Average Burden Hours per Response:* 1.5. *Estimated Total Burden Hours Requested:* 4215. The annualized cost to respondents is estimated at $30 (assuming $20 hourly wage × 1.50 hours) for the interview. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Request for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

For Further Information: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Honglei Chen, Epidemiology Branch, NIEHS, Building 101, A3–05, P.O. Box 12233, Research Triangle Park, NC 27709 or call non-toll-free number (919) 541–3782 or E-mail your request, including your address to: *chenh2@a_niehs.nih.gov*.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Dated: January 22, 2008.

Marc S. Hollander,

NIEHS, Associate Director for Management.

[FR Doc. E8–2606 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–07–350: Quality of Eggs and Pre-implantation Embryos.

Date: February 19, 2008.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Syed M. Amir, Phd, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6172, MSC 7892, Bethesda, MD 20892, 301–435–1043, *amirs@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Global Infectious Disease Training Program.

Date: February 20, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The River Inn, 924 25th Street, NW., Washington, DC 20037.

Contact Person: Dan D. Gerendasy, Phd, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5132, MSC 7843, Bethesda, MD 20892, 301–594–6830, *gerendad@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; International Research in Infectious Diseases.

Date: February 21, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The River Inn, 924 25th Street, NW., Washington, DC 20037.

Contact Person: Dan D. Gerendasy, Phd, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5132, MSC 7843, Bethesda, MD 20892, 301–594–6830, *gerendad@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Sleep and Courtship Behavior.

Date: February 25, 2008.

Time: 11 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Lawrence Baizer, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4152, MSC 7580, Bethesda, MD 20892 (301) 435–1257, *baizerl@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts: Circadian Rhythms and Sleep Apnea.

Date: February 27, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Christine L. Melchior, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5176, MSC 7844, Bethesda, MD 20892, 301–435–1713, *melchioc@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships in Cognition, Language and Perception—Special Emphasis Panel.

Date: March 3, 2008.

Time: 5 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Fairmont Hotel, 2401 M Street, NW., Washington, DC 20037.

Contact Person: Dana Jeffrey Plude, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3176, MSC 7848, Bethesda, MD 20892, 301–435–2309, *pluded@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Molecuar Tumorigenesis.

Date: March 13, 2008.

Time: 2:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Syed M. Quadri, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6210, MSC 7804, Bethesda, MD 20892, 301–435–1211, *quadris@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Genetics of Complex Psychiatric Disorders.

Date: March 21, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Barbara J. Thomas, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2218, MSC 7890, Bethesda, MD 20892, 301–435–0603, *bthomas@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Physiology and Pathobiology of Organ Systems.

Date: March 25, 2008.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Abdelouahab Aitouche, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2183, MSC 7818, Bethesda, MD 20892, 301–435–2365, *abdelouahaba@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Cell Biology SBIR/STTR Applications.

Date: March 25–26, 2008.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: David Balasundaram, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5189, MSC 7840, Bethesda, MD 20892, 301–435–1022, *balasundaramd@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business Applications in Development and Aging.

Date: March 26, 2008.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Cathy Wedeen, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3213, MSC 7808, Bethesda, MD 20892, 301–435–1191, *wedeenc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Crystallography Research Resource—Program Project.

Date: March 26–28, 2008.

Time: 6 p.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Lombardy, 2019 Pennsylvania Avenue, NW., Washington, DC 20006.

Contact Person: Nuria E. Assa-Munt, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4164, MSC 7806, Bethesda, MD 20892, (301) 451–1323, *assamunu@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Circulation Regulation and Pathophysiology.

Date: March 27–28, 2008.

Time: 8 a.m. to 8 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Ai-Ping Zou, PhD, MD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, (301) 435–1777, *zouai@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; FIRCA and GRIP in Behavioral and Social Sciences.

Date: March 31, 2008.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Georgetown Suites, 1000 29th Street, NW., Washington, DC 20007.

Contact Person: Manana Sukhareva, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3214, MSC 7808, Bethesda, MD 20892, (301) 435–1116, *sukharem@csr.nih.gov.*

Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 03.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 5, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–603 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts: Musculoskeletal Cell and Tissue Biology.

Date: February 20, 2008.

Time: 9:15 a.m. to 11:45 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: John P. Holden, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4211, MSC 7814, Bethesda, MD 20892, 301–496–8551, *holdenjo@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts: Musculoskeletal Tissue Engineering.

Date: February 25, 2008.

Time: 12:30 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: John P. Holden, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4211, MSC 7814, Bethesda, MD 20892, 301–496–8551, *holdenjo@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Orthopaedics and Skeletal Biology.

Date: March 1, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel 480, 480 Sutter Street, San Francisco, CA 94108.

Contact Person: John P. Holden, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4211, MSC 7814, Bethesda, MD 20892, 301–496–8551, *holdenjo@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; International Cooperative Biodiversity Groups

Date: March 4–5, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Georgetown Suites, 1000 29th Street, NW., Washington, DC 20007.

Contact Person: Dan D. Gerendasy, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5132, MSC 7843, Bethesda, MD 20892, (301) 594–6830, *gerendad@csr.nih.gov.*

Name of Committee: AIDS and Related Research Integrated Review Group, AIDS

Clinical Studies and Epidemiology Study Section.

Date: March 5, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Gateway Hotel Los Angeles, 6101 West Century Boulevard, Salon 205, Los Angeles, CA 90045.

Contact Person: Hilary D. Sigmon, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5216, MSC 7852, Bethesda, MD 20892, (301) 594–6377, *sigmonh@csr.nih.gov.*

Name of Committee: AIDS and Related Research Integrated Review Group, HIV/AIDS Vaccines Study Section.

Date: March 5, 2008.

Time: 8:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Suites, 285 North Palm Canyon Drive, Palm Springs, CA 92262.

Contact Person: Mary Clare Walker, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5208, MSC 7852, Bethesda, MD 20892, (301) 435–1165, *walkermc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Delivery Systems and Nanotechnology.

Date: March 10–12, 2008.

Time: 6 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Steven J. Zullo, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5146, MSC 7849, Bethesda, MD 20892, (301) 435–2810, *zullost@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Tools to Investigate Neural Circuit Development.

Date: March 11–12, 2008.

Time: 8 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Geoffrey G. Schofield, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040–A, MSC 7850, Bethesda, MD 20892, 301–435–1235, *geoffreys@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Fellowships: Physiology and Pathobiology of Organ Systems.

Date: March 18, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Najma Begum, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2175, MSC 7818, Bethesda, MD 20892, 301–435–1243, *begumn@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Cardiac Ion Channels and Arrhythmia.

Date: March 18, 2008.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Olga A. Tjurmina, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4030B, MSC 7814, Bethesda, MD 20892, 301–451–1375, *ot3d@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Genes, Genomes and Genetics Fellowships.

Date: March 20–21, 2008.

Time: 8:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott Washingtonian Center Hotel, 204 Boardwalk Place, Gaithersburg, MD 20878.

Contact Person: Richard Panniers, PhD, Chief, Genes, Genomes, and Genetic Sciences IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2212, MSC 7890, Bethesda, MD 20892, 301–435–1741, *pannierr@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 6, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–636 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, March 3, 2008, 10 a.m. to March 3, 2008, 11 a.m. National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 which was published in the **Federal Register** on February 4, 2008, 73 FR 6519–6521.

The meeting will be held March 3, 2008, from 2 p.m. to 4:30 p.m. The meeting location remains the same. The meeting is closed to the public.

Dated: February 6, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–637 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Institute Board of Scientific advisors, March 3, 2008, 8 a.m. to March 4, 2008 12 p.m., National Institutes of Health, Building 31, 31 Center Drive, 6th Floor Conference Room 10, Bethesda, MD 20892 which was published in the **Federal Register** on January 17, 2008, 73 FR 3257–3258.

This notice is being amended to add the BSA TARGET Ad Hoc Subcommittee Meeting on March 4, 2008 from 12 p.m. to 3:30 pm., at NIH, Building 31, 6th Floor, Conference Room 7. The meeting is open to the public.

Dated: February 6, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–632 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Center for Research Resources Special Emphasis Panel, February 21, 2008, 8 a.m. to February 22, 2008, 5 p.m., Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814 which was published in the **Federal Register** on January 17, 2008, 73 FR 3259.

This notice has been amended to change the date of Dr. Barbara Nelson's February 21–22, 2008, meeting to May 7–8, 2008. The meeting is closed to the public.

Dated: February 5, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–601 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Clinical Trials Review Committee, February 25, 2008, 8 a.m. to February 26, 2008, 5 p.m., InterContinental Harbor Court/ Baltimore, 550 Light Street, Baltimore, MD 21202 which was published in the **Federal Register** on January 31, 2008, FR08–420.

The meeting dates were changed from February 25–26, 2008 to February 24–25, 2008. The meeting will be held from 7 p.m. to 11 p.m. on February 24th and 8 a.m. to 3 p.m. on February 25th. The rest of the information remains the same. The meeting is closed to the public.

Dated: February 5, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–604 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Workgroup Meeting

Notice is hereby given of a meeting of the Strategic Plan Workgroup organized by the Interagency Autism Coordinating Committee (IACC).

This workgroup meeting will be closed to the public with attendance limited to invited participants. The purpose of the meeting is to discuss and prioritize proposed research initiatives that will be used in the development of the IACC strategic plan for Autism Spectrum Disorder (ASD) research. The next meeting of the IACC, which will be open to the public and at which research priorities will be discussed, is March 14, 2008.

Name of Committee: Interagency Autism Coordinating Committee (IACC).

Type of Meeting: Strategic Plan Workgroup.

Date: February 21, 2008.

Time: 9 a.m. to 3 p.m.

Agenda: Discussion of proposed research initiatives developed by Strategic Plan Workshops for development of the IACC strategic plan for Autism Spectrum Disorders research; prioritization and possible modification of the initiatives.

Place: National Institutes of Health, 9000 Rockville Pike, Building 31—Room 4A52, Bethesda, MD 20892.

Contact Person: Tanya Pryor, National Institute of Mental Health, NIH, 6001 Executive Boulevard, NSC, Room 6198, Bethesda, MD 20892–9669, 301–443–7153.

Information about the IACC is available on the Web site: *http://www.nimh.nih.gov/research-funding/scientific-meetings/recurring-meetings/iacc/index.shtml.*

Dated: February 5, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–600 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging, Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Drug U01 May/08 Council.

Date: February 28, 2008.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Louise L. Hsu, PhD, Health Scientist Administrator, Scientific Review Office, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue/Suite 2C212, Bethesda, MD 20892, (301) 496–7705, *hsul@exmur.nia.nih.gov*.

Name of Committee: National Institute on Aging Special Emphasis Panel; MOST.

Date: March 7, 2008.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suite Hotel, 4300 Military Road, Washington, DC 20015.

Contact Person: Alicja L. Markowska, PhD, DSC, National Institute on Aging, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, (301) 496–9666, *markowsa@nia.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: February 5, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–602 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Deafness and Other Communication Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel, CDRC Conflicts.

Date: February 26, 2008.

Time: 1 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Sheo Singh, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Activities, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892, 301–496–8683, *singhs@nidcd.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. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: February 6, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–631 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Reproduction, Andrology, and Gynecology Subcommittee.

Date: March 10, 2008.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Dennis Leszczynski, PhD, Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health, and Human Development, NIH, 6100 Executive Boulevard, Room 5B01, Bethesda, MD 20892, (301) 435–2717, *leszczyd@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.939, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: February 6, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–633 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–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 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel, Training & Career Development Awards Review Meeting.

Date: March 5, 2008.

Time: 8 a.m. to 5 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: Linda K. Bass, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–30, Research Triangle Park, NC 27709, 919–541–1307.

(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: February 6, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–638 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Review of an K08 Application.

Date: March 3, 2008.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Room 3137, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Quirijn Vos, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, 301–451–2666, *qvos@niaid.nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Microbicide Innovation Program III (MIP3).

Date: March 6–7, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Center Courtyard, 204 Boardwalk Place, Gaithersburg, MD 20878.

Contact Person: Michelle M. Timmerman, Phd, Scientific Review Officer, Scientific Review Program, DEA/NIAID/NIH/DHHS, Room 2217, 6700B Rockledge Drive, MSC–7616, Bethesda, MD 20892–7616, 301–496–2550, *timmermanm@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: February 6, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–639 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Biomedical Library and Informatics Review Committee.

Date: June 12–13, 2008.

Time: June 12, 2008, 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20892.

Time: June 13, 2008, 8 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, Board Room, 2nd Floor, 8600 Rockville Pike, Bethesda, MD 20892.

Contact Person: Arthur A Petrosian, PhD, Scientific Review Administrator, Division of Extramural Programs, National Library of Medicine, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892–7968, 301–496–4253, *petrosia@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: February 6, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–635 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of meeting of the Recombinant DNA Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact person listed below in advance of the meeting.

Name of Committee: Recombinant DNA Advisory Committee.

Date: March 11–12, 2008.

Time: March 11, 2008, 8 a.m. to 4:30 p.m.

Agenda: The Recombinant DNA Advisory Committee will review and discuss selected human gene transfer protocols as well as related data management activities. This will include an update on new developments in gene transfer for X–SCID.

Place: National Institutes of Health, Building 31, 31 Center Drive, Floor 6C, Room 6, Bethesda, MD 20892.

Time: March 12, 2008, 8 a.m. to 3 p.m.

Agenda: The Recombinant DNA Advisory Committee will review and discuss selected human gene transfer protocols as well as related data management activities.

Place: National Institutes of Health, Building 31, 31 Center Drive, Floor 6C, Room 6, Bethesda, MD 20892.

Contact Person: Laurie Lewallen, Advisory Committee Coordinator, Office of Biotechnology Activities, National Institutes of Health, 6705 Rockledge Drive, Room 750, Bethesda, MD 20892–7985, (301) 496–9838, *lewallla@od.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http:www4.od.nih.gov/oba/*, where an agenda and any additional information for the meeting will be posted when available.

OMB's ''Mandatory Information Requirements for Federal Assistance Program Announcements'' (45 FR 39592, June 11, 1980) requires a statement concerning the official government programs contained in the Catalog of Federal Domestic Assistance. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers virtually every NIH and Federal research program in which DNA recombinant molecule techniques could be used, it has been determined not to be cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the Catalog of Federal Domestic Assistance are affected.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: February 6, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 08–634 Filed 2–12–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Project: Access to Recovery (ATR) Program (OMB No. 0930–0266)—Revision

The Center for Substance Abuse Treatment (CSAT) is charged with implementing the Access to Recovery (ATR) program which will allow grantees (States, Territories, the District of Columbia and Tribal Organizations) a means to implement voucher programs for substance abuse clinical treatment and recovery support services. The ATR program is part of a Presidential initiative to: (1) Provide client choice among substance abuse clinical treatment and recovery support service providers, (2) expand access to a comprehensive array of clinical treatment and recovery support options (including faith-based programmatic options), and (3) increase substance

abuse treatment capacity. Monitoring outcomes, tracking costs, and preventing waste, fraud and abuse to ensure accountability and effectiveness in the use of Federal funds are also important elements of the ATR program. Grantees, as a contingency of their award, are responsible for collecting data from their clients at intake, discharge, and follow-up (at six months post intake).

The primary purpose of this data collection activity is to meet the reporting requirements of the Government Performance and Results Act (GPRA) by allowing SAMHSA to quantify the effects and accomplishments of SAMHSA programs. The following table is an estimated annual response burden for this effort.

ESTIMATES OF ANNUALIZED HOUR BURDEN [1]

Center/form/respondent type	Number of respondents	Responses per respondent	Total responses	Hours per response	Total hour burden	Added burden proportion [2]	Total annual burden hours
CSAT GPRA Client Outcome Measures for Access to Recovery Programs							
Clients							
Adults	53,333	3	160,000	.33	52,800	.33	17,424
Client Subtotal	53,333		160,000				17,424
Data Extract [3]							
Adult Records	53,333	3	160,000	.16	25,600	—	25,600
Data Extract Subtotal	53,333		160,000				25,600
Upload [4]	24 grants		160,000	1 hr. per 6,000 records.	27	—	27
Upload Subtotal	24 grants		160,000				27
ATR Voucher Information and Voucher Transaction							
Voucher information and transaction	53,333	1.5	80,000	.03	2,400		2,400
Voucher information and transaction Subtotal.	53,333		80,000				2,400
Subtotal	160,000		480,000				45,451
Total	160,000		480,000				45,451

[1] This table represents the maximum additional burden if adult respondents provide three sets of responses/data.
[2] Added burden proportion is an adjustment reflecting customary and usual business practices programs engage in (e.g., they already collect the data items).
[3] Data Extract: Grant burden for capturing customary and usual data.
[4] Upload: All ATR grants upload data.

Written comments and recommendations concerning the proposed information collection should be sent by March 14, 2008 to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–6974.

Dated: February 7, 2008.

Elaine Parry,

Acting Director, Office of Program Services.

[FR Doc. E8–2740 Filed 2–12–08; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2007–0007]

Collection of Information Under Review by Office of Management and Budget: OMB Control Number: 1625–0106

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) requesting an extension of their approval for the following collection of information: 1625–0106, Unauthorized Entry into Cuban Territorial Waters. Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Please submit comments on or before March 17, 2008.

ADDRESSES: To prevent duplicate submissions to the docket [USCG–2007–0007] or to OIRA, please submit your comments and related material by only one of the following means:

(1) Electronic submission. (a) To Coast Guard docket at *http://www.regulations.gov*. (b) To OIRA by e-mail to: *nlesser@omb.eop.gov*.

(2) Mail or Hand delivery. (a) To Docket Management Facility (DMF) (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Hand deliver between the hours of 9 a.m. and

5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329. (b) To OIRA, 725 17th Street, NW., Washington, DC 20503, to the attention of the Desk Officer for the Coast Guard.

(3) Fax. (a) To DMF at 202–493–2251 (b) To OIRA at 202–395–6566. To ensure your comments are received in time, mark the fax to the attention of Mr. Nathan Lesser, Desk Officer for the Coast Guard.

The DMF maintains the public docket for this notice. Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, will become part of this docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://www.regulations.gov*.

A copy of the complete ICR is available through this docket on the Internet at *http://www.regulations.gov*. Additionally, copies are available from Commandant (CG–611), U.S. Coast Guard Headquarters (Attn: Mr. Arthur Requina), 2100 2nd Street, SW., Washington, DC 20593–0001. The telephone number is 202–475–3523.

FOR FURTHER INFORMATION CONTACT: Mr. Arthur Requina, Office of Information Management, telephone 202–475–3523 or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION: The Coast Guard invites comments on whether this information collection request should be granted based on it being necessary in the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of information subject to the collections; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology.

Comments to DMF or OIRA must contain the OMB Control Number of the ICR addressed. Comments to DMF must contain the docket number, [USCG 2007–0007]. For your comments to OIRA to be considered, it is best if OIRA receives them on or before the March 17, 2008.

Public participation and request for comments: We encourage you to respond to this request by submitting comments and related materials. We will post all comments received, without change, to *http://www.regulations.gov*. They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the paragraph on DOT's ''Privacy Act Policy'' below.

Submitting comments: If you submit a comment, please include the docket number [USCG–2007–0007], indicate the specific section of the document to which each comment applies, providing a reason for each comment. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change the documents supporting this collection of information or even the underlying requirements in view of them. The Coast Guard and OIRA will consider all comments and material received during the comment period.

Viewing comments and documents: Go to *http://www.regulations.gov* to view documents mentioned in this notice as being available in the docket. Click on ''Search for Dockets,'' and enter the docket number [USCG–2007–0007] in the Docket ID box, and click enter. You may also visit the DMF in room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of all comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Privacy Act Statement of DOT in the **Federal Register** published on April 11, 2000 (65 FR 19477), or by visiting *http://DocketsInfo.dot.gov*.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard has published the 60-day notice (72 FR 59100, October 18, 2007) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments.

Information Collection Request

Title: Unauthorized Entry into Cuban Territorial Waters.

OMB Control Number: 1625–0106.

Type of Request: Extension of a currently approved collection.

Affected Public: Owners, operators and masters of vessels.

Abstract: Title 33 CFR part 107 prescribes regulations governing the unauthorized entry by U.S. vessels into Cuban territorial waters and their applications for permits to enter. The collection of information from applicants is required to comply with the regulations and to facilitate the application process for persons seeking permits to enter Cuban territorial seas pursuant to the regulation.

Burden Estimate: The estimated burden has decreased from 133 hours to 1 hour a year.

Dated: February 4, 2008.

D.T. Glenn,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. E8–2691 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2008–0017]

Commercial Fishing Industry Vessel Safety Advisory Committee; Vacancies

AGENCY: Coast Guard, DHS.

ACTION: Request for applications.

SUMMARY: The Coast Guard seeks applications for membership on the Commercial Fishing Industry Vessel Safety Advisory Committee (CFIVSAC). The CFIVSAC provides advice and makes recommendations to the Coast Guard for improving commercial fishing industry safety practices.

DATES: Applications for membership should reach the Coast Guard at the address below on or before June 1, 2008.

ADDRESSES: You may request an application form by writing to Commandant (CG–5433), U.S. Coast

Guard, 2100 Second Street, SW., Washington, DC 20593–0001; by calling 202–372–1249; or by faxing 202–372–1917. Send your application in written form to the above street address. This notice and the application form are available on the Internet at *http://www.FishSafe.info.*

FOR FURTHER INFORMATION CONTACT: Mr. Mike Rosecrans, a Designated Federal Officer (DFO) of the CFIVSAC by telephone at 202–372–1245, fax 202–372–1917, *e-mail: Michael.M.Rosecrans@uscg.mil.*

SUPPLEMENTARY INFORMATION: The CFIVSAC is an advisory committee established in accordance with the provisions of the Federal Advisory Committee Act (FACA) 5 U.S.C. (Pub. L. 92–463). The Coast Guard chartered the CFIVSAC to provide advice on issues related to the safety of commercial fishing industry vessels regulated under Chapter 45 of Title 46, United States Code, which includes uninspected fishing vessels, fish processing vessels, and fish tender vessels. (See 46 U.S.C. 4508.)

The CFIVSAC meets at least once a year. It may also meet for other extraordinary purposes. Its subcommittees may gather throughout the year to prepare for meetings or develop proposals for the committee as a whole to address specific problems.

We will consider applications for six positions that expire or become vacant in October 2008 in the following categories: (a) Commercial Fishing Industry (four positions); (b) Equipment Manufacturer (one position); and (c) General Public (one position).

The CFIVSAC consists of 17 members as follows: (a) Ten members from the commercial fishing industry who reflect a regional and representational balance and have experience in the operation of vessels to which Chapter 45 of Title 46, United States Code applies, or as a crew member or processing line member on an uninspected fish processing vessel; (b) one member representing naval architects or marine surveyors; (c) one member representing manufacturers of vessel equipment to which Chapter 45 applies; (d) one member representing education or training professionals related to fishing vessel, fish processing vessel, or fish tender vessel safety, or personnel qualifications; (e) one member representing underwriters that insure vessels to which Chapter 45 applies; and (f) three members representing the general public including, whenever possible, an independent expert or consultant in maritime safety and a member of a national organization composed of persons representing owners of vessels to which Chapter 45 applies and persons representing the marine insurance industry.

Each member serves a 3-year term. Members may serve consecutive terms. All members serve at their own expense and receive no salary from the Federal Government, although travel reimbursement and per diem may be provided.

In support of the policy of the Coast Guard on gender and ethnic diversity, qualified women and minorities are encouraged to apply for membership.

If you are selected as a non-representative member, or as a member who represents the general public, you will be appointed and serve as a Special Government Employee (SGE) as defined in section 202(a) of title 18, United States Code. As candidates for appointment as an SGE, applicants are required to complete a Confidential Financial Disclosure Report (OGE From 450). A completed OGE Form 450 is not releasable to the public except under an order issued by a Federal court or as otherwise provided under the Privacy Act (5 U.S.C. 552a). Only the Designated Agency Ethics Official or the DAEO's designate may release a Confidential Disclosure Report.

Dated: January 31, 2008.

J.G. Lantz,

Director of Commercial Regulations and Standards.

[FR Doc. E8–2680 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation and Approval of SGS North America, Inc., as a Commercial Gauger and Laboratory

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of accreditation and approval of SGS North America, Inc., as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 151.12 and 19 CFR 151.13, SGS North America, Inc., 1201 W. 8th at Georgia Ave., Deer Park, TX 77536, has been approved to gauge and accredited to test petroleum and petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquires regarding the specific test or gauger service this entity is accredited or approved to pelform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories.

DATES: The accreditation and approval of SGS North America, Inc., as commercial gauger and laboratory became effective on May 2, 2007. The next triennial inspection date will be scheduled for May 2010.

FOR FURTHER INFORMATION CONTACT: Commercial Gauger Laboratory Program Manager, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: January 31, 2008.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services.

[FR Doc. E8–2632 Filed 2–12–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

Notice of Issuance of Final Determination Concerning Multifunctional Machines

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that the U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of certain multifunctional machines which may be offered to the United States Government under an undesignated government procurement contract. CBP has concluded that, based upon the facts presented, certain goods imported into Japan are substantially transformed in Japan such that Japan is the country of origin of the finished multifunctional machines for government procurement purposes.

DATES: The final determination was issued on January 4, 2008. A copy of the final determination is attached. Any

party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of February 13, 2008.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202–572–8792).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on January 4, 2008, pursuant to subpart B of part 177, Customs Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of certain multifunctional machines which may be offered to the United States Government under an undesignated government procurement contract. This final determination, in HQ H018467, was issued at the request of Panasonic Corporation of North America under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18).

In the final determination, CBP concluded that, based upon the facts presented, certain goods imported into Japan are substantially transformed in Japan such that Japan is the country of origin of the finished multifunctional machines for government procurement purposes.

Section 177.29, Customs Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: January 4, 2008.

Sandra L. Bell,

Executive Director, Office of Regulations and Rulings, Office of International Trade.

Attachment

HQ H018467

January 4, 2008,

MAR–2–05 OT:RR:CTF:VS H018467 GOB

Category: Marking

Madeline B. Kuflik, Esq.,
Assistant General Counsel,
Panasonic Corporation of North America,
One Panasonic Way, 3B–6,
Secaucus, NJ 07094.

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. 2511); Subpart B, Part 177, CBP Regulations; Country of Origin of Multifunctional Machines.

Dear Ms. Kuflik:

This is in response to your letter of October 5, 2007, requesting a final determination on behalf of Panasonic Corporation of North America (''PNA''), pursuant to subpart B of Part 177, Customs and Border Protection (''CBP'') Regulations (19 CFR 177.21 *et seq.*). Under these regulations, which implement Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government. In response to our request, you provided additional information with your correspondence of November 7, 2007 and December 5, 2007.

This final determination concerns the country of origin of certain color digital multifunctional machines. We note that PNA is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and is entitled to request this final determination.

Facts

You describe the pertinent facts as follows. The product at issue is a full-color digital multifunctional machine which can scan, copy, and print. The machine has the following functions: up to 26 ppm color printing; 600 dpi × 600 dpi scanning resolution; 1200 dpi × 1200 dpi printing resolution; high-speed image editing; high speed image compression; network function; automatic duplex scanning; automatic duplex printing; paper ejection; and direct printing function from SD card and PC card. The machine is sold under model number DP–C354.

You state that the multifunctional machine consists of the following units:

1. *Automatic Document Feeder Unit*—takes several pages and feeds the paper one page at a time into the scanner.

2. *Scanner Unit*—consists of CCD board, lens, lamp, mirror, drive motor, detection sensor, scanner controlling board, image signal conversion board and SD (secure digital) memory board.

3. *Operation Panel Unit*—consists of tilt mechanism, 7.8 inch LCD, 23 operation buttons, 14 LED, five printing boards, and backup battery.

4. *Feed Unit*—consists of feeding roller, pick up roller, pick up solenoid, paper detection sensor, paper passage sensor and electromagnetic timing clutch.

5. *Manual Paper Feed Unit*—for use with special paper; consists of feeding roller, pick up roller, pick up solenoid, paper detection sensor, paper passage sensor and electromagnetic timing clutch.

6. *Lift-Up Motor Unit*—consists of driving motor, paper detection sensor and pick-up sensor.

7. *Automatic Document Transferring Unit*—feeds the printing paper to the toner transferring unit; consists of driving motor, cooling fan, paper passage sensor, paper ejection roller, transferring roller, switching solenoid, electromagnetic clutch, jam-proof door and pinch roller.

8. *Induction Heating Fuser Unit*—fuses the toner on paper by the induction heating method; consists of induction heating coil, fusing belt, heating roller, fusing roller and pressure roller.

9. *Induction Heating Power Supply Unit*—supplies power to the induction fuser unit.

10. *Transcription Unit*—transcribes the unit on the printing paper; consists of bias roller and OPC (organic photo conductor) drum unit.

11. *OPC Drum Unit*—this unit is charged with electricity and the laser beam sweeps across it to make the electrostatic latent image; consists of cleaning blade, cleaning roller and OPC drum.

12. *Developing Unit*—transfers the toner to the charged part of the OPC drum; consists of concentration sensor, magnet roller, developer, doctor blade and screw.

13. Laser Scanning Unit—irradiates the laser beam on the OPC drum to make the surface potential; consists of lens, mirrors, polygon motor and fan.

14. Motor Drive Board—controls the driving of the motors.

15. Automatic Duplex Unit Board—controls the paper detection sensor and paper passage sensor.

16. High-Voltage Power Supply Board—controls the high-voltage power supply.

17. Low-Voltage Power Supply Board—controls the low-voltage power supply.

18. Main Drive Unit—controls the transcription unit, OPC drum and developing units.

19. Subassembly Units—there are five different types of simple units which consist of two to five parts.

20. System Control Board—This board, which acts as the central control system, has a central processing unit (CPU) and 512 MB of memory. It performs ''image processing'' which is

the editing, color tuning, enlarging, reducing and manipulating of the image data to fit the image quality which is designated by the user for the copy output or the print output. Image data is the data which is scanned by the scanner. The user controls the multifunctional printer by touching the operational panel and sending the data from the PC. The system control board processes the data from the operation panel and PC and sends the processed command to the other boards that control the function which meets the user's intention. The three other boards which receive data from the system control board are the scanner unit, the operation panel unit and the engine control board. The system control board is the core part of this product. It measures approximately 244 mm long and 330 mm wide and it contains approximately 2750 parts.

21. Engine Control Board—This board controls the machinery parts that feed the recording papers. The machinery parts controlled by the engine control board are the feed unit, manual paper feed unit, lift up motor unit, automatic document feeding unit and main drive unit. The board also controls the units that print the image to the recording papers such as the induction heating fuser unit, transcription unit, OPC drum unit, developing unit and laser scanning unit. This board is approximately 244 mm long and 187 mm wide and consists of approximately 1610 parts.

In your submission of December 5, 2007, you state that ''[t]he system control board can be compared to the brain of a human being as it is responsible for coordinating all of the activity of the machine and controlling all of the following important functions of the machine.'' These functions include: all image processing functions (*e.g.*, where the toner is to be applied and the temperature of the toner); enlargement and reduction functions; all functions which are available from the control panel (*e.g.*, choices of multiple copies, double-sided copies, etc.); color image tuning (adding or subtracting color); user interface control (control panel and touch screen operations); and ''rastering'' of the printed data (the process of taking data sent by a computer's printer driver and converting it so that it can be understood by the engine control board to put the image on paper).

In the same submission, you state that ''[t]he engine control board can be analogized to the nervous system of a human being. It carries out the commands of the brain, or in this case the system control board.'' The engine control board controls the functions relating to the feed of paper, including the paper feed units, the manual feed units, the automatic document feeder unit, the paper lift-up motors, and the main drive unit motor. The engine control board also controls the following units with respect to the printing process: the laser unit, which exposes the photo-receptor to create the copy; the photo-conductor unit; the transfer belt units; the developing units, which contain the toners which are applied to the photo-conductors and transfer unit; and the fixing unit, which makes the toner permanent on the paper.

PNA's request involves two manufacturing scenarios. In the first scenario, there are three countries in which manufacturing occurs; in the second scenario, there are two countries in which manufacturing occurs.

First Scenario—Manufacturing in China, the Philippines, and Japan

The following seven units are manufactured in China from components produced in various countries: automatic document feeder unit; scanner unit; operation panel unit; feed unit; manual paper feed unit; lift up motor unit; and subassembly units. After these components are manufactured in China, they are sent to the factory in the Philippines.

The following eleven units are manufactured in the Philippines from components produced in various countries: Automatic document transferring unit; induction heating fuser unit; induction heating power supply unit; transcription unit; developing unit; laser scanning unit; main drive unit; motor drive board; high voltage power supply board; low voltage power supply board; and automatic duplex unit board. The components manufactured in China and those manufactured in the Philippines are assembled into one main body in the Philippines. That body is sent to the factory in Japan.

The following work is performed in Japan. The OPC drum unit and the toner reservoir are manufactured. The system control board and the engine control board, which are manufactured in Japan, are mounted and inspected. Approximately 1,600 electronic parts and 500 electronic parts are mounted on the back of the system control board and the engine control board, respectively, by three large mounting machines. The boards are then inspected. At that point, about 1,100 electronic parts and 1,000 electronic parts are mounted on the front sides of the system control board and the engine control board, respectively. The boards are then inspected again. Workers then mount 19 parts on the system control board and 40 parts on the engine control board by hand soldering. The boards are then inspected again.

You state that the workers involved in the mounting and soldering of the parts should be highly skilled because the parts are mounted densely in view of the large number of parts and the fact that each electronic part is microminiaturized. After the mounting process is completed, the boards are inspected as to functionality by special measurement equipment. This inspection takes approximately 10 to 20 minutes per board.

At this point in the process, the OPC drum unit, the toner reservoir, the system control board and the engine control board are incorporated into the main body which was assembled in the Philippines. The next step is the installation of firmware into the system control board and the engine control board. You state that the firmware in the system control board controls the user interface, imaging, and memories; the firmware in the engine control board controls machinery. You state that the firmware, which is developed in Japan, is similar to the application software of a personal computer.

The process concludes with the inspection of the completed product and adjustments to the concentration in the toner, print position, print color, and print quality. These adjustments are necessary for accurate printing.

Second Scenario—Manufacturing in the Philippines and Japan

The following 18 units are manufactured in the Philippines from components produced in various countries: Automatic document feeder unit; scanner unit; operation panel unit; feed unit; manual paper feed unit; lift up motor unit; subassembly units; automatic document transferring unit; induction heating fuser unit; induction heating power supply unit; transcription unit; developing unit; laser scanning unit; main drive unit; motor drive board; high voltage power supply board; low voltage power supply board; and automatic duplex unit board. These components are assembled into one main body in the Philippines. That body is sent to the factory in Japan.

The manufacturing process in Japan in this scenario is the same as the process described in the first scenario.

The second scenario differs from the first scenario in that no units are manufactured in China in the second scenario. The 18 units manufactured in the Philippines in the second scenario include the 11 units manufactured there in the first scenario and the seven units

manufactured in China in the first scenario.

Issue

What is the country of origin of the subject color digital multifunction machines for the purpose of U.S. Government procurement?

Law and Analysis

Pursuant to Subpart B of Part 177, 19 CFR 177.21 *et seq.*, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. 2518(4)(B):

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also, 19 CFR 177.22(a).

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens* v. *United States,* 573 F. Supp. 1149 (Ct. Int'l Trade 1983), *aff'd,* 741 F.2d 1368 (Fed. Cir. 1984). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. *See,* C.S.D. 80–111, C.S.D. 85–25, C.S.D. 89–110, C.S.D. 89–118, C.S.D. 90–51, and C.S.D. 90–97. If the manufacturing or combining process is a minor one which leaves the identity of the article intact, a substantial transformation has not occurred. *Uniroyal, Inc.* v. *United States,* 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd* 702 F. 2d 1022 (Fed. Cir. 1983). In C.S.D. 85–25, 19 Cust. Bull. 844 (1985), CBP held that for purposes of the Generalized System of Preferences (''GSP''), the assembly of a large number of fabricated components onto a printed circuit board in a process involving a considerable amount of time and skill resulted in a substantial transformation. In that case, in excess of 50 discrete fabricated components (such as resistors, capacitors, diodes, integrated circuits, sockets, and connectors) were assembled. Whether an operation is complex and meaningful depends on the nature of the operation, including the number of components assembled, number of different operations, time, skill level required, attention to detail, quality control, the value added to the article, and the overall employment generated by the manufacturing process.

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process may be relevant when determining whether a substantial transformation has occurred. No one factor is determinative.

In HQ 735315, dated April 10, 1995, CBP stated:

> We agree * * * that the assembly of the various components into the optics module shell, mainly the PWBs which are manufactured in the U.S., constitutes a substantial transformation. * * * [W]e find that the manufacture of the PWBs and their subsequent installation into the shells constitutes a complex and meaningful assembly pursuant to C.S.D. 85–25. Although the imported shells consist of important components, such as the sampling device, furnace, light bulbs, and mirrors/optics, the PWBs give the optics module the ability to function and analyze * * *.

In HQ 561734, dated March 22, 2001, CBP determined that certain multifunctional machines (printer, copier, and facsimile) assembled in Japan were a product of Japan for purposes of government procurement. The machines were comprised of 227 parts (108 parts obtained from Japan, 92 from Thailand, three from China, and 24 from other countries) and eight subassemblies, each of which was assembled in Japan. It was further noted that the scanner unit (one of the eight subassemblies assembled in Japan) was characterized as ''the heart of the machine.''

In HQ 562936, dated March 17, 2004, CBP found that a multifunctional machine (printer, copier, scanner, facsimile) was a product of Japan for the purpose of U.S. government procurement. CBP noted that a substantial portion of the machine's components and assemblies were of Japanese origin. The requester had described certain of these components as the ''most complex,'' ''key,'' and ''essential.'' CBP recognized that, in addition to the Japanese subassemblies, certain critical Japanese-origin parts were incorporated into the Chinese subassemblies. CBP found that the processing that occurred in Japan was complex and meaningful, required the assembly of a large number of components, and resulted in a new and distinct article of commerce that possessed a new name, character, and use.

Based upon the facts which you present, we note that operations are performed in three countries in the first scenario and two countries in the second scenario. In situations like these, no one country imparts the dominant portion of the work conducted. Nonetheless, based upon the applicable legal standard, we determine that, with respect to each of the two scenarios, the goods imported into Japan are substantially transformed in Japan such that Japan is the country of origin of the multifunctional machines (model number DP–C354) for government procurement purposes. In making this determination, we give substantial weight to the fact that the system control board, the engine control board, and the firmware are manufactured in Japan. Based upon the facts presented, these components are of utmost importance to the functionality of the completed good. We also find that the operations performed in Japan are meaningful and relatively complex and result in an article of commerce which possesses a new name, character, and use. Therefore, as Japan is the final country of production and a substantial amount of work is performed there, we find that the country of origin in both scenarios is Japan.

Holding

With respect to each of the two scenarios, the goods imported into Japan are substantially transformed in Japan such that Japan is the country of origin of the multifunctional machines (model number DP–C354) for government procurement purposes.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31, that

CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days after publication of the **Federal Register** notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Sandra L. Bell,

Executive Director, Office of Regulations and Rulings, Office of International Trade.

[FR Doc. E8–2636 Filed 2–12–08; 8:45 am]
BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

Notice of Issuance of Final Determination Concerning; Standard and Rolled-Edge Ball Seals

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that the Bureau of Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of two types of ball seals to be offered to the United States Government under an undesignated government procurement contract. Based on the facts presented, CBP has concluded that the operations performed in China do not result in a substantial transformation of the U.S. components. Therefore, the assembled ball seals will not be considered to be products of China.

DATES: The final determination was issued on February 6, 2008. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within 30 days of February 13, 2008.

FOR FURTHER INFORMATION CONTACT: Holly Files, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202–572–8740).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on February 6, 2008, pursuant to subpart B of part 177, Customs Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of two types of ball seals to be offered to the United States Government under an undesignated government procurement contract. The CBP ruling number is H021398. This final determination was issued at the request of Brammall, Inc. d/b/a/ TydenBrammall (''TydenBrammall'') under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18).

The final determination concluded that, based upon the facts presented, the simple assembly in China of three major U.S.-origin components with two minor Chinese-origin components does not result in a substantial transformation of the U.S.-origin components. Therefore, the assembled ball seals will not be considered to be products of China for purposes of U.S. Government procurement.

Section 177.29, Customs Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), states that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: February 6, 2008.

Myles B. Harmon,

Acting Executive Director, Office of Regulations and Rulings, Office of International Trade.

Attachment: HQ H021398

February 6, 2008
MAR–2–05 OT:RR:CTF:VS H021398 HEF
CATEGORY: Marking.
Ms. Linda M. Weinberg,
Barnes & Thornburg LLP, Suite 900, 750 17th Street, NW., Washington, DC 20006.

RE: U.S. Government Procurement; Final Determination; country of origin of ball seals; substantial transformation; 19 CFR Part 177.

Dear Ms. Weinberg: This is in response to your letter dated December 21, 2007, requesting a final determination on behalf of Brammall, Inc. d/b/a TydenBrammall (''TydenBrammall''), pursuant to subpart B of Part 177, Customs and Border Protection (''CBP'') Regulations (19 CFR 177.21 *et seq.*). Under these regulations, which implement Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations on whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of certain ball seals. We note that TydenBrammall is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and is entitled to request this final determination. Samples of the ball seals, at various stages of the manufacturing process, were also submitted with your request. In preparing this final determination, consideration was given to your supplemental submission dated January 9, 2008.

Facts

The products subject to this final determination are two types of ball seals known as the ''Tyden Standard Ball Seal'' and the ''Tyden Rolled-Edge Ball Seal.'' The ball seals are used to secure rail, container, and truck cargo shipments. The ''ball'' of a seal is comprised of metal top and bottom caps. A metal strap runs through the center of the ball and extends at length from the bottom cap. The metal strap may have a custom seal number embossed on it and/or a printed bar code. A die cut notch at the end of the metal strap is used to engage with two interlocking D-shaped rings, located inside the ball, to form a functional security lock. The ball itself is slotted to provide visible proof to the user that the seal is locked.

You advise that TydenBrammall uses identical materials and components in the manufacture of both the Tyden Standard Ball Seal and the Tyden Rolled-Edge Ball Seal. The manufacturing processes for the two products are also identical, with the exception that the Rolled-Edge Ball Seal requires the additional step of having its edges rolled under at the end of the U.S. processing. The ball seals are assembled from five components. You advise that the seals' three major components are produced in the United States from U.S. materials. The other two components are sourced in China.

To produce the U.S.-origin components, TydenBrammall purchases rolls of coiled steel from a U.S. steel producer. You note that highly trained operators and maintenance die technicians load the steel coils onto two computer-controlled presses and dies at TydenBrammall's U.S. facility. The presses and dies are used to stamp the strap, ball seal top cap, and ball seal bottom cap from the coiled steel into specific sizes and subject to precise tolerances. You assert that the U.S.-origin components have no other use other than as components of the finished ball seals due to their specific shapes, sizes, and tolerances.

Next, the three U.S.-origin components are shipped to China for a simple assembly process. You state that in China, unskilled laborers manually assemble two Chinese-origin ''D'' shaped locking rings with the U.S.-origin strap. After the rings are attached to the strap, the top and bottom caps are manually attached using a small hand press that seals the caps together by slightly bending the top cap around the bottom cap.

The assembled ball seals are then returned to TydenBrammall's U.S. facility where they are stored until ordered by specific end-customers. When a customer places an order, assembled seals are removed from storage and placed on a machine that die cuts a notch into the ''male'' end of the strap. You explain that the notch, like the teeth on a key, makes the seal a functional security lock. You also advise that prior to the die cutting of the notch, the seal is not functional. The same machine used to die cut the notch also embosses and/or inkjet prints

a unique serial number and/or bar code onto the strap of the seal. The operator of the machine then bundles the ball seals in sequential numbered order in groups of 100 seals.

Issue

What is the country of origin of the assembled ball seals for purposes of U.S. Government procurement?

Law and Analysis

Pursuant to subpart B of Part 177, 19 CFR 177.21 *et seq.*, which implements Title III of the Trade Agreements Act of 1979, as amended (''TAA''; 19 U.S.C. 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations on whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth at 19 U.S.C. 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also, 19 CFR 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulations. *See* 19 CFR 177.21. In this regard, CBP recognizes that the Federal Procurement Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 CFR 25.403(c)(1). The Federal Procurement Regulations define ''U.S.-made end product'' as:

* * * an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

48 CFR 25.003

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens* v. *United States,* 6 Ct. Int'l Trade 204, 573 F. Supp. 1149 (1983), *aff'd,* 741 F.2d 1368 (Fed. Cir. 1984). If the manufacturing or combining process is a minor one which leaves the identity of the imported article intact, a substantial transformation has not occurred. *Uniroyal, Inc.* v. *United States,* 3 Ct. Int'l Trade 220, 542 F. Supp. 1026 (1982). In *Uniroyal,* the court determined that a substantial transformation did not occur when an imported footwear upper, the essence of the finished article, was combined with a domestically produced outsole to form a shoe. *See id.* Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. *See* C.S.D. 80–111, C.S.D. 85–25, and C.S.D. 90–97.

In order to determine whether a substantial transformation occurs when components of various origins are assembled to form completed articles, CBP considers the totality of the circumstances and makes such decisions on a case-by-case basis. The country of origin of the article's components, the extent of the processing that occurs within a given country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, facts such as resources expended on product design and development, extent and nature of post-assembly inspection procedures, and worker skill required during the actual manufacturing process will be considered when analyzing whether a substantial transformation has occurred; however, no one such factor is determinative.

CBP has considered a number of different scenarios involving the assembly of locking apparatus. In Headquarters Ruling Letter (''HRL'') 734440, dated March 30, 1992, CBP found that a lock apparatus was substantially transformed in the United States as a result of combining it with pieces manufactured in the United States. In rendering the country of origin marking decision, CBP noted that the predominant expense of the assembled lock was from the parts produced in the United States, which required extensive manufacturing and development. By contrast, the imported piece was a generic mechanism that was inserted into the U.S. piece.

In another country of origin marking case, HRL 734923, dated May 14, 1993, CBP determined that imported components of a door lockset, the rosettes and parts of the latch, were substantially transformed when they were assembled together with significant U.S. components in the United States to make the finished door lockset. CBP found the manufacture of the rosettes in China to be relatively simple and that it did not require a great deal of precision as compared to the manufacture of the other components in the United States, which required significant precision and substantial machinery and tooling.

In HRL 735133, dated May 5, 1994, CBP held that imported lock parts and assemblies were not substantially transformed when assembled in the United States with a U.S.-origin coverplate screw. CBP noted that most of the cost in making the finished lock was attributable to operations performed in Taiwan and that the production in the United States was a simple manual assembly operation of basically finished parts.

Most recently, in HRL W563587, dated February 8, 2007, CBP issued another government procurement final determination to TydenBrammall concerning bolt container seals and cable seals. In HRL W563587, CBP considered two different manufacturing scenarios for each of the two products: one where the seals were assembled in the United States from imported components and another where the seals were assembled in the United States from imported components and a U.S.-origin lock body. In each instance, the U.S. operations involved the simple assembly of only four or five parts. The production of the bolt container seal involved the assembly of four parts to form a lock body assembly and the packaging of the assembly with a finished bolt shank of Chinese-origin. CBP found that packaging the bolt shank with the assembly did not substantially transform the bolt shank. Thus, the bolt shank retained its Chinese origin under both manufacturing scenarios, and the country of origin of the lock body assembly was determined separately. Where the products were produced entirely from foreign components, CBP found the U.S. assembly operations insufficient to substantially transform the foreign components into products of the United States. After finding that the Chinese-origin lock bodies imparted the essential character of both the cable seal and the lock body assembly, CBP determined that their country of origin was China. Where U.S. lock bodies were used, CBP determined that the country of origin of the cable seal and the lock body assembly was the United States. In reaching this determination, CBP noted that the U.S.-origin parts and the U.S. labor accounted for most of the cost of making the seals.

In the instant case, the major components of the ball seals are stamped in the United States from U.S.-origin steel to precise sizes and tolerances by skilled technicians using relatively sophisticated machinery. Next, the three U.S.-origin components are shipped to China where unskilled workers perform a simple manual assembly of the three components with two minor Chinese-origin components. The seals are then returned to the United States where notches are die cut into the straps to make the products functional locking mechanisms. We find that the U.S.-origin components impart the essential character to the assembled seals. Based on our previous rulings and the facts presented in the instant case, we also find that the operations performed in China are not complex or meaningful. The Chinese operations are simple assembly operations that involve a small number of components and do not appear to require a considerable amount of time, skill, or attention to detail. As such, the assembled ball seals, upon importation to the United States, will not be considered to be products of China.

Holding

Based on the facts provided, the U.S.-origin components impart the essential character to the assembled ball seals. The operations performed in China do not result in a substantial transformation of the U.S.-origin components. As such, the assembled ball seals, upon importation to the United States, will not be considered to be products of China.

Notice of this final determination will be given in the **Federal Register** as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19

CFR 177.31, that CBP reexamine the matter anew and issue a new final determination. Any party-at-interest may, within 30 days after publication of the **Federal Register** notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Myles B. Harmon,

Acting Executive Director, Office of Regulations and Rulings, Office of International Trade.

[FR Doc. E8–2631 Filed 2–12–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5194–N–05]

Notice of Proposed Information Collection for Public Comment; HOPE VI Public Housing Programs: Funding and Program Data Collection

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* April 14, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB Control number and should be sent to: Lillian L. Deitzer, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410–5000; telephone 202–708–2374 (this is not a toll-free number) or e-mail Ms. Deitzer at *Lillian_L._Deitzer@HUD.gov* for a copy of the proposed form and other available information.

FOR FURTHER INFORMATION CONTACT: Mary Schulhof, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street, SW., Washington DC 20410, telephone 202–402–4112, (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: HOPE VI program.

OMB Control Number: 2577–0208.

Description of the need for the information and proposed use: Section 24 of the U.S. Housing Act of 1937, as added by section 535 of the Quality Housing and Work Responsibility Act of 1998 (Pub. L. 105–276, 112 Stat. 2461, approved October 21, 1998) and revised by the HOPE VI Program Reauthorization and Small Community Main Street Rejuvenation and Housing Act of 2003 (Pub. L. 108–186, 117 Stat. 2685, approved December 16, 2003), establishes the HOPE VI program for the purpose of making assistance available on a competitive basis to public housing agencies (PHAs) in improving the living environment for public housing residents of severely distressed public housing projects through the demolition, rehabilitation, reconfiguration, or replacement of severely distressed public housing projects (or portions thereof); in revitalizing areas in which public housing sites are located, and contributing to the improvement of the surrounding community; in providing housing that avoids or decreases the concentration of very low-income families; and in building sustainable communities. In addition, the HOPE VI Program Reauthorization and Small Community Main Street Rejuvenation and Housing Act of 2003 added to the HOPE VI program the purpose of making assistance available on a competitive basis to small units of local government to develop affordable housing as part of Main Street rejuvenation projects. The program authorization was renewed by the Consolidated Appropriations Act, 2008 (Pub. L. 110–161, approved December 26, 2007), which extends the program until September 30, 2008. Under this requirement, the Department only has a few months to award and obligate the 2008 funds or they will be returned to the Treasury.

These information collections are required in connection with the annual publication in the **Federal Register** of Notices of Funding Availability (NOFAs), contingent upon available funding and authorization, which announce the availability of funds provided in annual appropriations for HOPE VI Revitalization, Demolition grants, and HOPE VI Main Street grants.

Eligible public housing agencies (PHAs) (for HOPE VI Revitalization and Demolition) and eligible local units of government (for HOPE VI Main Street) interested in obtaining HOPE VI grants are required to submit applications to HUD, as explained in each program NOFA. The information collection conducted in the applications enables HUD to conduct a comprehensive, merit-based selection process in order to identify and select the applications to receive funding. With the use of HUD-prescribed forms, the information collection provides HUD with sufficient information to approve or disapprove applications.

Applicants that are awarded HOPE VI grants are required to report on a quarterly basis on the sources and uses of all amounts expended for revitalization, demolition, or Main Street activities. HOPE VI Revitalization grantees use a fully-automated, Internet-based process for the submission of quarterly reporting information. HUD reviews and evaluates the collected information and uses it as a primary tool with which to monitor the status of HOPE VI Revitalization projects and the HOPE VI Revitalization program.

Agency form numbers: HUD–52774, HUD–52780, HUD 52785, HUD–52787, HUD–52798, HUD–52790, HUD–52797, HUD–52799, HUD–52800, HUD–52825–A, HUD–52860–A, HUD–52861, HUD–53001–A, SF–424, SF–LLL, HUD–27061, HUD 27300, HUD 2880, HUD 96010, and HUD 96011.

Members of affected public: Public Housing Agencies.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

For HOPE VI Revitalization Application: 30 respondents, once annually, 192 hours average per response results in a total annual reporting burden of 5,795.10 hours.

For HOPE VI Demolition Applications: 34 respondents, once annually, 40.25 hours average per

response results in a total annual reporting burden of 1,408.28 hours.

For HOPE VI Main Street Applications: 15 respondents, once annually, 45 hours average per response results in a total annual reporting burden of 692.55 hours.

For HOPE VI Revitalization Quarterly Reporting: 207 respondents, 4 times annually, 20 hours average per response results in a total annual reporting burden of 16,560 hours.

Grand total: These information collections, along with other Non-NOFA information collection items required in connection with the HOPE VI program including budget updates, supportive services and relocation plans, and cost certificates result in an annual total reporting burden of 26,262.93 hours.

Status of the proposed information collection: Extension of a Currently Approved Collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: February 7, 2008.

Bessy M. Kong,

Deputy Assistant Secretary for Policy, Program, and Legislative Initiatives.

[FR Doc. E8–2677 Filed 2–12–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Privacy Act of 1974; Amendments to Existing Systems of Records

AGENCY: Office of the Secretary, Interior.

ACTION: Proposed amendment of existing Privacy Act systems of records.

SUMMARY: In accordance with the Privacy Act of 1974 (5 U.S.C. 552a), the Office of the Secretary of the Department of the Interior is issuing public notice of its intent to amend 35 existing Privacy Act system of records notices to add a new routine use to authorize the disclosure of records to individuals involved in responding to a breach of Federal data.

DATES: Comments must be received by March 24, 2008.

ADDRESSES: Any persons interested in commenting on these proposed amendments may do so by submitting comments in writing to the Office of the Secretary Privacy Act Officer, Sue Ellen Sloca, U.S. Department of the Interior, MS–116 SIB, 1951 Constitution Avenue NW., Washington, DC 20240, or by e-mail to *Sue_Ellen_Sloca@nbc.gov*.

FOR FURTHER INFORMATION CONTACT: Office of the Secretary Privacy Act Officer, Sue Ellen Sloca, U.S. Department of the Interior, MS–116 SIB, 1951 Constitution Avenue NW., Washington, DC 20240, or by e-mail to *Sue_Ellen_Sloca@nbc.gov*.

SUPPLEMENTARY INFORMATION: On May 22, 2007, in a memorandum for the heads of Executive Departments and Agencies entitled ''Safeguarding Against and Responding to the Breach of Personally Identifiable Information,'' the Office of Management and Budget directed agencies to develop and publish a routine use for disclosure of information in connection with response and remedial efforts in the event of a data breach. This routine use will serve to protect the interest of the individuals whose information is at issue by allowing agencies to take appropriate steps to facilitate a timely and effective response to the breach, thereby improving its ability to prevent, minimize or remedy any harm resulting from a compromise of data maintained in its systems of records. Accordingly, the Office of the Secretary of the Department of the Interior is proposing to add a new routine use to authorize disclosure to appropriate agencies, entities, and persons, of information maintained in the following systems in the event of a data breach. These amendments will be effective as proposed at the end of the comment period unless comments are received which would require a contrary determination. The Department will publish a revised notice if changes are made based upon a review of comments received.

Sue Ellen Sloca,

Office of the Secretary Privacy Act Officer.

SYSTEM NAMES:

Interior, OAS—01: ''Official Pilot Folder.'' (Published March 22, 1999, 64 FR 13809–13810)

Interior, OAS—02: ''Aircraft Services Administrative and Fiscal Records.'' (Published April 7, 1999, 64 FR 16990–16991)

Interior, DOI—01: ''Interior Child Care Subsidy Program.'' (Published February 14, 2001, 66 FR 10309–10311)

Interior, OS—02: ''Individual Indian Money (IIM) Trust Funds.'' (Published March 8, 2001, 66 FR 13945–13947)

Interior, OS—03: ''The Box Index Search System.'' (Published July 29, 2005, 70 FR 43899–43900)

Interior, DOI—04: ''Employee Assistance Program Records.'' (Published April 23, 1999, 64 FR 20011–20013)

Interior, DOI—07: ''Federal and Non-Federal Aviation Personnel, Equipment, and Mishap Information System.'' (Published April 7, 1999, 64 FR 16981–16983)

Interior, OS—09: ''Hearings and Appeals Files.'' (Published November 27, 2006, 71 FR 68633–68635)

Interior, OS—10: ''Electronic Email Archive System (EEAS).'' (Published January 28, 2003, 68 FR 4220–4221)

Interior, OS—14: ''Take Pride in America System.'' (Published July 3, 2003, 68 FR 39958–39959)

Interior, DOI—16: ''DOI LEARN (Department-wide Learning Management System.'' (Published October 5, 2005, 70 FR 58230–58232)

Interior, DOI—18: ''Discrimination Complaints.'' (Published April 14, 1999, 71 FR 18438–18440)

Interior, OS—20: ''Secretarial Controlled Correspondence File.'' (Published April 23, 1999, 64 FR 20013–20014)

Interior, OS—35: ''Library Circulation Control System.'' (Published April 7, 1999, 66 FR 16988–16989)

Interior, OS—36: ''Telephone Call Detail Records.'' (Published February 15, 1994, FR Doc 94–3498)

Interior, OS—46: ''Secretarial Subject Files.'' (Published April 7, 1999, 64 FR 16983–16984)

Interior, OS—47: ''Parking Assignment Records.'' (Published April 7, 1999, 64 FR 16984–16985)

Interior, OS—51: ''Property Accountability and Control System.'' (Published April 9, 1999, 64 FR 17404–17405)

Interior, OS—52: ''Passport and Visa Records.'' (Published April 7, 1999, 64 FR 16981)

Interior, DOI—57: ''Privacy Act Files.'' (Published March 24, 1999, 64 FR 14258–14259)

Interior, DOI—58: ''Employee Administrative Records.'' (Published April 20, 1999, 64 FR 19384–19386)

Interior, DOI—60: ''Safety Management Information System.'' (Published April 7, 1999, 64 FR 16991–16992)

Interior, DOI—71: ''Electronic FOIA Tracking System and FOIA Case Files.'' (Published September 18, 2002, 67 FR 58817–58819)

Interior, DOI—72: ''FECA Chargeback Case Files.'' (Published April 20, 1999, 64 FR 19380–19381)

Interior, DOI—74: ''Grievance Records.'' (Published April 20, 64 FR 19381–19383)

Interior, DOI—76: ''Employee Training and Career Development Records.'' (Published May 18, 1999, 64 FR 26999–27000)

Interior, DOI—77: ''Unfair Labor Practice Charges/Complaints Files.'' (Published April 14, 1999, 64 FR 18434–18436)

Interior, DOI—78: ''Negotiated Grievance Files.'' (Published April 20, 1999, 64 FR 19383–19384)

Interior, DOI—79: ''Interior Personnel Records.'' (Published April 23, 1999, 64 FR 20010–20011)

Interior, DOI—82: ''Executive Development Program Files.'' (Published April 23, 1999, 64 FR 20014–20015)

Interior, OS—84: ''Delinquent Debtor Files.'' (Published April 14, 1999, 64 FR 18436–18437)

Interior, DOI—85: ''Payroll, Attendance, Retirement, and Leave Records.'' (Published May 18, 1999, 64 FR 26997–26999)

Interior, OS—86: ''Accounts Receivable.'' (Published April 7, 1999, 64 FR 16985–16986)

Interior, OS—88: ''Travel Management Records.'' (Published April 9, 1999, 64 FR 17403–17404)

Interior, DOI—90: ''Federal Financial System.'' (Published August 27, 1999, 64 FR 46930–46932)

NEW ROUTINE USE:

Disclosures outside the Department of the Interior may be made:

To appropriate agencies, entities, and persons when:

(a) It is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; and

(b) The Department has determined that as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interest, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and

(c) The disclosure is made to such agencies, entities and persons who are reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

[FR Doc. E8–2584 Filed 2–12–08; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Waccamaw National Wildlife Refuge

AGENCY: Fish and Wildlife Service, Department of Interior.

ACTION: Notice of availability of the Draft Comprehensive Conservation Plan and Environmental Assessment for Waccamaw National Wildlife Refuge.

SUMMARY: The Fish and Wildlife Service announces that a Draft Comprehensive Conservation Plan and Environmental Assessment (Draft CCP/EA) for Waccamaw National Wildlife Refuge in Georgetown, Horry, and Marion Counties, South Carolina, is available for distribution. This Draft CCP/EA was prepared pursuant to the National Wildlife Refuge System Administration Act of 1997, and the National Environmental Policy Act of 1969, and describes the Service's proposal for management of this refuge over the next 15 years.

DATES: Written comments must be received at the postal address listed below no later than March 14, 2008.

ADDRESSES: To provide written comments or to obtain a copy of the Draft CCP/EA, please write to: Mr. Craig Sasser, Refuge Manager, Waccamaw National Wildlife Refuge, 1601 North Fraser Street, Georgetown, SC 29440. The Draft CCP/EA may also be accessed and downloaded from the Service's Internet site: *http://southeast.fws.gov.planning.*

FOR FURTHER INFORMATION CONTACT: Mr. Craig Sasser, Refuge Manager, at Telephone: 843–527–8069 or 843–509–1514; E-mail: *marshall_sasser@fws.gov.*

SUPPLEMENTARY INFORMATION:

Public Availability of Comments: Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comments to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Background: Waccamaw National Wildlife Refuge is currently 18,251 acres in size (within an approved acquisition boundary of 54,000 acres), and was established in 1997 for the following purposes: (1) To protect and manage diverse habitat components within an important coastal river ecosystem for the benefit of threatened and endangered species, freshwater and anadromous fish, migratory birds, and forest wildlife, including a wide array of plants and animals associated with bottomland hardwood habitats; and (2) to provide compatible wildlife-dependent recreational activities, including hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation.

Significant issues raised by the public and addressed in the Draft CCP/EA include: conserving migratory waterfowl, neotropical migratory birds, and black bears; increasing opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation; developing a new visitor center; acquiring parcels from willing sellers within the approved refuge acquisition boundary; restoring longleaf pine forests; developing partnerships with the State and non-governmental organizations, and protecting Bull Island as wilderness. The Service developed four alternatives for management of the refuge (Alternatives A, B, C, and D), with Alternative D as the Service's proposed alternative.

Alternative A (Current Management)

Under this alternative, Waccamaw Refuge would continue its current management. No active, direct management of waterfowl populations would occur. With regard to neotropical migratory birds, the refuge would continue to conduct informal surveys on swallow-tailed kites and Swainson's warblers on an occasional basis. Incidental observations of black bear on the refuge would be compiled. Threatened and endangered species would continue to be protected on appropriate refuge habitats. Each of the recreational uses as identified in the National Wildlife Refuge System Improvement Act of 1997 would continue.

Alternative B (Habitat Restoration/ Enhancements on Unit 1)

Under this alternative, the refuge would focus on habitat restoration efforts and enhancements on Unit 1, which consists of 34,784 acres (including acreage within the acquisition boundary not owned by the refuge) and is made up entirely of alluvial and black water floodplain forested wetlands. The refuge would aim to improve wintering waterfowl habitat on approximately 600 acres on Unit 1 by restoring hydrology. With regard to neotropical migratory birds and black bears, Alternative B would be the same as Alternative A. With regard to threatened and endangered species, Alternative B's proposed hydrology restoration on Unit 1 would enhance its existing wood stork rookery. All existing recreational uses would be continued and additional wildlife-dependent public uses would be implemented.

Alternative C (Habitat Restoration/ Enhancement on All Units)

Under this alternative, the refuge would focus habitat restoration efforts

and enhancements on all units of the refuge—Units 1, 2, and 3. Unit 1 consists of 34,784 acres of alluvial and black water floodplain forested wetlands. Unit 2 consists of 12,046 acres, with approximately 6,362 acres of upland longleaf pine forest and tidal forested and emergent wetlands. Unit 3 consists of 2,902 acres and contains historic rice fields, many of which remain intact and are managed for wintering waterfowl. Management of migratory waterfowl and neotropical migratory birds would be the same as Alternatives A and B. Management of black bears would be more active under this alternative. Refuge acquisition and habitat restoration efforts within wetland corridors would be targeted to improve connectivity between bear populations. Management of threatened and endangered species would generally be the same as Alternative B, restoring the hydrology on Unit 1 to enhance the existing wood stork rookery. In addition, it would restore wood stork feeding areas on Unit 3 and red-cockaded woodpecker nesting and foraging habitat on Unit 2. Recreational use of the refuge would remain the same as Alternatives A and B, but would expand hunting opportunities. It would explore the potential for a youth waterfowl hunt on managed wetlands. In addition, opportunities for wildlife observation, wildlife photography, and environmental education and interpretation would be expanded.

Alternative D (Optimize Habitat Management and Visitor Services)—Proposed Alternative

Under this alternative, habitat management and visitor services throughout the refuge would be optimized. Management of waterfowl and migratory birds would be the same as Alternatives B and C; however, management of black bears would be stepped up from that of the previous three alternatives. This alternative would conduct annual surveys of black bears and attempt to enlist public participation in gathering, recording, and compiling sightings. Management of threatened and endangered species would generally be the same as Alternative C—restoring the hydrology on Unit 1 to enhance the existing wood stork rookery, restoring wood stork feeding areas on Unit 3, and red-cockaded woodpecker nesting and foraging habitat on Unit 2. Recreational use of the refuge would continue. This alternative would expand on hunting opportunities for deer and hog by considering a hunt by mobility-impaired individuals. It would potentially include a youth waterfowl hunt on refuge management lands. Over the lifetime of the CCP, this alternative would call for reducing deer herd density to improve herd health and to improve habitat quality for other species. This alternative would identify the 4,600-acre Bull Island as a proposed Wilderness Study Area. The Service would maintain its wilderness character, and within 10 years of approval of the comprehensive conservation plan, would prepare a wilderness study report and additional NEPA documentation on whether Bull Island should be formally designated by Congress as a unit of the National Wilderness Preservation System. The refuge would prepare and implement a Visitor Services' Plan and expand most wildlife-dependent public uses in a number of ways.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: November 30, 2007.

Cynthia K. Dohner,

Acting Regional Director.

[FR Doc. E8–2628 Filed 2–12–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2008–N0022; 80221–1113–0000–F5]

Endangered Species Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comment.

SUMMARY: We invite the public to comment on the following applications to conduct certain activities with endangered species.

DATES: Comments on these permit applications must be received on or before March 14, 2008.

ADDRESSES: Written data or comments should be submitted to the U.S. Fish and Wildlife Service, Endangered Species Program Manager, Region 8, 2800 Cottage Way, Room W–2606, Sacramento, CA, 95825 (telephone: 916–414–6464; fax: 916–414–6486). Please refer to the respective permit number for each application when submitting comments. All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public.

FOR FURTHER INFORMATION CONTACT: Daniel Marquez, Fish and Wildlife Biologist, see **ADDRESSES**, (telephone: 760–431–9440; fax: 760–431–9624).

SUPPLEMENTARY INFORMATION: The following applicants have applied for scientific research permits to conduct certain activities with endangered species pursuant to section 10(a)(1)(A) of the Endangered Species Act (16 U.S.C. 1531 et seq.). The U.S. Fish and Wildlife Service (''we'') solicits review and comment from local, State, and Federal agencies, and the public on the following permit requests. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Permit No. TE–815214

Applicant: Oceano Dunes State Vehicular Recreation Area, Arroyo Grande, California.

The applicant requests an amendment to take (salvage, replace, and transfer non-viable eggs) the California Least Tern (*Sterna antillarum browni*) in conjunction with surveys and population monitoring in San Luis Obispo and Santa Barbara Counties, California, for the purpose of enhancing its survival.

Permit No. TE–170381

Applicant: William F. Stagnaro, San Francisco, California.

The applicant requests a permit to take (harass by survey, capture, mark, and monitor) the San Francisco garter snake (*Thamnophis sirtalis tetrataenia*), and the California tiger salamander (*Ambystoma californiense*) in conjunction with surveys and population monitoring activities throughout the range of each species in California, for the purpose of enhancing their survival.

Permit No. TE–084606

Applicant: David F. Moskovitz, Diamond Bar, California.

The applicant requests an amendment to take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus*

packardi) in conjunction with surveys throughout the range of each species in California, for the purpose of enhancing their survival.

Permit No. TE–170389

Applicant: Travis B. Cooper, San Juan Capistrano, California.

The applicant requests a permit to take (harass by survey, and nest monitor) the least Bell's vireo (*Vireo bellii pusillus*), and the Southwestern willow flycatcher (*Empidonax traillii extimus*) in conjunction with surveys and monitoring throughout the range of each species in California, for the purpose of enhancing its survival.

Permit No. TE–004939

Applicant: Gordon F. Pratt, Riverside, California.

The applicant requests an amendment to take (capture, release, remove from the wild, and captive breed) the El Segundo Blue butterfly (*Euphilotes battoides allyni*) in conjunction with genetic research at Vandenberg Air Force base, Santa Barbara County, California, for the purposes of enhancing its survival.

Permit No. TE–170403

Applicant: Melissa A. Amarello, Carbondale, California.

The applicant requests a permit to take (harass by survey, capture, mark, and monitor) the San Francisco garter snake (*Thamnophis sirtalis tetrataenia*) in conjunction with population monitoring and research activities at the Cloverdale Ranch, San Mateo County, California, for the purpose of enhancing their survival.

Permit No. TE–795930

Applicant: Helm Biological Consulting, Lincoln, California.

The permittee requests an amendment to take (harass by survey, capture, handle, and release) the California tiger salamander (*Ambystoma californiense*) in conjunction with surveys throughout the range of the species in California, for the purpose of enhancing its survival.

Permit No. TE–168282

Applicant: Normandeau Associates, Inc., Stevenson Washington.

The permittee request a permit to take (harass by survey) the razorback sucker (*Xyrauchen texanus*) and bonytail chub (*Gila elegans*) in conjunction with surveys and backwater inventories along the lower Colorado river in Imperial County, California, for the purpose of enhancing their survival.

Permit No. TE–170681

Applicant: Stanley C. Spencer, Riverside, California.

The applicant requests an amendment to take (survey by pursuit) the Quino checkerspot butterfly (*Euphydryas editha quino*) and Delhi sands flower loving fly (*Rhaphiomidas terminatus abdominalis*), and take (capture, collect, and kill) the Conservancy fairy shrimp (*Branchinecta conservatio*), the longhorn fairy shrimp (*Branchinecta longiantenna*), the Riverside fairy shrimp (*Streptocephalus wootoni*), the San Diego fairy shrimp (*Branchinecta sandiegonensis*), and the vernal pool tadpole shrimp (*Lepidurus packardi*) in conjunction with surveys throughout the range of each species in California, for the purpose of enhancing their survival.

Permit No. TE–053085

Applicant: Bureau of Reclamation, Boulder City, Navada.

The permittee request a permit to take (harass by survey, electroshock, capture, collect, mark, transport, captive rear, captive propagate, reintroduce) the razorback sucker (*Xyrauchen texanus*) and bonytail chub (*Gila elegans*) in conjunction with surveys, population monitoring, and research along the Colorado river in Clark County, Nevada, and San Bernardino, Riverside, and Imperial County, California, for the purpose of enhancing their survival.

We solicit public review and comment on each of these recovery permit applications. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Dated: February 6, 2008.

Michael Fris,

Acting Regional Director, Region 8, Sacramento, California.

[FR Doc. E8–2586 Filed 2–12–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Recovery Plan for the Sierra Nevada Bighorn Sheep (Ovis canadensis californiana)

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of the recovery plan for the Sierra Nevada bighorn sheep *(Ovis canadensis californiana).* The Sierra Nevada bighorn sheep occurs primarily on lands managed by the U.S. Forest Service (Inyo and Humboldt-Toiyabe National Forests) and the National Park Service (Yosemite National Park) in the Sierra Nevada in western Inyo and Mono Counties, California. This recovery plan describes the status, current management, recovery objectives and criteria, and specific actions needed to reclassify the Sierra Nevada bighorn sheep from endangered to threatened, and to ultimately delist it.

ADDRESSES: You may obtain a copy of the plan by either of the following methods:

Internet: Download a copy at *http://endangered.fws.gov/recovery/index.html#plans,* or *U.S. mail:* Send a request to U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003. Printed copies of the recovery plan will be available for distribution in 4 to 6 weeks.

FOR FURTHER INFORMATION CONTACT: Brian Croft, Fish and Wildlife Biologist, at the above address (telephone 951–697–5365).

SUPPLEMENTARY INFORMATION:

Background

Recovery of endangered or threatened animals and plants to the point where they are again secure, self-sustaining members of their ecosystems is a primary goal of our endangered species program. To help guide the recovery effort, we are working to prepare recovery plans for most listed species native to the United States. Recovery plans describe actions considered necessary for the conservation of the species, establish criteria for downlisting or delisting listed species, and estimate time and cost for implementing the recovery measures needed.

The Endangered Species Act (16 U.S.C. 1531, *et seq.*) (Act) requires us to develop recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act requires us to provide public notice and an opportunity for public review and comment during recovery plan development. We made the draft recovery plan for the Sierra Nevada bighorn sheep available for public comment from July 30, 2003, through September 29, 2003 (68 FR 44808), and again from October 9, 2003, through December 8, 2003 (68 FR 58355). We considered information we received during these public comment periods and information from peer reviewers in our preparation of this final recovery plan, and also summarized that information in Appendix J of the

recovery plan. We will forward substantive comments regarding recovery plan implementation to appropriate Federal and State agencies or other entities so they can consider these comments during the course of implementing recovery actions. We developed this recovery plan with input from the Sierra Nevada Bighorn Sheep Recovery Team, including a science team and a stakeholder team. We also coordinated with the California Department of Fish and Game.

We listed the Sierra Nevada bighorn sheep as an endangered distinct population segment (DPS) on January 3, 2000 (65 FR 20), following initial emergency listing on April 20, 1999 (64 FR 19300). At the time of listing, the Sierra Nevada bighorn sheep population consisted of about 125 adults, known to exist among 5 geographic areas, with little probability of interchange among those areas. In 2000, on the basis of concurrence between genetic and morphometric data, Wehausen and Ramey (2000) reassigned populations of California bighorn outside of the Sierra Nevada to other subspecies, leaving bighorn sheep in the Sierra Nevada as their own subspecies. By the rules of zoological nomenclature, they again assume Grinnell's (1912) subspecies name *sierrae* (Wehausen *et al.* 2005). With that nomenclature change, the California bighorn subspecies was terminated. Concurrent with the proposed designation of critical habitat for Sierra Nevada bighorn, on July 25, 2007, the U.S. Fish and Wildlife Service formally proposed a taxonomic revision to amend the final listing rule from DPS to subspecies, *Ovis canadensis sierrae.*

The Sierra Nevada bighorn sheep is threatened primarily by mountain lion predation, small population size, and the potential for disease transmission due to contact with domestic sheep and goats. Key elements for immediate action are: (1) Predator management; (2) augmentation of small herds with sheep from larger ones; and (3) elimination of the threat of a pneumonia epizootic resulting from contact with domestic sheep or goats. Actions needed to recover the bighorn sheep include: (1) Protection, maintenance, and enhancement of bighorn sheep habitat; (2) enhancing survivorship and reproductive output of bighorn sheep in order to the increase population; (3) increasing the use of low-elevation winter ranges; (4) increasing the numbers of herds, and thereby the number of bighorn sheep; (5) developing and implementing a genetic management plan to maintain genetic diversity; (6) developing sources of translocation stock; (7) developing and implementing a captive breeding program, if necessary; (8) monitoring status and trends of bighorn sheep herds and their habitat; (9) research; and (10) providing information to and working with the public.

Authority: The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: February 6, 2008.

Ken McDermond,

Acting Regional Director, Region 8, U.S. Fish and Wildlife Service.

[FR Doc. E8–2627 Filed 2–12–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Geological Survey

Office of the Secretary; Notice of Renewal of the Advisory Committee on Water Information Charter.

AGENCY: United States Geological Survey.

ACTION: Notice of Renewal of the Advisory Committee on Water Information Charter

SUMMARY: Following consultation with the General Services Administration, notice is hereby given that the Secretary of the Interior is renewing the Advisory Committee on Water Information (ACWI).

The ACWI has been established under the authority of Office of Management and Budget Memorandum No. M–92–01 and the Federal Advisory Committee act. The purpose of this Presidential Committee is to represent the interests of water-information users and professionals in advising the Federal Government on Federal water-information programs and their effectiveness in meeting the Nation's water-information needs. Member organizations help to foster communications between the Federal and non-Federal sectors of sharing water information.

Membership represents a wide range of water resources interests and functions. Representation on the ACWI includes all levels of government, academia, private industry, and professional and technical societies. Member organizations designate their representatives and alternates. Membership is limited to a maximum of 35 organization.

The Committee will function solely as an advisory body, and in compliance with the provisions of the Federal Advisory Committee Act. The Charter will be filed under the Act, 15 days from the date of publication of this notice.

FOR FURTHER INFORMATION CONTACT: Ms. Toni M. Johnson (Executive Secretary), Chief, Water Information Coordination Program, U.S. Geological Survey, 12201 Sunrise Valley Drive, MS 417, Reston, Virginia 20192. Telephone: 703–648–6810; Fax: 703–648–5644.

Dated: February 1, 2008.

Dirk Kempthorne,

Secretary of the Interior.

[FR Doc. 08–612 Filed 2–12–08; 8:45 am]

BILLING CODE 4311–AM–M

DEPARTMENT OF THE INTERIOR

Geological Survey

Notice of an Open Meeting of the Advisory Committee on Water Information (ACWI)

SUMMARY: Notice is hereby given of the 2008 annual meeting of the ACWS. This meeting is to discuss broad policy topics relating to National water initiatives; and the development and dissemination of water information, through reports from the eight ACWS subgroups. The agenda will include an update on the three pilot studies of the National Water Quality Monitoring Network for U.S. Coastal Waters and their Tributaries and the first report from the Subcommittee on Ground Water on a National Ground Water Framework, as well as other water initiatives.

The ACWI has been established under the authority of the Office of Management and Budget Memorandum No. M–92–01 and the Federal Advisory Committee Act. The purpose of this Presidential Committee is to represent the interests of water-information users and professionals in advising the Federal Government on Federal water-information programs and their effectiveness in meeting the Nation's water-information needs. Member organizations help to foster communications between the Federal and non-government sectors on sharing water information.

Membership represents a wide range of water resources interests and functions. Representation on the ACWI includes all levels of government, academia, private industry, and professional and technical societies. Member organizations designate their representatives and alternates. Membership is limited to a maximum of 35 organizations.

DATES: The formal meeting will convene at 8:30 a.m. on February 20, 2008, and will adjourn on February 21, 2008 at 4:30 p.m.

ADDRESSES: Crowne Plaza Dulles Airport, 2200 Centreville Road, Herndon, Virginia 20170.

FOR FURTHER INFORMATION CONTACT: Ms. Toni M. Johnson (Executive Secretary), Chief, Water Information Coordination Program, U.S. Geological Survey, 12201 Sunrise Valley Drive, MS 417 National Center, Reston, VA 20192. Telephone: 703–648–6810, Fax: 703–648–5644, e-mail *tjohnson@usgs.gov*.

SUPPLEMENTARY INFORMATION: This meeting is open to the public. Up to a half hour will be set aside for public comment. Persons wishing to make a brief presentation (up to 5 minutes) are asked to provide a written request with a description of the general subject to Ms. Johnson at the above address no later than noon, February 15, 2008. It is requested that 65 copies of a written statement be submitted at the time of the meeting for distribution to members of the ACWI and placement in the official file. Any member of the public may submit written information and (or) comments to Ms. Johnson for distribution at the ACWI meeting.

Dated: February 6, 2008.

Katherine Lins,

Chief, Office of Water Information.

[FR Doc. 08–613 Filed 2–12–08; 8:45 am]

BILLING CODE 4311–AM–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–910–08–1150–PH–24–1A]

Notice of Utah's Recreation Resource Advisory Committee Meeting

AGENCY: Bureau of Land Management, Department of Interior.

ACTION: Notice of Utah's Recreation Resource Advisory Committee (RRAC) Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and The Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management's (BLM) Utah Recreation Resource Advisory Committee (RRAC) will meet as indicated below.

DATES: The Utah Recreation Resource Advisory Committee (RRAC) will meet March 13 (1 p.m.–5 p.m.) and March 14, 2008 (8 a.m.–Noon) in Moab, Utah.

ADDRESSES: The RRAC will meet at the La Quinta Inn, Castle Rock Conference Room, 815 South Main Street, Moab, Utah 84532.

FOR FURTHER INFORMATION: Contact Sherry Foot, Special Programs Coordinator, Utah State Office, Bureau of Land Management, P.O. Box 45155, Salt Lake City, Utah 84145–0155; phone (801) 539–4195.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Utah. The Recreation Resource Advisory Committee will be given recreation fee presentations from the BLM's Monticello Field Office (Cedar Mesa/Kane Gulch), the Price Field Office (Cleveland Lloyd Dinosaur Quarry) and from the U.S. Forest Service—Flaming Gorge NRA, American Fork Canyon, Mirror Lake Corridor, Manti-La Sal REA Program and Fishlake Campground. On March 14, a half-hour public comment period is scheduled to begin from 10:45 a.m.–11:15 a.m. Written comments may be sent to the Bureau of Land Management addressed listed above. All meetings are open to the public; however, transportation, lodging, and meals are the responsibility of the participating public.

Dated: February 5, 2008.

Jeff Rawson,

Acting State Director.

[FR Doc. E8–2546 Filed 2–12–08; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf (OCS) Central Gulf of Mexico (GOM) Planning Area Oil and Gas Lease Sale 206

AGENCY: Minerals Management Service, Interior.

ACTION: Final Notice of Sale (FNOS) 206.

SUMMARY: On March 19, 2008, the MMS will open and publicly announce bids received for blocks offered in Central GOM Planning Area Oil and Gas Lease Sale 206, pursuant to the OCS Lands Act (43 U.S.C. 1331–1356, as amended) and the regulations issued thereunder (30 CFR Part 256). The Final Notice of Sale 206 Package (FNOS 206 Package) contains information essential to bidders, and bidders are charged with the knowledge of the documents contained in the Package.

DATES: Public bid reading for the Central GOM Planning Area Oil and Gas Lease Sale 206 will begin at 9 a.m., Wednesday, March 19, 2008, at the Louisiana Superdome, 1500 Sugarbowl Drive, New Orleans, Louisiana 70112. The lease sale will be held in the St. Charles Club Room on the second floor (Loge Level). Entry to the Superdome will be on the Poydras Street side of the building through Gate A on the Ground or Plaza Level, and parking should be available at Garage 6. All times referred to in this document are local New Orleans times, unless otherwise specified.

ADDRESSES: Bidders can obtain a FNOS 206 Package containing this Notice of Sale and several supporting and essential documents referenced herein from the MMS Gulf of Mexico Region Public Information Unit, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, (504) 736–2519 or (800) 200–GULF, or via the MMS Internet Web site at *http://www.gomr.mms.gov*.

Filing of Bids: Bidders must submit sealed bids to the Regional Director (RD), MMS Gulf of Mexico Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, between 8 a.m. and 4 p.m. on normal working days, and from 8 a.m. to the Bid Submission Deadline of 10 a.m. on Tuesday, March 18, 2008. If bids are mailed, please address the envelope containing all of the sealed bids as follows:

Attention: Supervisor, Sales and Support Unit (MS 5422), Leasing Activities Section, MMS Gulf of Mexico Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394. *Contains Sealed Bids for Oil and Gas Lease Sale 206. Please Deliver to Ms. Nancy Kornrumpf, 6th Floor, Immediately.*

Please note: Bidders mailing their bid(s) are advised to call Ms. Nancy Kornrumpf, (504) 736–2726, immediately after putting their bid(s) in the mail.

If the RD receives bids later than the time and date specified above, he will return those bids unopened to bidders. Bidders may not modify or withdraw their bids unless the RD receives a written modification or written withdrawal request prior to 10 a.m. on Tuesday, March 18, 2008. Should an unexpected event such as flooding or travel restrictions be significantly disruptive to bid submission, the MMS Gulf of Mexico Region may extend the Bid Submission Deadline. Bidders may call (504) 736–0557 for information about the possible extension of the Bid Submission Deadline due to such an event.

Areas Offered for Leasing: The MMS is offering for leasing all blocks and partial blocks listed in the document ''Blocks Available for Leasing in Central GOM Planning Area Oil and Gas Lease Sale 206'' included in the FNOS 206 Package. All of these blocks are shown

on the following leasing maps and Official Protraction Diagrams (OPDs):

OUTER CONTINENTAL SHELF LEASING MAPS—LOUISIANA MAP NUMBERS 1 THROUGH 12

([These 30 maps sell for $2.00 each])

LA1	West Cameron Area (Revised November 1, 2000).
LA1A	West Cameron Area, West Addition (Revised February 28, 2007).
LA1B	West Cameron Area, South Addition (Revised February 28, 2007).
LA2	East Cameron Area (Revised November 1, 2000).
LA2A	East Cameron Area, South Addition (Revised November 1, 2000).
LA3	Vermilion Area (Revised November 1, 2000).
LA3A	South Marsh Island Area (Revised November 1, 2000).
LA3B	Vermilion Area, South Addition (Revised November 1, 2000).
LA3C	South Marsh Island Area, South Addition (Revised November 1, 2000).
LA3D	South Marsh Island Area, North Addition (Revised November 1, 2000).
LA4	Eugene Island Area (Revised November 1, 2000).
LA4A	Eugene Island Area, South Addition (Revised November 1, 2000).
LA5	Ship Shoal Area (Revised November 1, 2000).
LA5A	Ship Shoal Area, South Addition (Revised November 1, 2000).
LA6	South Timbalier Area (Revised November 1, 2000).
LA6A	South Timbalier Area, South Addition (Revised November 1, 2000).
LA6B	South Pelto Area (Revised November 1, 2000).
LA6C	Bay Marchand Area (Revised November 1, 2000).
LA7	Grand Isle Area (Revised November 1, 2000).
LA7A	Grand Isle Area, South Addition (Revised February 17, 2004).
LA8	West Delta Area (Revised November 1, 2000).
LA8A	West Delta Area, South Addition (Revised November 1, 2000).
LA9	South Pass Area (Revised November 1, 2000).
LA9A	South Pass Area, South and East Additions (Revised November 1, 2000).
LA10	Main Pass Area (Revised November 1, 2000).
LA10A	Main Pass Area, South and East Additions (Revised November 1, 2000).
LA10B	Breton Sound Area (Revised November 1, 2000).
LA11	Chandeleur Area (Revised November 1, 2000).
LA11A	Chandeleur Area, East Addition (Revised November 1, 2000).
LA12	Sabine Pass Area (Revised February 28, 2007).

OUTER CONTINENTAL SHELF OFFICIAL PROTRACTION DIAGRAMS

([These 19 diagrams sell for $2.00 each])

NG15–02	Garden Banks (Revised February 28, 2007).
NG15–03	Green Canyon (Revised November 1, 2000).
NG15–05	Keathley Canyon (Revised February 28, 2007).
NG15–06	Walker Ridge (Revised November 1, 2000).
NG15–08	Sigsbee Escarpment (Revised February 28, 2007).
NG15–09	Amery Terrace (Revised October 25, 2000).
NG16–01	Atwater Valley (Revised November 1, 2000).
NG16–02	Lloyd Ridge (Revised February 28, 2007).
NG16–04	Lund (Revised November 1, 2000).
NG16–05	Henderson (Revised February 28, 2007).
NG16–07	Lund South (Revised November 1, 2000).
NG16–08	Florida Plain (Revised February 28, 2007).
NH15–12	Ewing Bank (Revised November 1, 2000).
NH16–04	Mobile (Revised November 1, 2000).
NH16–05	Pensacola (Revised February 28, 2007).
NH16–07	Viosca Knoll (Revised November 1, 2000).
NH16–08	Destin Dome (Revised February 28, 2007).
NH16–10	Mississippi Canyon (Revised November 1, 2000).
NH16–11	De Soto Canyon (Revised February 28, 2007).

Please note: A CD–ROM (in ARC/INFO and Acrobat (.PDF) format) containing all of the GOM leasing maps and OPD's, except for those not yet converted to digital format, is available from the MMS Gulf of Mexico Region Public Information Unit for a price of $15. For the current status of all Central GOM Planning Area leasing maps and OPD's, please refer to 66 FR 28002 (published May 21, 2001), 69 FR 23211 (published April 28, 2004), 72 FR 27590 (published May 16, 2007), and 72 FR 35720 (published June 29, 2007). In addition, Supplemental Official OCS Block Diagrams (SOBD's) are available for blocks which contain the ''U.S. 200 Nautical Mile Limit'' line and the ''U.S.-Mexico-Maritime Boundary'' line. These SOBD's are also available from the MMS Gulf of Mexico Region Public Information Unit. For additional information, please call Ms. Tara Montgomery, (504) 736–5722.

All blocks are shown on these leasing maps and OPD's. The available Federal acreage of all whole and partial blocks in this lease sale is shown in the document ''List of Blocks Available for Leasing in Lease Sale 206'' included in the FNOS 206 Package. Some of these blocks may be partially leased or deferred, or transected by administrative lines such as the Federal/State jurisdictional line. A bid on a block must include all of the available Federal acreage of that block. Also, information on the unleased portions of such blocks is found in the document ''Central Gulf of Mexico Planning Area Lease Sale 206—Unleased Split Blocks and Available Unleased Acreage of Blocks with Aliquots and Irregular Portions Under Lease or Deferred'' included in the FNOS 206 Package.

Areas Not Available for Leasing: The following whole and partial blocks are not offered for lease in this lease sale:

Blocks currently under appeal (although currently unleased, the following blocks are under appeal and bids will not be accepted):

Mississippi Canyon (OPD NH16–10) Block 943.

West Delta Area (Leasing Map LA8) Block 50.

Whole blocks and portions of blocks which lie within the former Western Gap portion of the 1.4 nautical mile buffer zone north of the continental shelf boundary between the United States and Mexico:

Amery Terrace (OPD NG 15–09).

Whole Blocks: 280, 281, 318 through 320, and 355 through 359.

Portions of Blocks: 235 through 238, 273 through 279, and 309 through 317.

Sigsbee Escarpment (OPD NG 15–08)

Whole Blocks: 239, 284, 331 through 341.

Portions of Blocks: 151, 195, 196, 240, 241, 285 through 298, 342 through 349.

Whole blocks which are beyond the United States Exclusive Economic Zone in the area known as the Northern portion of the Eastern Gap:

Lund South (OPD NG 16–07)

Blocks: 172, 173, 213 through 217, 253 through 261, 296 through 305, and 349.

Henderson (OPD NG 16–05)

Blocks: 467, 510, 511, 553 through 555, 595 through 599, 638 through 643, 681 through 688, 723 through 732, 766 through 776, 808 through 820, 851 through 863, 893 through 906, 935 through 949, and 977 through 993.

Florida Plain (OPD NG 16–08)

Blocks: 7 through 24, 49 through 67, 90 through 110, 133 through 154, 177 through 197, 221 through 240, 265 through 283, 309 through 327, and 363 through 370.

Blocks that were previously included in the Eastern GOM Planning Area and are within 100 miles of the Florida coast:

Pensacola (OPD NH 16–05)

Blocks: 751 through 754, 793 through 798, 837 through 842, 881 through 886, 925 through 930, 969 through 975.

Destin Dome (OPD NH 16–08)

Blocks: 1 through 7, 45 through 51, 89 through 96, 133 through 140, 177 through 184, 221 through 228, 265 through 273, 309 through 317, 353 through 361, 397 through 405, 441 through 450, 485 through 494, 529 through 538, 573 through 582, 617 through 627, 661 through 671, 705 through 715, 749 through 759, 793 through 804, 837 through 848, 881 through 892, 925 through 936, and 969 through 981.

DeSoto Canyon (OPD NH 16–11)

Whole Blocks: 1 through 16, 45 through 60, and 92 through 102.

Portions of Blocks: 89 through 91, 103, 104, and 135 through 147.

Blocks outside the original Sale 181 area that were previously included in the Eastern GOM Planning Area *and* are beyond 100 miles of the Florida coast, which are under the 1998 Presidential moratorium until 2012:

DeSoto Canyon (OPD NH 16–11)

Whole Blocks: 148, and 185 through 193.

Portions of Blocks: 103, 104, and 141 through 147.

Blocks east of the Military Mission Line (i.e. the north-south line at 86°41′W. longitude), *and* north of the northern portion of the Eastern Gap, *and* west of the Central and Eastern Planning Area Boundary:

Henderson (OPD NG 16–05)

Portions of Blocks: 246, 290, 334, 378, 422, and 466.

Blocks that are south of the Sale 181 area, as approved in the Final Outer Continental Shelf Oil and Gas Leasing Program for 1997–2002, *and* north of the previously noted Northern portion of the Eastern Gap *and* west of the Military Mission Line:

Lloyd Ridge (OPD NG 16–02)

Blocks: 529 through 550, 573 through 595, 617 through 639, 661 through 683, 705 through 727, 749 through 771, 793 through 816, 837 through 860, 881 through 904, 925 through 948, and 969 through 992.

Henderson (OPD NG 16–05)

Whole Blocks: 1 through 25, 45 through 69, 89 through 113, 133 through 157, 177 through 201, 221 through 245, 265 through 289, 309 through 333, 353 through 377, 397 through 421, 441 through 465, 485 through 509, 529 through 552, 573 through 594, 617 through 637, 661 through 680, 705 through 722, 749 through 765, 793 through 807, 837 through 850, 881 through 892, 925 through 934, and 969 through 976.

Portions of Blocks: 246, 290, 334, 378, 422, and 466.

Florida Plain (OPD NG 16–08)

Blocks 1 through 6, 45 through 48, and 89.

Statutes and Regulations: Each lease issued in this lease sale is subject to the OCS Lands Act of August 7, 1953; 43 U.S.C. 1331 *et seq.*, as amended, hereinafter called ''the Act''; all regulations issued pursuant to the Act and in existence upon the Effective Date of the lease; all regulations issued pursuant to the statute in the future which provide for the prevention of waste and conservation of the natural resources of the OCS and the protection of correlative rights therein; and all other applicable statutes and regulations.

Lease Terms and Conditions: Initial periods, extensions of initial periods, minimum bonus bid amounts, rental rates, escalating rental rates for leases with an approved extension of the initial 5-year period, royalty rate, minimum royalty, and royalty suspension provisions, if any, applicable to this sale are noted below. Depictions of related areas are shown on the map ''Lease Terms and Economic Conditions, Lease Sale 206, Final'' for leases resulting from this lease sale.

Initial Periods: 5 years for blocks in water depths of less than 400 meters; 8 years for blocks in water depths of 400 to less than 800 meters (pursuant to 30 CFR 256.37, commencement of an exploratory well is required within the first 5 years of the initial 8-year term to avoid lease cancellation); and 10 years for blocks in water depths of 800 meters or deeper.

Extensions of Initial Periods: The 5-year initial term for a lease issued from this sale may be extended to 8 years if a well, targeting hydrocarbons below 25,000 feet true vertical depth subsea (TVD SS), is spudded within the first 5 years of the initial period. The 3-year extension may be granted in cases where the well is drilled to a target below 25,000 feet TVD SS and also in cases where the well does not reach a depth below 25,000 feet TVD SS due to mechanical or safety reasons.

In order for the lease term to be extended to 8 years, the lessee is required to submit to the Regional Supervisor for Production and Development, within 30 days after completion of the drilling operation, a letter providing the well number, spud date, information demonstrating the target below 25,000 feet TVD SS, and, if applicable, any safety or mechanical problems encountered that prevented the well from reaching a depth below 25,000 feet TVD SS. The Regional Supervisor must concur in writing that the conditions have been met to extend the lease term 3 years. The Regional Supervisor will provide written confirmation of any lease extension within 30 days of receipt of the letter provided.

For any lease that has a well spudded in the first 5 years of the initial period with a hydrocarbon target below 25,000 feet TVD SS, the regulations found at 30 CFR 250.175(a), (b), and (c) *will not* be applicable at the end of the 5th year.

For any lease that does not have a well spudded in the first 5 years of the initial period which targets hydrocarbons below 25,000 feet TVD SS, the regulations found at 30 CFR 250.175(a), (b), and (c) will be applicable, but the 3-year extension *will not* be available.

At the end of the 8th year, the lessee is free to use all lease-term extension provisions under the regulations.

Minimum Bonus Bid Amounts: A bonus bid will not be considered for acceptance unless it provides for a cash bonus in the amount of $25 or more per acre or fraction thereof for blocks in water depths of less than 400 meters, or $37.50 or more per acre or fraction thereof for blocks in water depths of 400 meters or deeper; to confirm the exact calculation of the minimum bonus bid amount for each block, see ''List of Blocks Available for Leasing'' which is contained in the FNOS 206 Package. Please note that bonus bids must be in whole dollar amounts (i.e., any cents will be disregarded by the MMS).

Rental Rates: $6.25 per acre or fraction thereof for blocks in water depths of less than 200 meters,* and $9.50 per acre or fraction thereof for blocks in water depths of 200 meters or deeper,* to be paid on or before the 1st day of each lease year until determination of well producibility is made, then at the expiration of each lease year until the start of royalty-bearing production.

• An exception to the rental rate requirement for blocks in water depths up to 400 meters will be escalating rental rates in the 6th, 7th, and 8th years for leases with an approved extension of the initial 5-year period, as noted in the following paragraph of this document.

Escalating rental rates for leases with an approved extension of the initial 5-year period: Any lease granted a 3-year extension beyond the initial 5-year period will pay an escalating rental rate as set out in the following table, to be paid on or before the 1st day of each lease year until determination of well producibility is made, then at the expiration of each lease year until the start of royalty-bearing production:

Extended lease year No.	Escalating annual rental rate † for a lease in less than a 200-meter water depth	Escalating annual rental rate † for a lease in a 200-to less than 400-meter water depth
6	$12.50 per acre or fraction thereof.	$19.00 per acre or fraction thereof.
7	$18.75 per acre or fraction thereof.	$28.50 per acre or fraction thereof.
8	$25.00 per acre or fraction thereof.	$38.00 per acre or fraction thereof.

† If another well is spudded during the 3-year extended term of the lease that targets hydrocarbons below 25,000 feet TVD SS, and MMS concurs that this has occurred, the rental rate will remain fixed at the rental rate in effect during the lease year in which the well was spudded.

Royalty Rate: 18¾ percent royalty rate for blocks in all water depths, except during periods of royalty suspension, to be paid monthly on the last day of the month following the month during which the production is obtained.

Minimum Royalty: After the start of royalty-bearing production, regardless of the year of the lease and notwithstanding any royalty suspension that may apply: $6.25 per acre or fraction thereof per year for blocks in water depths of less than 200 meters and $9.50 per acre or fraction thereof per year for blocks in water depths of 200 meters or deeper, to be paid at the expiration of each lease year with credit applied for actual royalty paid during the lease year. If actual royalty paid exceeds the minimum royalty requirement, then no minimum royalty payment is due.

Royalty Suspension Provisions: Leases with royalty suspension volumes (RSVs) are authorized under existing MMS rules at 30 CFR Part 260. There are no circumstances under which a single lease could receive a royalty suspension both for deep gas production and for deepwater production.

Section 344 of the Energy Policy Act of 2005 (EPAct05) extends existing deep gas incentives in two ways. First, it mandates an RSV of at least 35 billion cubic feet of natural gas for certain wells completed in a drilling depth category (greater than 20,000 feet subsea) for leases in 0–400 meters of water. Second, section 344 directs that the same incentives prescribed in MMS's 2004 rule for wells completed between 15,000 feet and 20,000 feet TVD SS on leases in 0–200 meters of water be applied to leases in 200–400 meters of water. Section 345 of the EPAct05 directs continuation of the MMS deepwater incentive program utilized since 2001 in the Gulf of Mexico for leases issued between August 8, 2005, and August 8, 2010, and provides for an increase in RSV from 12 million barrels of oil equivalent (MMBOE) to 16 MMBOE for leases in water depths greater than 2,000 meters.

Deep Gas Royalty Suspensions

A lease issued as a result of this sale may be eligible for royalty relief. The MMS published a proposed rule on May 18, 2007, and will publish a final rule implementing section 344 (Incentives for Natural Gas Production from Deep Wells in the Shallow Waters of the Gulf of Mexico) of EPAct05. Royalty relief under section 344 of EPAct05 applies to all blocks in this sale west of 87.5° W. longitude. The same terms will be applied to all blocks in this sale east of 87.5° W. longitude in order to be consistent for all blocks within this Planning Area. If a lease is eligible, it will be subject to the provisions of that final rule, including any price threshold provisions. Please refer to the Royalty Suspension Provisions cited below.

A. *The following Royalty Suspension Provisions apply to qualifying deep wells on leases, at least partly, in water depths up to 200 meters:*

Such wells require a perforated interval the top of which is from 15,000 to less than 20,000 feet TVD SS. Suspension volumes, conditions, and requirements prescribed in 30 CFR 203.41 through 203.47 and any amendments or successor regulations apply to deep gas production from a lease in this water depth range issued as a result of this sale. Definitions that apply to this category of royalty relief are found in 30 CFR 203.0. To receive this category of royalty relief, production from a qualified well or drilling of a certified unsuccessful well must commence before May 3, 2009.

B. *The following Royalty Suspension Provisions apply to qualifying deep wells on leases entirely in water depths more than 200 but less than 400 meters:*

Such wells require a perforated interval the top of which is from 15,000 to less than 20,000 feet TVD SS. The EPAct05 requires the Secretary to issue regulations granting RSVs to leases entirely in water depths more than 200 but less than 400 meters that will be calculated using the same methodology as is currently employed for leases at least partly in water depths up to 200 meters. Deep wells on leases in the 200- to 400-meter water depth range issued in Sale 206 will be eligible for royalty relief prescribed in the final rule implementing section 344 of the EPAct05.

C. *The following Royalty Suspension Provisions apply to qualifying ultra-deep wells on leases entirely in water depths less than 400 meters:*

Ultra-deep wells (i.e., wells completed with a perforated interval the top of which is 20,000 feet TVD SS or deeper) on leases entirely in water depths less than 400 meters issued in Sale 206 will be eligible for royalty relief prescribed in the final rule implementing section 344 of the EPAct05.

Deepwater Royalty Suspensions

The following Royalty Suspension Provisions apply to deepwater oil and gas production:

A lease issued as a result of this sale may be eligible for royalty relief. Royalty relief under section 345 of EPAct05 (Royalty Relief for Deepwater Production) applies to all blocks in this sale west of 87.5° W. longitude. The same terms will be applied to all blocks in this sale east of 87.5° W. longitude in order to be consistent for all blocks within this Planning Area. The following Royalty Suspension Provisions for deepwater oil and gas production apply to a lease issued as a result of this sale. These provisions are similar to, and mean the same as, the language used in recent sales except for some clarifying text and updated examples. In addition to these provisions and the EPAct05, refer to 30 CFR 218.151 and applicable provisions of sections 260.120–260.124 for regulations on how royalty suspensions relate to field assignment, product types, rental obligations, and supplemental royalty relief.

1. A lease in water depths of 400 meters or more will receive a royalty suspension as follows, according to the water depth range in which the lease is located:

400 meters to less than 800 meters: 5 MMBOE.

800 meters to less than 1,600 meters: 9 MMBOE.

1,600 meters to 2,000 meters: 12 MMBOE.

Greater than 2,000 meters: 16 MMBOE.

2. In any calendar year during which the arithmetic average of the daily

closing prices for the nearby delivery month on the New York Mercantile Exchange (NYMEX) for the applicable product exceeds the adjusted product price threshold, the lessee must pay royalty on production that would otherwise receive royalty relief under 30 CFR Part 260 or supplemental relief under 30 CFR Part 203, and such production will count towards the RSV.

(a) The base level price threshold for light sweet crude oil is set at $35.75 per barrel in 2006. The adjusted oil price threshold in any subsequent calendar year is computed by changing the price threshold applicable in the immediately preceding calendar year by the percentage by which the implicit price deflator for the gross domestic product has changed during the calendar year.

(b) The base level price threshold for natural gas is set at $4.47 per million British thermal units (MMBTU) in 2006. The adjusted gas price threshold in any subsequent calendar year is computed by changing the price threshold applicable in the immediately preceding calendar year by the percentage by which the implicit price deflator for the gross domestic product has changed during the calendar year.

(c) As an example, if the implicit price deflator indicates that inflation is 2.5 percent in 2007 and 2 percent in 2008, then the price threshold in calendar year 2008 would become $37.37 per barrel for oil and $4.67 for gas. Therefore, royalty on oil production in calendar year 2008 would be due if the average of the daily closing prices for the nearby delivery month on the NYMEX in 2008 exceeds $37.37 per barrel, and royalty on gas production in calendar year 2008 would be due if the average of the daily closing prices for the nearby delivery month on the NYMEX in 2008 exceeds $4.67 per MMBTU.

(d) The MMS plans to provide notice in March of each year when adjusted price thresholds for the preceding year were exceeded. Once this determination is made, based on the then-most-recent implicit price deflator information, it will not be revised regardless of any subsequent adjustments in the implicit price deflator published by the U.S. Government for the preceding year. Information on price thresholds is available at the MMS Web site *http://www.mms.gov/econ.*

(e) In cases where the actual average price for the product exceeds the adjusted price threshold in any calendar year, royalties must be paid no later than 90 days after the end of the year (see 30 CFR 260.122 (b)(2) for more detail), and royalties must be paid provisionally in the following calendar year (See 30 CFR 260.122 (c) for more detail).

(f) Full royalties are owed on all production from a lease after the RSV is exhausted, beginning on the first day of the month following the month in which the RSV is exhausted.

Lease Stipulations: The map ''Stipulations and Deferred Blocks, Lease Sale 206, Final'' depicts the blocks on which one or more of 12 lease stipulations apply: (1) Topographic Features; (2) Live Bottoms; (3) Military Areas; (4) Evacuation; (5) Coordination; (6) Blocks South of Baldwin County, Alabama; (7) Law of the Sea Convention Royalty Payment; (8) Protected Species; (9) Limitation on Use of Seabed and Water Column in the Vicinity of the Approved Port Pelican Offshore Liquefied Natural Gas (LNG) Deepwater Port Receiving Terminal, Vermilion Area, Blocks 139 and 140; (10) Below Seabed Operations on Mississippi Canyon, Block 920; (11) Limitation on Use of Seabed and Water Column in the Vicinity of the Approved Gulf Landing Offshore LNG Deepwater Port Receiving Terminal, West Cameron Area, Block 213; and (12) Below Seabed Operations on a Portion of Mississippi Canyon, Block 650. The texts of the stipulations are contained in the document ''Lease Stipulations, Central Gulf of Mexico Planning Area Oil and Gas Lease Sale 206, Final'' included in the FNOS 206 Package. In addition, the ''List of Blocks Available for Leasing'' contained in the FNOS 206 Package identifies for each block listed the lease stipulations applicable to that block.

Information to Lessees: The FNOS 206 Package contains an ''Information To Lessees'' document that provides detailed information on certain specific issues pertaining to this proposed oil and gas lease sale.

Method of Bidding: For each block bid upon, a bidder must submit a separate signed bid in a sealed envelope labeled ''Sealed Bid for Oil and Gas Lease Sale 206, not to be opened until 9 a.m., Wednesday, March 19, 2008.'' The submitting company's name, its GOM company number, the map name, map number, and block number should be clearly identified on the outside of the envelope.

Please refer to the sample bid envelope included within the FNOS 206 Package. The total amount of the bid must be in a whole dollar amount; any cent amount above the whole dollar will be ignored by the MMS. Details of the information required on the bid(s) and the bid envelope(s) are specified in the document ''Bid Form and Envelope'' contained in the FNOS 206 Package. A blank bid form has been provided for your convenience which may be copied and filled in.

Please also refer to the Telephone Numbers/Addresses of Bidders Form included within the FNOS 206 Package. We are requesting that you provide this information in the format suggested for each lease sale. Please provide this information prior to or at the time of bid submission. Do not enclose this form inside the sealed bid envelope.

The MMS published in the **Federal Register** a list of restricted joint bidders, which applies to this lease sale, at 72 FR 64088 on November 14, 2007. Please also refer to joint bidding provisions at 30 CFR 256.41 for additional information. All bidders must execute all documents in conformance with signatory authorizations on file in the MMS Gulf of Mexico Region Adjudication Unit. Designated signatories must be authorized to bind their respective legal business entities (e.g., a corporation, partnership, or LLC) and must have an incumbency certificate setting forth the authorized signatories on file with the GOM Region Adjudication Office. Bidders submitting joint bids must include on the bid form the proportionate interest of each participating bidder, stated as a percentage, using a maximum of five decimal places (e.g., 33.33333 percent). The MMS may require bidders to submit other documents in accordance with 30 CFR 256.46. The MMS warns bidders against violation of 18 U.S.C. 1860 prohibiting unlawful combination or intimidation of bidders. Bidders are advised that the MMS considers the signed bid to be a legally binding obligation on the part of the bidder(s) to comply with all applicable regulations, including payment of the one-fifth bonus bid amount on all high bids. A statement to this effect must be included on each bid (see the document ''Bid Form and Envelope'' contained in the FNOS 206 Package).

Rounding: The following procedure must be used to calculate the minimum bonus bid, annual rental, and minimum royalty: Round up to the next whole acre if the block acreage contains a decimal figure prior to calculating the minimum bonus bid, annual rental, and minimum royalty amounts. The appropriate rate per acre is applied to the next whole (rounded up) acreage figure, and the resultant calculation is rounded up to the next whole dollar amount if the calculation results in a decimal figure (see next paragraph).

Please note: The minimum bonus bid calculation, including all rounding, is shown in the document ''List of Blocks Available for Leasing in Lease Sale 206'' included in the FNOS 206 Package.

Bonus Bid Deposit: Each bidder submitting an apparent high bid must submit a bonus bid deposit to the MMS equal to one-fifth of the bonus bid amount for each such bid. Under the authority granted by 30 CFR 256.46(b), the MMS requires bidders to use electronic funds transfer (EFT) procedures for payment of one-fifth bonus bid deposits for Lease Sale 206, following the detailed instructions contained in the document ''Instructions for Making EFT Bonus Payments'' which can be found on the MMS Web site at *http://www.gomr.mms.gov/homepg/lsesale/206/cgom206.html*. All payments must be electronically deposited into an interest-bearing account in the U.S. Treasury (account specified in the EFT instructions) by 11 a.m. Eastern Time the day following the bid reading. Such a deposit does not constitute and shall not be construed as acceptance of any bid on behalf of the United States. If a lease is awarded, however, MMS requests that only one transaction be used for payment of the four-fifths bonus bid amount and the first year's rental.

Please note: Certain bid submitters (i.e., those that are NOT currently an OCS mineral lease record titleholder or designated operator OR those that have ever defaulted on a one-fifth bonus bid payment (EFT or otherwise)) *are required to guarantee (secure) their one-fifth bonus bid payment prior to the submission of bids*. For those who must secure the EFT one-fifth bonus bid payment, one of the following options may be used: (1) Provide a third-party guarantee; (2) amend bond coverage; (3) provide a letter of credit; or (4) provide a lump sum payment in advance via EFT. The EFT instructions specify the requirements for each option.

Withdrawal of Blocks: The United States reserves the right to withdraw any block from this lease sale prior to issuance of a written acceptance of a bid for the block.

Acceptance, Rejection, or Return of Bids: The United States reserves the right to reject any and all bids. In any case, no bid will be accepted, and no lease for any block will be awarded to any bidder, unless the bidder has complied with all requirements of this Notice, including the documents contained in the associated FNOS 206 Package and applicable regulations; the bid is the highest valid bid; and the amount of the bid has been determined to be adequate by the authorized officer. Any bid submitted which does not conform to the requirements of this Notice, the Act, and other applicable regulations may be returned to the person submitting that bid by the RD and not considered for acceptance. The Attorney General may also review the results of the lease sale prior to the acceptance of bids and issuance of leases. To ensure that the Government receives a fair return for the conveyance of lease rights for this lease sale, high bids will be evaluated in accordance with MMS bid adequacy procedures. A copy of current procedures, ''Modifications to the Bid Adequacy Procedures'' at 64 FR 37560 on July 12, 1999, can be obtained from the MMS Gulf of Mexico Region Public Information Unit or via the MMS Internet Web site at: *http://www.gomr.mms.gov/homepg/lsesale/bidadeq.html*.

Successful Bidders: As required by the MMS, each company that has been awarded a lease must execute all copies of the lease (Form MMS–2005 (March 1986) as amended); pay by EFT the balance of the bonus bid amount and the first year's rental for each lease issued in accordance with the requirements of 30 CFR 218.155; and satisfy the bonding requirements of 30 CFR 256, subpart I, as amended.

Also, in accordance with regulations at 2 CFR Part 180 and 2 CFR Part 1400, the lessee shall comply with the U.S. Department of the Interior's nonprocurement debarment and suspension requirements and agrees to communicate this requirement to comply with these regulations to persons with whom the lessee does business as it relates to this lease by including this term as a condition to enter into their contracts and other transactions.

Affirmative Action: The MMS requests that, prior to bidding, Equal Opportunity Affirmative Action Representation Form MMS 2032 (June 1985) and Equal Opportunity Compliance Report Certification Form MMS 2033 (June 1985) be on file in the MMS Gulf of Mexico Region Adjudication Unit. This certification is required by 41 CFR Part 60 and Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967. In any event, prior to the execution of any lease contract, both forms are required to be on file in the MMS Gulf of Mexico Region Adjudication Unit.

Geophysical Data and Information Statement: Pursuant to 30 CFR 251.12, the MMS has a right to access geophysical data and information collected under a permit in the OCS. Every bidder submitting a bid on a block in Sale 206, or participating as a joint bidder in such a bid, must submit a Geophysical Data and Information Statement (GDIS) identifying any processed or reprocessed pre- and post-stack depth migrated geophysical data and information used as part of the decision to bid or participate in a bid on the block. The GDIS should clearly identify the survey type-two dimensional (2–D) or three dimensional (3–D); survey extent (i.e., number of line miles for 2D or number of blocks for 3D); and imaging type (pre-stack, post-stack and migration algorithm) of the data and information. The statement must also include the name and phone number of a contact person, and an alternate, who are both knowledgeable about the depth data listed, the owner or controller of the reprocessed data or information, the survey from which the data were reprocessed and the owner/controller of the original data set, the date of reprocessing, and whether the data were processed in-house or by a contractor. In the event such data and information include multiple data sets processed from the same survey using different velocity models or different processing parameters, you should identify only the highest quality data set used for bid preparation. The MMS reserves the right to query about alternate data sets and to quality check and compare the listed and alternative data sets to determine which data set most closely meets the needs of the fair-market-value determination process. The statement must also identify each block upon which a bidder bid, or participated in a bid, but for which it did not use processed or reprocessed pre- or post-stack depth migrated geophysical data and information as part of the decision to bid or participate in the bid. In the event your company supplies any type of data to the MMS, in order to get reimbursed, your company must be registered with the Central Contractor Registration (CCR) at *http://www.ccr.gov*. This is a requirement that was implemented on October 1, 2003, and requires all entities doing business with the Government to complete a business profile in the CCR and update it annually. Payments are made electronically based on the information contained in the CCR. Therefore, if your company is not actively registered in the CCR, the MMS will not be able to reimburse or pay your company for any data supplied. The MMS will specify additional detailed procedures in the FNOS 206 Package regarding the GDIS. Please also refer to Notice to Lessees No. 2003-G05 for more detail concerning submission of the GDIS, making the data available to the MMS following the lease sale,

preferred format, reimbursement for costs, and confidentiality.

Force Majeure: The Regional Director of the MMS Gulf of Mexico Region has the discretion to change any date, time, and/or location specified in the FNOS 206 Package in case of a force majeure which the Regional Director deems may interfere with the carrying out of a fair and proper lease sale process. Such events may include, but are not limited to, natural disasters (earthquakes, hurricanes, floods), wars, riots, acts of terrorism, fire, strikes, civil disorder, or other events of a similar nature. In case of such events, bidders should call (504) 736–0557 for information about any changes.

Dated: February 6, 2008.

Randall B. Luthi,

Director, Minerals Management Service.

[FR Doc. E8–2684 Filed 2–12–08; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf (OCS) Eastern Gulf of Mexico (GOM) Planning Area Oil and Gas Lease Sale 224

AGENCY: Minerals Management Service, Interior.

ACTION: Final notice of Sale 224.

SUMMARY: On Wednesday, March 19, 2008, the Minerals Management Service (MMS) will open and publicly announce bids received for blocks offered in GOM Eastern Planning Area (EPA) Oil and Gas Lease Sale 224, pursuant to the Outer Continental Shelf (OCS) Lands Act (43 U.S.C. 1331–1356, as amended), the regulations issued thereunder (30 CFR Part 256), and the Gulf of Mexico Energy Security Act .

The Final Notice of Sale 224 Package (FNOS 224 Package) contains information essential to bidders, and bidders are charged with the knowledge of the documents contained in the Package.

DATES: Public bid reading for the EPA Oil and Gas Lease Sale 224 will begin after the public bid reading for GOM Central Planning Area Oil and Gas Lease Sale 206 which will begin at 9 a.m., Wednesday, March 19, 2008, at the Louisiana Superdome, 1500 Sugarbowl Drive, New Orleans, Louisiana 70112. The lease sale will be held in the St. Charles Club Room on the second floor (Loge Level). Entry to the Superdome will be on the Poydras Street side of the building through Gate A on the Ground or Plaza Level, and parking should be available at Garage 6. All times referred to in this document are local New Orleans times, unless otherwise specified.

ADDRESSES: Bidders can obtain a FNOS 224 Package containing this Notice of Sale and several supporting and essential documents referenced herein from the MMS Gulf of Mexico Region Public Information Unit, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, (504) 736–2519 or (800) 200–GULF, or via the Gulf of Mexico MMS Internet web site at: *http://www.gomr.mms.gov*.

FILING OF BIDS: Bidders must submit sealed bids to the Regional Director (RD), MMS Gulf of Mexico Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, between 8 a.m. and 4 p.m. on normal working days, and from 8 a.m. to the Bid Submission Deadline of 10 a.m. on Tuesday, March 18, 2008. If bids are mailed, please address the envelope containing all of the sealed bids as follows:

Attention: Supervisor, Sales and Support Unit (MS 5422), Leasing Activities Section, MMS Gulf of Mexico Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394.

Contains Sealed Bids for Oil and Gas Lease Sale 224

Please Deliver to Ms. Nancy Kornrumpf, 6th Floor, Immediately

Please note: Bidders mailing their bid(s) are advised to call Ms. Nancy Kornrumpf at (504) 736–2726 immediately after putting their bid(s) in the mail.

If the RD receives bids later than the time and date specified above, he will return those bids unopened to bidders. Bidders may not modify or withdraw their bids unless the RD receives a written modification or written withdrawal request prior to 10 a.m. on Tuesday, March 18, 2008. Should an unexpected event such as flooding or travel restrictions be significantly disruptive to bid submission, the MMS Gulf of Mexico Region may extend the Bid Submission Deadline. Bidders may call (504) 736–0557 for information about the possible extension of the Bid Submission Deadline due to such an event.

Areas Offered for Leasing: The MMS is offering all of the unleased blocks located within the portion of the EPA 125 statute miles and greater offshore, south of the Florida Panhandle and west of the Military Mission Line (86 degrees, 41 minutes West longitude) in water depths of 810 to 3,113 meters. Please see the map included in the FNOS 224 Package: ''Lease Terms, Economic Conditions, and Stipulations, Lease Sale 224, Final.'' All of these blocks are shown on the following Official Protraction Diagrams (OPD's), which may be purchased from the MMS Gulf of Mexico Region Public Information Unit:

Outer Continental Shelf Official Protraction Diagrams (These diagrams sell for $2.00 each.)

NG16–02 Lloyd Ridge (revised February 28, 2007).

NH16–11 De Soto Canyon (revised February 28, 2007).

Please Note: A CD-ROM (in ARC/INFO and Acrobat (pdf) format) containing all of the GOM Leasing Maps and OPD's, except for those not yet converted to digital format, is available from the MMS Gulf of Mexico Region Public Information Unit for a price of $15.

All blocks are shown on these two OPD's. The available Federal acreage of all blocks in this lease sale is shown in the document ''List of Blocks Available for Leasing in Sale 224'' included in the FNOS 224 Package. A bid on a block must include all of the available Federal acreage of that block.

Statutes and Regulations: Each lease issued in this lease sale is subject to the OCS Lands Act of August 7, 1953 (43 U.S.C. 1331 et seq.), as amended, hereinafter called ''the Act''; all regulations issued pursuant to the Act and in existence upon the Effective Date of the lease; all regulations issued pursuant to the statute in the future which provide for the prevention of waste and conservation of the natural resources of the OCS and the protection of correlative rights therein; and all other applicable statutes and regulations.

Lease Terms and Conditions: Initial period, minimum bonus bid amount, rental rates, royalty rate, and minimum royalty are noted below. Depictions of related areas are shown on the map ''Lease Terms, Economic Conditions, and Stipulations, Lease Sale 224, Final'' for leases resulting from this lease sale.

Initial Period: 10 years (all blocks in this sale are in water depths of 800 meters or deeper).

Minimum Bonus Bid Amount: A bonus bid will not be considered for acceptance unless it provides for a cash bonus in the amount of $37.50 or more per acre or fraction thereof; see the ''List of Blocks Available for Leasing'' contained in the FNOS 224 Package to confirm the exact calculation of the minimum bonus bid amount for each block.

Rental Rates: $9.50 per acre or fraction thereof to be paid on or before

the 1st day of each lease year until determination of well producibility is made, then at the expiration of each lease year until the start of royalty-bearing production.

Royalty Rate: 18-3/4 percent royalty rate in all water depths to be paid monthly on the last day of the month following the month during which the production is obtained.

Minimum Royalty: After the start of royalty-bearing production regardless of the year of the lease: $9.50 per acre or fraction thereof per year, to be paid at the expiration of each lease year with credit applied for actual royalty paid during the lease year. If actual royalty paid exceeds the minimum royalty requirement, then no minimum royalty payment is due.

Please Note: The royalty relief provisions provided in the Energy Policy Act of 2005 do not apply to Sale 224 as the entire sale area is east of 87.53 °W longitude; Congress only provided these provisions for the Western Gulf of Mexico (that portion of the Gulf of Mexico west of 87.53 °W longitude). There are no other existing statutory requirements to offer royalty relief in the EPA. For Sale 224, MMS has decided not to utilize its discretion to use the bidding system described at 30 CFR 260.110(g) under which royalty suspension volumes would be offered.

Lease Stipulations: Four lease stipulations apply: (1) Military Areas; (2) Evacuation; (3) Coordination; and (4) Protected Species. Please refer to the map, ''Lease Terms, Economic Conditions, and Stipulations, Lease Sale 224, Final'' in the FNOS 224 Package. The texts of the lease stipulations are contained in the document ''Lease Stipulations for Oil and Gas Lease Sale 224, Final'' included in the FNOS 224 Package.

Information to Lessees: The FNOS 224 Package contains an ''Information To Lessees'' document which provides detailed information on certain specific issues pertaining to this oil and gas lease sale.

Method of Bidding: For each block bid upon, a bidder must submit a separate signed bid in a sealed envelope labeled ''Sealed Bid for Oil and Gas Lease Sale 224, not to be opened until 9 a.m., Wednesday, March 19, 2008.'' The submitting company's name, its GOM Company number, the map name, map number, and block number should be clearly identified on the outside of the envelope. Please refer to the sample bid envelope included in the FNOS 224 Package. The total amount of the bid must be in a whole dollar amount; any cent amount above the whole dollar will be ignored by the MMS. Details of the information required on the bid(s) and the bid envelope(s) are specified in the document ''Bid Form and Envelope'' contained in the FNOS 224 Package. A blank bid form has been provided for your convenience which may be copied and completed.

Please also refer to the Telephone Numbers/Address of Bidders Form included within the FNOS 224 Package. We are requesting that you provide this information in the format suggested for each lease sale. Please provide this information prior to or at the time of bid submission. Do not enclose this form inside the sealed bid envelope.

The MMS published in the **Federal Register** a list of restricted joint bidders, which applies to this lease sale, at 72 FR 64088 on November 14, 2007. Please also refer to joint bidding provisions at 30 CFR 256.41 for additional information. All bidders must execute all documents in conformance with signatory authorizations on file in the MMS Gulf of Mexico Region Adjudication Unit. Designated signatories must be authorized to bind their respective legal business entities (*e.g.*, a corporation, partnership, or LLC) and must have an incumbency certificate setting forth the authorized signatories on file with the GOM Region Adjudication Office. Bidders submitting joint bids must include on the bid form the proportionate interest of each participating bidder, stated as a percentage, using a maximum of five decimal places (*e.g.*, 33.33333 percent). The MMS may require bidders to submit other documents in accordance with 30 CFR 256.46. The MMS warns bidders against violation of 18 U.S.C. 1860 prohibiting unlawful combination or intimidation of bidders. Bidders are advised that the MMS considers the signed bid to be a legally binding obligation on the part of the bidder(s) to comply with all applicable regulations, including payment of the one-fifth bonus bid amount on all high bids. A statement to this effect must be included on each bid (see the document ''Bid Form and Envelope'' contained in the FNOS 224 Package).

Rounding: The following procedure must be used to calculate the minimum bonus bid, annual rental, and minimum royalty: Round up to the next whole acre if the block acreage contains a decimal figure prior to calculating the minimum bonus bid, annual rental, and minimum royalty amounts. The appropriate rate per acre is applied to the next whole (rounded up) acreage figure, and the resultant calculation is rounded up to the next whole dollar amount if the calculation results in a decimal figure (see next paragraph).

Please note: The minimum bonus bid calculation, including all rounding, is shown in the document ''List of Blocks Available for Leasing in Lease Sale 224'' included in the FNOS 224 Package.

Bonus Bid Deposit: Each bidder submitting an apparent high bid must submit a bonus bid deposit to the MMS equal to one-fifth of the bonus bid amount for each such bid. All payments must be electronically deposited into an interest-bearing account in the U.S. Treasury (account information provided in the EFT instructions) by 11 a.m. Eastern Time the day following bid reading. Under the authority granted by 30 CFR 256.46(b), the MMS requires bidders to use electronic funds transfer (EFT) procedures for payment of one-fifth bonus bid deposits for Lease Sale 224, following the detailed instructions contained in the document ''Instructions for Making EFT Bonus Payments'' which can be found on the MMS Web site at: *http://www.gomr.mms.gov/ homepg/lsesale/224/egom224.html.* Such a deposit does not constitute and shall not be construed as acceptance of any bid by the United States. If a lease is awarded, however, MMS requests that only one transaction be used for payment of the four-fifths bonus bid amount and the first year's rental.

Please note: *Certain bid submitters* (*i.e.*, those that are NOT currently an OCS mineral lease record titleholder or designated operator OR those that have ever defaulted on a one-fifth bonus bid payment (EFT or otherwise)) *are required to guarantee (secure) their one-fifth bonus bid payment prior to the submission of bids.* For those who must secure the EFT one-fifth bonus bid payment, one of the following options may be used: (1) Provide a third-party guarantee; (2) amend bond coverage; (3) provide a letter of credit; or (4) provide a lump sum payment in advance via EFT. The EFT instructions specify the requirements for each option.

Withdrawal of Blocks: The United States reserves the right to withdraw any block from this lease sale prior to issuance of a written acceptance of a bid for the block.

Acceptance, Rejection, or Return of Bids: The United States reserves the right to reject any and all bids. In any case, no bid will be accepted, and no lease for any block will be awarded to any bidder, unless the bidder has complied with all requirements of this Notice, including the documents contained in the associated FNOS 224 Package and applicable regulations; the bid is the highest valid bid; and the amount of the bid has been determined to be adequate by the authorized officer. Any bid submitted which does not conform to the requirements of this

Notice, the Act, and other applicable regulations may be returned to the person submitting that bid by the RD and not considered for acceptance. The Attorney General may also review the results of the lease sale prior to the acceptance of bids and issuance of leases. To ensure that the Government receives a fair return for the conveyance of lease rights for this lease sale, high bids will be evaluated in accordance with MMS bid adequacy procedures. A copy of current procedures, ''Modifications to the Bid Adequacy Procedures'' at 64 FR 37560 on July 12, 1999, can be obtained from the MMS Gulf of Mexico Region Public Information Unit.

Successful Bidders: As required by the MMS, each company that has been awarded a lease must execute all copies of the lease (Form MMS–2005 (March 1986) as amended), pay by EFT the balance of the bonus bid amount and the first year's rental for each lease issued in accordance with the requirements of 30 CFR 218.155, and satisfy the bonding requirements of 30 CFR Part 256, Subpart I, as amended.

Also, in accordance with regulations at 2 CFR Part 180 and 2 CFR Part 1400, the lessee shall comply with the U.S. Department of the Interior's nonprocurement debarment and suspension requirements and agrees to communicate this requirement to comply with these regulations to persons with whom the lessee does business as it relates to this lease by including this term as a condition to enter into their contracts and other transactions.

Affirmative Action: The MMS requests that, prior to bidding, Equal Opportunity Affirmative Action Representation Form MMS 2032 (June 1985) and Equal Opportunity Compliance Report Certification Form MMS 2033 (June 1985) be on file in the MMS Gulf of Mexico Region Adjudication Unit. This certification is required by 41 CFR Part 60 and Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967. In any event, prior to the execution of any lease contract, both forms are required to be on file in the MMS Gulf of Mexico Region Adjudication Unit.

Geophysical Data and Information Statement: Pursuant to 30 CFR 251.12, the MMS has a right to access geophysical data and information collected under a permit in the OCS.

Every bidder submitting a bid on a block in Sale 224, or participating as a joint bidder in such a bid, must submit a Geophysical Data and Information Statement (GDIS) identifying any processed or reprocessed pre- and post-stack depth migrated geophysical data and information used as part of the decision to bid or participate in a bid on the block. The GDIS should clearly identify the survey type—2 dimensional or 3 dimensional (2D or 3D), survey extent (*i.e.*, number of line miles for 2D or number of blocks for 3D), and imaging type (pre-stack, post-stack and migration algorithm) of the data and information. The statement must also include the name and phone number of a contact person, and an alternate, who are both knowledgeable about the depth data listed, the owner or controller of the reprocessed data or information, the survey from which the data were reprocessed and the owner/controller of the original data set, the date of reprocessing, and whether the data was processed in-house or by a contractor. In the event such data and information includes multiple data sets processed from the same survey using different velocity models or different processing parameters, the bidder should identify only the highest quality data set used for bid preparation. The MMS reserves the right to query about alternate data sets and to quality check and compare the listed and alternative data sets to determine which data set most closely meets the needs of the fair-market-value determination process. The statement must also identify each block upon which a bidder bid, or participated in a bid, but for which it did not use processed or reprocessed pre- or post-stack depth migrated geophysical data and information as part of the decision to bid or participate in the bid.

In the event a company supplies any type of data to the MMS, in order to get reimbursed, it must be registered with the Central Contractor Registration (CCR) at *http://www.ccr.gov*. This is a requirement that was implemented on October 1, 2003, and requires all entities doing business with the Government to complete a business profile in the CCR and update it annually. Payments are made electronically based on the information contained in the CCR. Therefore, if the company is not actively registered in the CCR, the MMS will not be able to reimburse or pay it for any data supplied.

An Example of the Preferred Format for the GDIS and a sample of the Geophysical Envelope Preferred Format are included in the FNOS 224 Package. Please also refer to Notice to Lessees No. 2003–G05 for more detail concerning submission of the GDIS, making the data available to the MMS following the lease sale, preferred format, reimbursement for costs, and confidentiality.

Force Majeure: The Regional Director (RD) of the MMS Gulf of Mexico Region has the discretion to change any date, time, and/or location specified in the FNOS 224 Package in case of a force majeure which the RD deems may interfere with the carrying out of a fair and proper lease sale process. Such events may include, but are not limited to, natural disasters (*e.g.*, earthquakes, hurricanes, floods), wars, riots, acts of terrorism, fire, strikes, civil disorder, or other events of a similar nature. In case of such events, bidders should call (504) 736–0557 for information about any changes.

Dated: February 6, 2008.

Randall B. Luthi,

Director, Minerals Management Service.

[FR Doc. E8–2676 Filed 2–12–08; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: Saint Louis Science Center, Saint Louis, MO

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of the Saint Louis Science Center, Saint Louis, MO, that meet the definition of ''sacred objects'' under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

The two cultural items are two eagle feathers (24–0420a and 24–0420b).

In 1970, the two feathers were donated to the Museum of Science and Natural History (now known as the Saint Louis Science Center), by Cleveland H. Shutt. Mr. Shutt acquired the cultural items in 1953 at Harbor Springs, Emmet County, MI. The cultural items were given to Mr. Shutt by the Ottawa (also known as Odawa) tribe in Harbor Springs.

Harbor Springs is part of the area known as L'Abre Croche (Land of the

crooked tree), which has been a permanent Odawa settlement since 1742. This location is documented as being the homeland of the Little Traverse Bay Bands of Odawa Indians, Michigan. The Odawa believe the eagle feathers are sacred objects and without proper relationships and appropriate ceremonial uses of the eagle feathers the spirits and Odawa people suffer. Descendants of the Odawa Tribe in Harbor Springs are members of the Little Traverse Bay Bands of Odawa Indians, Michigan.

Officials of the Saint Louis Science Center have determined that, pursuant to 25 U.S.C. 3001 (3)(C), the two cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the Saint Louis Science Center also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the sacred objects and the Little Traverse Bay Bands of Odawa Indians, Michigan.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the sacred objects should contact Melinda Frillman, Associate Director, Collections Department, Saint Louis Science Center, 5050 Oakland Ave., St. Louis, MO 63110, telephone (314) 533–8285, before March 14, 2008. Repatriation of the sacred objects to the Little Traverse Bay Bands of Odawa Inidans, Michigan may proceed after that date if no additional claimants come forward.

The Saint Louis Science Center is responsible for notifying Little Traverse Bay Bands of Odawa Indians, Michigan that this notice has been published.

Dated: January 3, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–2602 Filed 2–12–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Arizona State Museum, University of Arizona, Tucson, AZ

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession and control of the Arizona State Museum, University of Arizona, Tucson, AZ. The human remains were removed from Pima County, AZ.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Arizona State Museum professional staff in consultation with representatives of the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico. The Tohono O'odham Nation of Arizona is acting on behalf of the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona, Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and themselves.

In 1979, human remains representing a minimum of four individuals were removed from the Burruel site, AZ AA:16:58(ASM), which is located on private land adjacent to the San Xavier Indian Reservation, Pima County, AZ. The human remains were inadvertently discovered by the property owner and excavations were conducted by staff from the Arizona State Museum. The human remains and several associated funerary objects were brought to the museum for documentation in 1979, and the associated objects were returned to the property owner later that same year. The owner donated the human remains to the Arizona State Museum in 1980. No known individuals are present. No associated funerary objects are present.

The Burruel site includes at least two trash mounds and a cremation area. Ceramics associate the site with the Tanque Verde phase of the Classic period of the Hohokam Archaeological tradition, approximately A.D. 1150 - 1450. The human remains were cremated and contained within ceramic vessels. The burial context and time period indicate that the human remains represent individuals of Native American ancestry.

Father Eusebio Kino visited the O'odham village of Bac in 1692 and established Mission San Xavier. He reported the presence of 800 inhabitants at the time of his first visit. O'odham people have continued to occupy the land in the vicinity of the mission throughout the historic period. They also identify themselves with the Hohokam Archaeological tradition. Cultural continuity between the prehistoric occupants of the region and present day O'odham, Pee-Posh, and Puebloan peoples is supported by continuities in settlement pattern, architectural technologies, basketry, textiles, ceramic technology, ritual practices, and oral traditions. The descendants of the O'odham, Pee-Posh, and Puebloan peoples of the areas described above are members of the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico.

Officials of the Arizona State Museum have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of four individuals of Native American ancestry. Officials of the Arizona State Museum also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact John Madsen, Repatriation Coordinator, Arizona State Museum, University of Arizona, Tucson, AZ 85721, telephone (520) 621-4795, before March 14, 2008. Repatriation of the human remains to the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt

River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico may proceed after that date if no additional claimants come forward.

The Arizona State Museum is responsible for notifying the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico that this notice has been published.

Dated: December 19, 2007.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–2572 Filed 2–12–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Denver Museum of Nature & Science, Denver, CO

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the Denver Museum of Nature & Science, Denver, CO. The human remains and associated funerary objects were removed from Arapahoe and Weld Counties, CO.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Denver Museum of Nature & Science professional staff in consultation with the Arapahoe Tribe of the Wind River Reservation, Wyoming; Cheyenne-Arapaho Tribes of Oklahoma; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Comanche Nation of Oklahoma; Iowa Tribe of Oklahoma; Jicarilla Apache Nation, New Mexico; Kiowa Indian Tribe of Oklahoma; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Ottawa Tribe of Oklahoma; Paiute Indian Tribe of Utah (Cedar City Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes); Pawnee Nation of Oklahoma; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Sac & Fox Tribe of the Mississippi in Iowa; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Standing Rock Sioux Tribe of North & South Dakota; and Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah.

In 1972, human remains representing a minimum of one individual were removed from a construction site on private land in Aurora, Arapahoe County, CO, by the County Coroner for the Department of Health and Hospitals and turned over to the museum (DMNS catalogue numbers A786.1–9). No known individual was identified. The 12 associated funerary objects are 6 vials of white and light blue Italian glass pony beads (including one soil sample with beads intermixed); strands of an animal's hair; fragments of 1 metal belt buckle; and 4 sets of fragments of textiles, probably wool.

Osteological characteristics indicate that the individual is Native American. During the first half of the 19th century the larger Italian glass seed beads were widely traded from the Upper Missouri River Valley south into the Great Plains and were used by Indian tribes of the Colorado High Plains. The textile fragments are a basic twill and plain weave in simple stripe patterns using hand spun yarns. Analysis suggests that the textiles could have originated from any of the Navajo, Pueblo, or Spanish American weaving areas of the Southwest. Textiles from these areas were commonly traded to the Plains Indians throughout the 19th century. On the basis of the funerary objects associated with the human remains, the estimated date of the burial is between A.D. 1800 and 1860.

In 1939, human remains representing a minimum of two individuals were removed from a construction site two miles west of Johnston, Weld County, CO, by unknown parties associated with the Works Progress Administration. Later that same year, Forest L. Powers of the Works Progress Administration donated the human remains to the museum (DMNS catalogue numbers A53.1–15). No known individuals were identified. The 19 associated funerary objects are 2 fragments of copper wire; 1 fragment of a wooden bow; 1 catlinite pipe bowl fragment; 1 leather clothing fragment with blue pony beads; rusted fragments of 1 metal animal trap; 1 rusted commercial coffee grinder; 1 leather belt, in pieces; 1 leather bag, in fragments, with possible human ribs embedded; 4 woodpecker beaks; 2 bird bones; 1 belt buckle; 1 leather sheath; fragments of 1 leather strap; and fragments of 1 piece of cloth.

Osteological characteristics indicate that the individuals are Native American. Copper stains near the mastoid processes of one individual suggest that the individual wore copper ear ornaments, which supports Native American identification for the human remains. The associated funerary objects are consistent with possible belongings of Indian people of Colorado during the mid–1800s. The items include traditional items of Native gathering, construction, and use, as well as Euro-American trade items. Catlinite pipes were widely traded from the Minnesota mine source to tribes throughout the Great Plains. The Euro-American artifacts date from the mid–19th century. On the basis of the funerary objects associated with the human remains, the estimated date of the burials is between A.D. 1840 and 1870.

A 2001 map published by the Colorado Commission of Indian Affairs, *The Estimated Tribal Territories in Colorado during the Late Nineteenth Century*, shows that the two locations from which the human remains were removed were within the historic territories of the Arapaho, Cheyenne, Jicarilla Apache, Kiowa, Lakota (Sioux), and Pawnee peoples. Consultation with the Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado and Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah established that the Ute tribes also used the area from which the human remains were removed. Historic records and statements from members of the consulted tribes further corroborate the presence of Arapaho, Cheyenne, Jicarilla Apache, Kiowa, Lakota (Sioux), Pawnee peoples, in or near the area during the Protohistoric and Historic periods. Documentary evidence suggests Iowa, Ottawa, and Paiute peoples in or near the area during the Protohistoric and Historic periods. Descendants of the Arapaho, Cheyenne, Jicarilla Apache, Iowa, Lakota, Ottawa, Paiute, Pawnee, and Ute are members of the Arapahoe Tribe of the Wind River Reservation,

Wyoming; Cheyenne-Arapaho Tribes of Oklahoma; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Iowa Tribe of Oklahoma; Jicarilla Apache Nation, New Mexico; Kiowa Indian Tribe of Oklahoma; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Ottawa Tribe of Oklahoma; Paiute Indian Tribe of Utah; Pawnee Nation of Oklahoma; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Sac & Fox Tribe of the Mississippi in Iowa; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Standing Rock Sioux Tribe of North & South Dakota; and Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah.

Officials of the Denver Museum of Nature & Science have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of three individuals of Native American ancestry. Officials of Denver Museum of Nature & Science also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 31 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Denver Museum of Nature & Science officials have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Arapahoe Tribe of the Wind River Reservation, Wyoming; Cheyenne-Arapaho Tribes of Oklahoma; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Iowa Tribe of Oklahoma; Jicarilla Apache Nation, New Mexico; Kiowa Indian Tribe of Oklahoma; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Ottawa Tribe of Oklahoma; Paiute Indian Tribe of Utah; Pawnee Nation of Oklahoma; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Sac & Fox Tribe of the Mississippi in Iowa; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Standing Rock Sioux Tribe of North & South Dakota; and Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Dr. Chip Colwell-Chanthaphonh, Denver Museum of Nature & Science, 2001 Colorado Boulevard, Denver, CO 80205, telephone (303) 370–6378, before March 14, 2008. Repatriation to the Arapahoe Tribe of the Wind River Reservation, Wyoming; Cheyenne-Arapaho Tribes of Oklahoma; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Iowa Tribe of Oklahoma; Jicarilla Apache Nation, New Mexico; Kiowa Indian Tribe of Oklahoma; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Ottawa Tribe of Oklahoma; Paiute Indian Tribe of Utah; Pawnee Nation of Oklahoma; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Sac & Fox Tribe of the Mississippi in Iowa; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Standing Rock Sioux Tribe of North & South Dakota; and Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah may proceed after that date if no additional claimants come forward.

The Denver Museum of Nature & Science is responsible for notifying the Arapahoe Tribe of the Wind River Reservation, Wyoming; Cheyenne-Arapaho Tribes of Oklahoma; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Comanche Nation of Oklahoma; Iowa Tribe of Oklahoma; Jicarilla Apache Nation, New Mexico; Kiowa Indian Tribe of Oklahoma; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Ottawa Tribe of Oklahoma; Paiute Indian Tribe of Utah; Pawnee Nation of Oklahoma; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Sac & Fox Tribe of the Mississippi in Iowa; Sac & Fox Nation of Missouri in Kansas and Nebraska; Sac & Fox Nation, Oklahoma; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Standing Rock Sioux Tribe of North & South Dakota; and Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah that this notice has been published.

Dated: January 9, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–2576 Filed 2–12–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Department of Anthropology, University of Hawaii at Hilo, Hilo, HI

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the Department of Anthropology, University of Hawaii at Hilo, Hilo, HI. The human remains were removed from Hawaii Island, HI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the University of Hawaii at Hilo professional staff in consultation with representatives of the Big Island Burial Council, Department of Hawaiian Homelands, Hui Malama I Na Kupuna O Hawaii Nei, and the Office of Hawaiian Affairs.

In August 1980, human remains were removed from Kahalu'u Habitation Cave (site 50–10–37–7702) and a small adjacent lava tube (site 50–10–37–5611) in Kahalu'u, North Kona, HI, by the University of Hawaii at Hilo and Paul H. Rosendahl, Inc., during excavations for the West Hawaii Housing Foundation, as mitigation prior to a federal housing development. Human remains discovered at the time were determined to be prehistoric and reburied. Midden deposits from both sites are in the possession of the University of Hawaii at Hilo. During the NAGPRA inventory process, additional human remains representing a minimum of three individuals from 50–10–37–7702 and one individual from 50–10–37–5611 were discovered in the midden deposits. No known individuals were identified. No associated funerary objects are present.

Sites 7702 and 5611 were partially collapsed lava tubes located approximately 300 m from the coast of Kahalu'u Bay. Both sites contained midden deposits dating prior to contact and the associated burials also date to this pre-contact era. These findings support a cultural affiliation for the human remains as Native Hawaiian.

Officials of the University of Hawaii at Hilo have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent a minimum of four individuals of Native Hawaiian ancestry. Officials of the University of Hawaii at Hilo also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native Hawaiian human remains and the Hui Malama I Na Kupuna O Hawaii Nei and Office of Hawaiian Affairs.

Representatives of any other Native Hawaiian Organization that believes itself to be culturally affiliated with the human remains should contact Peter R. Mills, Department of Anthropology, Social Sciences Division, 200 West Kawaili Street, Hilo, Hawaii 96720–4091, telephone (808) 974–7465, before March 14, 2008. Repatriation of the human remains to the the Hui Malama I Na Kupuna O Hawaii Nei and the Office of Hawaiian Affairs may proceed after that date if no additional claimants come forward.

The University of Hawaii at Hilo is responsible for notifying the Big Island Burial Council, Department of Hawaiian Homelands, Hui Malama I Na Kupuna O Hawaii Nei, and Office of Hawaiian Affairs that this notice has been published.

Dated: December 13, 2007.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–2601 Filed 2–12–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: University of Colorado Museum, Boulder, CO

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the University of Colorado Museum, Boulder, CO. The human remains and associated funerary objects were removed from Meagher County, MT.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by University of Colorado Museum professional staff in consultation with representatives of the Arapahoe Tribe of the Wind River Reservation, Wyoming; Blackfeet Tribe of the Blackfeet Indian Reservation of Montana; Cheyenne-Arapaho Tribes of Oklahoma; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Tribe of Montana; Fort Belknap Indian Community of the Fort Belknap Reservation of Montana; Fort Sill Apache Tribe of Oklahoma; Jicarilla Apache Nation, New Mexico; Kiowa Indian Tribe of Oklahoma; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Pawnee Nation of Oklahoma; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; Ute Indian Tribe of the Uintah & Ouray Reservation, Utah; and Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah. The Apache Tribe of Oklahoma; Comanche Nation, Oklahoma; Mescalero Apache Tribe of the Mescalero Reservation, New Mexico; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; and Standing Rock Sioux Tribe of North & South Dakota were provided with copies of all available documentation.

In 1905, human remains representing a minimum of five individuals were removed from ''in a butte (''Sentinal [sic] Rock''), Meagher County, MT,'' by Ralph Hubbard. The human remains were later sent to the museum by Mr. Hubbard. In 1993, the human remains were found uncatalogued during an inventory and subsequently catalogued (99195-#1, 99195-#2, 99195-#3, 99195-#4, 99195-#5). No known individuals were identified. The two associated funerary objects are one tin spoon and one coyote molar.

Based on a note written by Mr. Hubbard, the human remains are Native American. Based on Indian Claims Commission decisions, the human remains are reasonably believed to be Blackfeet, Crow, Gros Ventre, or Assiniboine. Descendants of the Blackfeet are members of the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana. The Fort Belknap Indian Community of the Fort Belknap Reservation of Montana confirms that the Gros Ventre and Assiniboine ranged through the Meagher County area mainly in the form of hunting and war parties. The descendants of the Gros Ventre and Assiniboine are members of the Fort Belknap Indian Community of the Fort Belknap Reservation of Montana. Based on oral tradition, the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, includes Meagher County as a part of their traditional territory. The Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota are comprised of Arikara, Hidatsa, and Mandan peoples. The Crow people were once a part of the Hidatsa Nation based on Crow oral tradition. Therefore, the Hidatsa people of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota and Crow Tribe of Montana have a relationship of shared group identity.

Officials of the University of Colorado Museum have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of five individuals of Native American ancestry. Officials of the University of Colorado Museum also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the two objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the University of Colorado Museum have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana; Crow Tribe of Montana; Fort Belknap Indian Community of the Fort Belknap Reservation of Montana; and Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Steve Lekson, Curator of Anthropology, University of Colorado Museum, Henderson Building, Campus Box 218, Boulder, CO 80309–0218, telephone (303) 492–6671, before March

14, 2008. Repatriation of the human remains and associated funerary objects to the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana; Crow Tribe of Montana; Fort Belknap Indian Community of the Fort Belknap Reservation of Montana; and Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota may proceed after that date if no additional claimants come forward.

University of Colorado Museum is responsible for notifying the Apache Tribe of Oklahoma; Arapahoe Tribe of the Wind River Reservation, Wyoming; Blackfeet Tribe of the Blackfeet Indian Reservation of Montana; Cheyenne-Arapaho Tribes of Oklahoma; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Comanche Nation, Oklahoma; Crow Tribe of Montana; Fort Belknap Indian Community of the Fort Belknap Reservation of Montana; Fort Sill Apache Tribe of Oklahoma; Jicarilla Apache Nation, New Mexico; Kiowa Indian Tribe of Oklahoma; Mescalero Apache Tribe of the Mescalero Reservation, New Mexico; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Pawnee Nation of Oklahoma; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; Standing Rock Sioux Tribe of North & South Dakota; Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; Ute Indian Tribe of the Uintah & Ouray Reservation, Utah; and Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah that this notice has been published.

Dated: January 9, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–2575 Filed 2–12–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Second Meeting of the Big Cypress National Preserve Off-Road Vehicle (ORV) Advisory Committee

AGENCY: Department of the Interior, National Park Service, ORV Advisory Committee.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770, 5 U.S.C. App 1, 10), notice is hereby given of the second meeting of the Big Cypress National Preserve ORV Advisory Committee.

DATES: The Committee will meet on Tuesday, March 18, 2008, beginning at 3:30 p.m.

ADDRESSES: The meeting will be held at the Everglades City Community Center, 205 Buckner Avenue, Everglades City, Florida. Written comments may be sent to: Superintendent, Big Cypress National Preserve, 33100 Tamiami Trail East, Ochopee, FL 34141–1000, Attn: ORV Advisory Committee.

FOR FURTHER INFORMATION CONTACT: Karen Gustin, Superintendent, Big Cypress National Preserve, 33100 Tamiami Trail East, Ochopee, Florida 34141–1000; 239–695–1103, or go to the Web site *http://parkplanning.nps.gov/projectHome.cfm?parkId=352&projectId=20437*.

SUPPLEMENTARY INFORMATION: The Committee was established (**Federal Register**, August 1, 2007, pp. 42108–42109) pursuant to the Preserve's 2000 *Recreational Off-road Vehicle Management Plan* and the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix) to examine issues and make recommendations regarding the management of ORVs in the Preserve. The agenda for this meeting will be published by press release and on the *http://parkplanning.nps.gov/projectHome.cfm?parkId=352&projectID=20437* Web site. The meeting will be open to the public, and time will be reserved for public comment. Oral comments will be summarized for the record. If individuals wish to have their comments recorded verbatim, they must submit them in writing.

Pedro Ramos,

Deputy Superintendent, Big Cypress National Preserve.

[FR Doc. 08–627 Filed 2–12–08; 8:45 am]

BILLING CODE 4310–06–M

DEPARTMENT OF THE INTERIOR

National Park Service

Native American Graves Protection and Repatriation Review Committee: Meeting

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Federal Advisory Committee Act, 5 U.S.C. Appendix (1988), of a meeting of the Native American Graves Protection and Repatriation Review Committee (Review Committee). The Review Committee will meet on May 15–16, 2008, at the F.K. Bemis International Conference Center on the Campus of St. Norbert College, 100 Grant Street, De Pere, WI 54115–2099. Meeting sessions will begin at 8:30 a.m. and end at 5 p.m. each day.

The agenda for the meeting includes preparation of the Review Committee's Report to Congress for 2007; update on National NAGPRA Program activities during the first half of fiscal year 2008; reports from the National NAGPRA Program on projects requested by the Review Committee; update and Review Committee recommendations on development of the draft proposed rule for disposition of unclaimed cultural items excavated or removed from Federal or tribal lands after November 16, 1990 (43 CFR 10.7); update on development of the final rule for disposition of culturally unidentifiable Native American human remains in collections (43 CFR 10.11); requests for recommendations regarding the disposition of culturally unidentifiable human remains; presentations and statements by Indian tribes, Native Hawaiian organizations, museums, Federal agencies, and the public; and selection of dates and site for spring 2009 meeting.

A detailed agenda for this meeting will be posted by April 30, 2008, at http://www.nps.gov/history/nagpra/.

Requests to schedule a presentation to the Review Committee during the meeting should be submitted in writing no later than April 15, 2008. Requests should include an abstract of the presentation and contact information for the presenters. Persons also may submit written statements for consideration by the Review Committee during the meeting. Send requests and statements to the Designated Federal Officer, NAGPRA Review Committee by U.S. Mail to the National Park Service, 1849 C Street NW (2253), Washington, DC 20240; or by commercial delivery to the National Park Service, 1201 Eye Street NW, 8th floor, Washington, DC 20005. Because increased security in the Washington, DC, area may delay delivery of U.S. Mail to Government offices, copies of mailed requests and statements should also be faxed to (202) 371–5197. Written submissions may be received by the Designated Federal Officer until the close of business on April 15, 2008.

Transcripts of Review Committee meetings are available approximately eight weeks after each meeting at the National NAGPRA Program office, 1201 Eye Street NW, 8th floor, Washington, DC. To request electronic copies of meeting transcripts, send an e-mail message to Tim__McKeown@nps.gov.

Information about NAGPRA, the Review Committee, and Review Committee meetings is available at the National NAGPRA website, http://www.nps.gov/history/nagpra/; for the Review Committee's meeting procedures, select ''Review Committee,'' then select ''Procedures.''

The Review Committee was established by the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. 3001 *et seq.* Review Committee members are appointed by the Secretary of the Interior. The Review Committee is responsible for monitoring the NAGPRA inventory and identification process; reviewing and making findings related to the identity or cultural affiliation of cultural items, or the return of such items; facilitating the resolution of disputes; compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such human remains; consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations; consulting with the Secretary of the Interior in the development of regulations to carry out NAGPRA; and making recommendations regarding future care of repatriated cultural items. The Review Committee's work is completed during meetings that are open to the public.

Dated: December 13, 2007

C. Timothy McKeown,

Designated Federal Officer,

Native American Graves Protection and Repatriation Review Committee.

[FR Doc. E8–2571 Filed 2–12–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Native American Graves Protection and Repatriation Review Committee: Nomination Solicitation

AGENCY: National Park Service, Interior.

ACTION: Native American Graves Protection and Repatriation Review Committee; Notice of Nomination Solicitation.

The National Park Service is soliciting nominations for three members of the Native American Graves Protection and Repatriation Review Committee. The Secretary of the Interior will appoint one member from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders. This particular appointee must be a traditional Native American religious leader. The Secretary of the Interior will also appoint two members from nominations submitted by national museum organizations and scientific organizations.

Nominations must include the following information.

1. Nominations by traditional religious leaders: Nominations must be submitted with the nominator's original signature and daytime telephone number. The nominator must explain how he or she meets the definition of traditional religious leader.

2. Nominations by Indian tribes or Native Hawaiian organizations: Nominations must be submitted on official tribal or organization letterhead with the nominator's original signature and daytime telephone number. The nominator must be the official authorized by the tribe or organization to submit nominations in response to this solicitation. The nomination must include a statement that the nominator is so authorized.

3. Nominations by national museum organizations and scientific organizations: Nominations must be submitted on organization letterhead with the nominator's original signature and daytime telephone number. The nominator must be the official authorized by the organization to submit nominations in response to this solicitation. The nomination must include a statement that the nominator is so authorized.

4. Information about nominees: All nominations must include the following information:

a. nominee's name, address, and daytime telephone number and e-mail address; and

b. nominee's resume or brief biography emphasizing the nominee's NAGPRA experience and ability to work effectively as a member of an advisory board.

5.Nominations from traditional religious leaders, Indian tribes, or Native Hawaiian organization must include a statement that the nominee is a traditional religious leader.

DATES: Nominations must be received by June 12, 2008.

ADDRESSES:

Via U.S. Mail: Address nominations to Designated Federal Officer, Native American Graves Protection and Repatriation Review Committee, National NAGPRA Program, National Park Service, 1849 C Street NW (2253), Washington, DC 20240. Because increased security in the Washington, DC, area may delay delivery of U.S. Mail to U.S. Government offices, a copy of each mailed nomination should also be faxed to (202) 371–5197.

Via commercial delivery: Address nominations to C. Timothy McKeown, Designated Federal Officer, Native American Graves Protection and Repatriation Review Committee, National NAGPRA Program, National Park Service, 1201 Eye Street NW, 8th floor, Washington, DC 20005.

SUPPLEMENTARY INFORMATION: 1. The Review Committee was established by the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. 3001 *et seq.*

2. The Review Committee is responsible for -

a. monitoring the NAGPRA inventory and identification process;

b. reviewing and making findings related to the identity or cultural affiliation of cultural items, or the return of such items;

c. facilitating the resolution of disputes;

d. compiling an inventory of culturally unidentifiable human remains and developing a process for disposition of such remains;

e. consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the Review Committee affecting such tribes or organizations;

f. consulting with the Secretary of the Interior in the development of regulations to carry out NAGPRA; and

g. making recommendations regarding future care of repatriated cultural items.

3. Seven members compose the Review Committee. All members are appointed by the Secretary of the Interior. The Secretary may not appoint Federal officers or employees to the Review Committee.

a. Three members are appointed from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders. At least two of these members must be traditional Native American religious leaders.

b. Three members are appointed from nominations submitted by national museum organizations and scientific organizations.

c. One member is appointed from a list of persons developed and consented to by all of the other members.

4. Members serve as Special Governmental Employees, which requires submission of annual financial disclosure reports and completion of annual ethics training.

5. Appointment terms: Members are appointed for 4–year terms and incumbent members may be reappointed for 2–year terms.

6. The Review Committee's work is completed during public meetings. The Review Committee normally meets face-to-face two times per year, and each meeting is normally two or three days. The Review Committee may also hold one or more public teleconferences of several hours duration.

7. Compensation: Review Committee members are compensated for their participation in Review Committee meetings.

8. Reimbursement: Review Committee members are reimbursed for travel expenses incurred in association with Review Committee meetings.

9. Additional information regarding the Review Committee, including the Review Committee's charter, meeting protocol, and dispute resolution procedures, is available on the National NAGPRA program Website, http://www.nps.gov/history/nagpra/ (click ''Review Committee'' in the menu on the right).

10.The terms ''Indian tribe,'' ''Native Hawaiian organization,'' and ''traditional religious leader'' have the same definitions as given in 43 CFR 10.2.

FOR FURTHER INFORMATION CONTACT: C. Timothy McKeown, Designated Federal Officer, Native American Graves Protection and Repatriation Review Committee, National NAGPRA Program, National Park Service, 1849 C Street NW (2253), Washington, DC 20240; telephone (202) 354–2206; email Tim__McKeown@nps.gov.

C. Timothy McKeown,

Designated Federal Officer,

Native American Graves Protection and Repatriation Review Committee.

[FR Doc. E8–2573 Filed 2–12–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Protecting and Restoring Native Ecosystems by Managing Non-Native Ungulates Hawaii Volcanoes National Park, Hawaii; Notice of Intent To Prepare an Environmental Impact Statement

SUMMARY: In accord with § 102(2)(C) of the National Environmental Policy Act of 1969 (Pub. L. 91–90), the National Park Service is undertaking a conservation planning and environmental impact analysis process for a Non-native Ungulate Management Plan for Hawaii Volcanoes National Park. The purpose of the plan is to refine the strategies for managing non-native ungulates that supports long-term ecosystem protection, recovery and restoration of native vegetation and other natural resources, and protects and preserves cultural resources. Non-native ungulate management is needed to address unacceptable impacts of non-native ungulates, which result in the loss of native ecosystems, especially native plant and animal communities; the loss of sensitive endemic species, including state and federally listed species; and the loss of irreplaceable cultural resources. The park also needs to update non-native ungulate management in order to address *NPS Management Policies 2006, § 4.4.4, Management of Exotic Species,* which states that non-native species will not be allowed to displace native species if displacement can be prevented.

Background Information; Ungulates, or mammals with hooves, are an issue of concern throughout the State of Hawaii because of these are non-native species which have detrimental impacts on native diversity and ecosystems. Non-native species are those that do not naturally occur in the ecosystem and were introduced into the environment from elsewhere. Goats, European pigs, sheep, and cattle were introduced to the Hawaiian Islands in the late eighteenth century and have become feral. Mouflon sheep were introduced to Hawaii Island in the twentieth century as a game animal. Populations of non-native ungulates have proliferated in Hawaii because of an equable climate, abundant food sources, vegetation poorly adapted to herbivorous mammals, and lack of predators.

Because the ecosystems of the Hawaiian Islands evolved without large mammalian herbivores, they are particularly vulnerable to the effects of non-native ungulates. Non-native ungulates cause habitat degradation and population decline for native Hawaiian species. They impact native species through browsing, stripping bark, destroying habitat, and inhibiting regeneration. Non-native ungulates increase soil disturbance and erosion, and foster the spread of non-native plants.

Non-native ungulates also have the potential to affect cultural resources at the park, which include archeological sites, cultural landscapes, and ethnographic resources. Digging and rooting could impact archeological sites through ground disturbance. Alterations in the ecosystem of an area could impact the characteristics that contribute to its designation as a cultural landscape. Traditional uses of native peoples could be impacted by the loss of native plant and animal communities important to their culture.

The park was created in 1916, and has been addressing populations of non-native species, including ungulates, since the 1920s. However, the park's most recent EIS addressing non-native ungulate control was completed 30 years ago. Consequently the new EIS/plan will address non-native ungulate management in the context of NPS policies updated in 2006, recent park land acquisition, new invasive species challenges, and currently available strategies for managing ungulates.

Scoping Process: Hawaii Volcanoes National Park and the National Park Service (NPS) are eliciting early public comment regarding the full spectrum of issues and public concerns, the nature and extent of potential environmental impacts (and as appropriate, mitigation measures), and all feasible management alternatives which should be considered by the planning team in preparing a Draft EIS/plan. Through outreach activities planned in the scoping phase, the NPS welcomes relevant information and suggestions from the public. Publication of this Notice formally initiates the public scoping phase for the EIS process.

All written scoping comments must be postmarked or transmitted not later than May 19, 2008. Written comments may be sent to: Cindy Orlando, Superintendent, Hawai'i Volcanoes National Park, P.O. Box 52, Hawai'i National Park, HI 96718-0052. Alternatively, comments may also be transmitted electronically through the NPS Planning, Environment and Public Comment project Web site at *http://parkplanning.nps.gov/HAVO.* Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you would be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

At this time, it is expected that public meetings will be hosted in the towns of Hilo (April 29), Na'alehu (April 30), and Kona (May 1). All meetings will be conducted in an open house format from 5 p.m. to 8 p.m. Detailed information regarding the meetings will be included in an announcement posted on the project Web site, and also publicized in direct mailings and via

local and regional press media. All attendees will be given the opportunity to ask questions and provide comments to the planning team. The Web site noted above will provide the most up-to-date information regarding the project, including project description, planning process updates, meeting reports and documents, and informational links associated with the project.

Decision Process: Following the scoping phase and due consideration of public concerns and other agency comments, a Draft EIS for the Non-native Ungulate Management Plan will be prepared and released for public review. Availability of the forthcoming Draft EIS for pubic review and written comment will be formally announced through the publication of a Notice of Availability in the **Federal Register**, as well as through local and regional news media, direct mailing to the project mailing list, and via the internet at the project Web site. At this time it is expected that the Draft EIS/plan may be available for public release during summer-fall, 2009. Following due consideration of all agency and public comment as may be forthcoming after release of the draft document, a Final EIS will be prepared. As a delegated EIS, the official responsible for the final decision on the proposed non-native ungulate management plan is the Regional Director, Pacific West Region, National park Service. Subsequently, the official directly responsible for implementation of the approved plan would be the Superintendent, Hawai'i Volcanoes National Park.

Dated: December 3, 2007.

Jonathan B. Jarvis,

Regional Director, Pacific West Region.

[FR Doc. 08–628 Filed 2–12–08; 8:45 am]

BILLING CODE 4310–KU–M

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Change of Use for the Mark Twain Recreation Area Lake Access, New Melones Lake, Tuolumne County, CA

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of change in use of public access.

SUMMARY: The Bureau of Reclamation's New Melones Recreation Resource Office will change public use of the Mark Twain Recreation Area Lake Access, located within a special use area, near the Park Administration and Visitor Center at new Melones Lake. The public use will change from launching of trailered boats of any size to launching of small boats by hand only. Boats will be limited to canoes, kayaks, rowboats, skiffs, or small boats with up to a ten horsepower motor that can be hand carried. With this change in use, vehicles, including motorcycles, will no longer be permitted to drive to the water's edge to launch boats or for other purposes. The location of vehicle access will vary due to fluctuating water level of the lake, irregularity of the shoreline and eroded nature of the former roadway which is used for lake access. However, Reclamation intends to manage vehicle access to allow public vehicles to within approximately 100–200 feet of the water. Other authorized recreation activities will not be affected. This change in use will serve to enhance public safety and water quality, while providing for recreation and protection of cultural and natural resources in the area.

EFFECTIVE DATES: The change of use will become effective April 1, 2008 and continue indefinitely.

ADDRESSES: A map of the proposed change is available at Reclamation's New Melones Lake Visitor Center, located at 6840 Studhorse Flat road, Sonora, California 95370. The Visitor Center is open to the public from 10 a.m. and 4 p.m., Wednesday through Sunday. The map is also on the New Melones Web site at: *http://www.usbr.gov/mp/ccao/field_offices/new_melones/index.html.* To have a map mailed to you, fax your request to 209–536–9652 or send your request to the address above, Attention: Mark Twain Change of Use Map Request.

FOR FURTHER INFORMATION CONTACT: Bureau of Reclamation, Mid-Pacific Region, Public Affairs Office, at 916–978–5100, or contact Peggi Brooks, Resource Manager, New Melones Recreation Resource Office via e-mail at *pbrooks@mp.usbr.gov* or by telephone at 209–536–9094.

SUPPLEMENTARY INFORMATION: This action is being taken under 43 CFR part 423 to protect public safety and prevent additional resource degradation. Reclamation will change public use of the Mark Twain Recreation Area Lake Access, located within a special use area near the Park Administration and Visitor Center at New Melones Lake. The public use will change from launching of trailered boats of any size to launching of small boats by hand only. Boat launching will be limited to canoes, kayaks, rowboats, skiffs, or small boats with up to a ten horsepower motor that can be hand carried. With this change in use, vehicles, including motorcycles, will no longer be permitted to drive to the water's edge to launch boats or for other purposes. The location of vehicle access will vary due to fluctuation water level of the lake, irregularity of the shoreline, and eroded nature of the former roadway which is used for lake access. However Reclamation intends to manage vehicle access to allow public vehicles to within approximately 100–200 feet of the water. Boats entering the Mark Twain cove from the lake will be required to comply with the posted ''No Wake'' zone to provide for public safety.

Presently this area is being used for shoreline fishing, swimming, hiking and launching of boats of all sizes via trailers and by hand. These multi-use activities have caused visitor conflict issues in addition to health and safety hazards to the public. The narrow access roadway to the Mark Twain Recreation Area Lake Access is via old State Highway 49 which ends directly at the reservoir. Below gross pool level, the former road is severely degraded with uneven pavement, steep drop-offs, ruts and gullies making it unsafe for launching of trailered vessels. Unrestricted vehicle access to the water's edge has resulted in illegal dumping of refuse and hazardous materials into the lake, jeopardizing water quality, and public health. Cultural and natural resources in this area are also being damaged by vehicles traveling illegally off-road and wave erosion due to operation of boats at high speeds. In addition, during periods of peak use the design capacity of this area is often exceeded, making it unsafe to operate vehicles, restricting access for emergency medical services, and endangering visitors. This congestion is causing visitors to park on the adjacent State Highway 49 road shoulders in an unsafe manner.

The Mark Twain Recreation Area Lake Access will remain open to other authorized public recreational activities including but not limited to fishing, had launching of boats under ten horsepower, wildlife viewing, hiking, and sightseeing. Public foot and bicycle access will not be impeded.

Reclamation will implement the change of use by placing vehicle barriers across the roadway to restrict public vehicle access to approximately 100–200 feet away from the water's edge. The exact placement of barriers will vary depending on lake elevation and physical constraints which could impact public safety and/or resource protection. Removable locking posts will be installed at different elevations to allow for emergency access. The public will be notified of the changes

through signage, newspaper press releases, and website postings.

This order is posted in accordance with 43 CFR 423.60. Violation of this prohibition or any prohibition listed in 43 CFR part 423 is punishable by fine or imprisonment of not more than six months, or both.

Dated: January 14, 2008.

Robert Schroeder,

Acting Area Manager, Central California Area Office.

[FR Doc. 08–650 Filed 2–12–08; 8:45 am]

BILLING CODE 4310–MN–M

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Change of Use for the Waterway Between Smittle Creek Day Use Area, Oak Shores Day Use Area, and Big Island at Lake Berryessa, Napa, CA

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of change in public use.

SUMMARY: The Bureau of Reclamation Mid-Pacific Region, Central California Area Office will change public use of the Big Island area at Lake Berryessa, specifically the waterway between the Smittle Creek Day Use Area, the Oak Shores Day Use Area, and Big Island. Use will change from a gasoline-powered motorized zone to an electric trolling motor-only zone.

DATES: The change of use will become effective February 1, 2008 and continue indefinitely.

ADDRESSES: A map of the proposed change is available at Reclamation's Lake Berryessa Visitor Center, located at 5520 Knoxville Rd., Napa, California 94558. The Visitor Center is open to the public from 10 a.m. to 4 p.m., Wednesday through Sunday. The map is also on Lake Berryessa's Web site at: *http://www.usbr.gov/mp/ccao/field_offices/lake_berryessa/docs/map_resort.pdf.* To have a map mailed to your address, fax your request to 707–966–0409 or send your request to the above address, Attention: Big Island Change of Use Map Request.

FOR FURTHER INFORMATION CONTACT: Bureau of Reclamation, Mid-Pacific Region Public Affairs Office, at 916–978–5100, or contact Janet Rogers, Park Manager, Lake Berryessa Recreation Resource Branch at 707–966–2111 or via e-mail at *jlrogers@mp.usbr.gov.*

SUPPLEMENTARY INFORMATION: This action is being taken under 43 CFR part 423 to protect safety and prevent additional resource degradation. Reclamation will change public use of the Big Island Area, located within a special use area between Smittle Creek and Oak Shores Day Use Area. This change in use is consistent with the Record of Decision (ROD) for *Future Recreation Use and Operations of Lake Berryessa,* issued in June of 2006, section III. 6, *Land and Water Use Classification.* This change will serve to reduce the impacts of noise on visitors and wildlife, provide the opportunity for a more primitive recreation experience, and enhance public safety, while helping to protect the natural resources in this area.

Presently, this area is a 5 mph boating zone and is used for swimming, boating, both motorized and non-motorized, fishing, and wildlife viewing. Reclamation will designate the change of use area by placing a series of signs on buoys identifying the non-gasoline motorized zone. The public will be notified of the changes through signage, newspaper press releases, and Web site postings.

This order is posted in accordance with 43 CFR 423.60. Violation of this prohibition or any prohibition listed in 43 CFR part 423 is punishable by fine or imprisonment for not more than six months or both.

Dated: January 25, 2008.

Robert Schroeder,

Acting Area Manager, Central California Area Office.

[FR Doc. 08–649 Filed 2–12–08; 8:45 am]

BILLING CODE 4310–MN–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Residential Lead-Based Paint Hazard Reduction Act

Notice is hereby given that on January 28, 2008 a proposed Consent Decree in *United States* v. *VIP Properties, LLC, George L. and Toni Dufour Living Trust, Edward Anderson d/b/a Edric Associates, 50th Penn, LLC, David C. Brown, Hillsboro Homes, LLC, Richard O. Hanousek, Victor Yalom, Bisanz Family Limited and Jersey Company*, Civil Action No. 08–CV–246 (PJS/RLE) was lodged with the United States District Court for the District of Minnesota.

The consent decree settles claims against the owners and management company of approximately 10 residential properties containing approximately 292 units located in the area of Minneapolis and St. Paul, Minnesota. The claims were brought on behalf of the Environmental Protection Agency (''U.S. EPA'') and the Department of Housing and Urban Development (''HUD'') under the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. 4851 et seq. (''Lead Hazard Reduction Act''). The United States alleged in the complaint that the defendant failed to make one or more of the disclosures or to complete one or more of the disclosure activities required by the Lead Hazard Reduction Act.

Under the Consent Decree, the Defendants will certify that they are complying with residential lead paint notification requirements. They also have agreed to hire contractors to complete risk assessments and have agreed to abate all lead-based paint hazards identified in all of the residential properties managed by VIP. Defendants will pay a civil penalty of $7,500. In addition, Defendants have agreed to perform a child health improvement project (''CHIP'') designed to reduce incidences of childhood lead poisoning in the Twin Cities metropolitan area where Defendants' housing properties are located at a cost of $50,000. Specifically, Defendants will work with the St. Paul Health Department and a not-for-profit community development organization to replace all of the windows in at least 35 properties in very low income, owner-occupied homes with children under the age of 6 in the Thomasdale, Rice Street, and Lower East Side of St. Paul neighborhoods.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to U.S. Department of Justice, Washington, DC 20044–7611 P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *VIP Properties, et al.*, D.J. Ref. # 90–5–2–1–09280.

The Proposed Consent Decree may be examined at the Department of Housing and Urban Development, Office of General Counsel, 451 7th St. NW., Room 9262, Washington, DC 20410; at the office of the United States Attorney for the District of Minnesota, 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota, 55415 (Attn. Assistant United States Attorney Gregory G. Brooker); and at U.S. EPA Region 5, 77 W. Jackson Blvd., Chicago, IL 60604. During the public comment period, the Consent Decree may also be

examined on the following Department of Justice Web site, to *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $9.75 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Karen Dworkin,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–2579 Filed 2–12–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of First Modification To Consent Decree Under the Clean Air Act

Under 28 CFR 50.7, notice is hereby given that on February 7, 2008, a First Modification (''First Modification'') to the November 2005 First Revised Consent Decree in the case of *United States, et al.* v. *Marathon Ashland Petroleum, LLC*, Civil Action No. 01–40119 (PVG), was lodged with the United States District Court for the Eastern District of Michigan.

Under the November 2005 First Revised Consent Decree, Marathon Ashland Petroleum (''MAP'') (presently known as Marathon Petroleum Company) agreed to continue to implement pollution control provisions originally found in a Consent Decree entered in August of 2001, but the parties replaced some of the original control technologies that proved ineffective or potentially unsafe with alternative, proven technologies. The parties also extended some compliance deadlines while accelerating others, incorporated some new final emissions limits, and modified some provisions relating to reporting, recordkeeping, modification, and termination. MAP still is obligated to comply with the November 2005 First Revised Consent Decree, but under the First Modification, the parties eliminate provisions related to Plantwide Applicability Limits (''PALs'') (which were unique to the Marathon decree) and add provisions (which are found in other refinery consent decrees) relating to prohibitions on emissions credit generation. In addition, the First Modification extends and accelerates certain deadlines with the net effect of achieving greater emissions reductions. In the First Modification, the United States is joined by the State of Louisiana and the State of Minnesota.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the First Modification. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States, et al.* v. *Marathon Ashland Petroleum, LLC*, D.J. Ref. No. 90–5–2–1–07247.

The First Modification may be examined at the Office of the United States Attorney, 211 W. Fort St., Suite 2300, Detroit, Michigan 48226, and at U.S. EPA Region 5, 77 W. Jackson St., Chicago, IL 60604. During the public comment period, the First Modification may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the First Modification may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax number (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $5.75 (25 cents per page reproduction cost) payable to the U.S. Treasury, or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Robert D. Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8–2639 Filed 2–12–08; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0047]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Race and National Origin Identification.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until April 14, 2008. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Ann Marie Hannon, Chief, Policy and Human Capital Planning Branch, Room 2.S–189, 99 New York Avenue, NE., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies, estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Race and National Origin Identification.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF F 2931.1. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. *Other:* None. The information collection is used to maintain Race and National Origin data on all employees and new hires to meet diversity/EEO goals and act as a component of a tracking system to ensure that personnel practices meet the requirements of Federal laws.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 10,000 respondents will complete a 3-minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 500 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: February 7, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, Department of Justice.

[FR Doc. E8–2600 Filed 2–12–08; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Joint Venture Under ATP Award No. 70NANB7H7019

Notice is hereby given that, on October 17, 2007, pursuant to Section 6(a) of the National Cooperative Research and Production act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Joint Venture under ATP Award No. 70 NANB7H7019 has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties and (2) the nature and objectives of the venture. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are Agiltron, Inc. Woburn, MA; Advanced MicroSensors, Inc. Shrewsbury, MA; and L–3 Communications Infrared Products, Dallas, TX. The nature and the objectives of the venture are: The development of technologies related to low cost thermal imaging.

The activities of this venture project will be partially founded by an award from the Advanced Technology Program, National Institute of Standards and Technology, U.S. Department of Commerce.

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 08–610 Filed 2–12–08; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–0102]

Agency Information Collection Activities: Existing Collection; Comment Requested

ACTION: 30-Day Notice of Information Collection Under Review:

Re-instatement and revision of existing collection,

Prison Population Reports: Midyear Population Counts and Summary of Sentenced Population Movement—National Prisoner Statistics.

The Department of Justice (DOJ), Office of Justice Programs, will be submitting the following information collection to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was published in the **Federal Register** Volume 72, Number 234, page 68900–68901 on December 6, 2007, allowing for a 60 day public comment period.

The purpose of this notice is to allow an additional 30 days for public comments until March 14, 2008. This process is in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via fascimile to (202) 395–7285.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following points:

(1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Re-instatement and minor revision.

(2) *Title of the Form/Collection:* Prison Population Reports Midyear Counts; and Summary of Sentenced Population Movement—National Prisoner Statistics

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form number:* NPS–1A; and NPS–1B. Office of Justice Programs, U.S. Department of Justice.

(4) *Affected public who will be asked to respond, as well as a brief abstract: Primary:* State Departments of Corrections. *Others:* The Federal Bureau of Prisons. For the NPS–1A form, 51 central reporters (one from each State and the Federal Bureau of Prisons) responsible for keeping records on inmates will be asked to provide information for the following categories:

(a) As of June 30, the number of male and female inmates under their jurisdiction with maximum sentences of

more than one year, one year or less; and unsentenced inmates; and

(b) The number of male and female inmates in their custody with maximum sentences of more than one year, one year or less; and unsentenced inmates; and

(c) The number of male and female inmates under their jurisdiction housed in privately-operated facility, either in state or out of state;

(d) The number of male and females inmates in their custody by race and Hispanic origin;

(e) The number of male and female inmates under the age of 18 held in their system; and

(f) The number of male and female noncitizen inmates held in their system.

For the NPS–1B form, 51 central reporters (one from each and the Federal Bureau of Prisons) responsible for keeping records on inmates will be asked to provide information for the following categories:

(a) As of December 31, the number of male and female inmates within their custody and under their jurisdiction with maximum sentences of more than one year, one year or less; and unsentenced inmates;

(b) The number of inmates housed in privately operated facilities, county or other local authority correctional facilities, or in other state or Federal facilities on December 31;

(c) Prison admission information in the calendar year for the following categories: new court commitments, parole violators, other conditional release violators returned, transfers from other jurisdictions, AWOLs and escapees returned, and returns from appeal and bond;

(d) Prison release information in the calendar year for the following categories: expirations of sentence, commutations, other conditional releases, probations, supervised mandatory releases, paroles, other conditional releases, deaths by cause, AWOLs, escapes, transfers to other jurisdictions, and releases to appeal or bond;

(e) Number of inmates under jurisdiction on December 31 by race and Hispanic origin;

(f) Testing of incoming inmates for HIV; and HIV infection and AIDS cases on December 31; and

(g) The aggregate rated, operational, and design capacities, by sex, of each State's correctional facilities at year-end.

The Bureau of Justice Statistics uses this information in published reports and for the U.S. Congress, Executive Office of the President, practitioners, researchers, students, the media, and others interested in criminal justice statistics.

(5) An estimate of the total number of respondents and the amount of time needed for an average respondent to respond to both forms: 51 respondents each taking an average 8.0 total hours to respond (1.5 hours for the NPS–1A and 6.5 hours for the NPS–1B). Burden hours are up by 255 hours under this clearance because we are adding the elements from the NPS–1 form (approved under OMB number 1121–0078), with 51 respondents each taking an estimated 6 hours to complete. However, we are also eliminating the previous NPS–1B form due to redundancy, 51 respondents at 1.5 hours each, thus reducing the overall burden of the NPS series by 76.5 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: 408 annual burden hours.

If additional information is required, contact: Ms. Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530

Dated: February 7, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E8–2599 Filed 2–12–08; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–61,318]

Epic Technologies, LLC. Including On-Site Leased Workers of Superior Technical Resources and Spherion, Johnson City Division, Johnson City, TN; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on May 14, 2007, applicable to workers of Epic Technologies, LLC., including on-site leased workers of Superior Technical Resources, Johnson City Division, Johnson City, Tennessee. The notice was published in the **Federal Register** on May 30, 2007 (72 FR 30033).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of assembled printed circuit boards.

New information shows that leased workers of Spherion were employed on-site at the Johnson City, Tennessee location of Epic Technologies, LLC., Johnson City Division. The Department has determined that these workers were sufficiently under the control of Epic Technologies, LLC., Johnson City Division to be considered leased workers.

Based on these findings, the Department is amending this certification to include leased workers of Spherion working on-site at the Johnson City, Tennessee location of the subject firm.

The intent of the Department's certification is to include all workers employed at Epic Technologies, LLC., Johnson City Division, Johnson City, Tennessee who were adversely impacted by a shift in production of assembled printed circuit boards to Mexico.

The amended notice applicable to TA–W–61,318 is hereby issued as follows:

All workers of Epic Technologies, LLC., including on-site leased workers from Superior Technical Resources, and Spherion, Johnson City Division, Johnson City, Tennessee, who became totally or partially separated from employment on or after April 16, 2006, through May 14, 2009, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 1st day of February 2008.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–2621 Filed 2–12–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–59,362; TA–W–59,362A; TA–W–59,362B]

Mount Vernon Mills, Inc., Trion Denim Mill Division, Trion, GA; Including Employees of Mount Vernon Mills, Inc. Trion Denim Mill Division, Trion, GA Located in: Verona, NJ, Riedsville, NC; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on May 31, 2006, applicable to workers of Mount Vernon Mills, Inc., Trion Denim Mill Division, Trion, Georgia. The notice was published in the **Federal Register** on June 22, 2006 (71 FR 35949).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm.

New information shows that worker separations have occurred involving employees of the Trion, Georgia facility of Mount Vernon Mills, Inc., Trion Denim Mill Division Group, Inc. located in Verona, New Jersey and Riedsville, North Carolina. Ms. Jennifer Finn and Mr. Michael White provided sales and product development functions supporting the production of denim cloth that is produced at the Trion, Georgia location of the subject firm.

Based on these findings, the Department is amending this certification to include employees of the Trion, Georgia facility of Mount Vernon Mills, Inc., Trion Denim Mill Division working out of Verona, New Jersey and Riedsville, North Carolina.

The intent of the Department's certification is to include all workers of Mount Vernon Mills, Inc., Trion Denim Mill Division, Trion, Georgia who were adversely affected by increased customer imports.

The amended notice applicable to TA–W–59,362 is hereby issued as follows:

All workers of Mount Vernon Mills, Inc., Trion Denim Mill Division, Trion, Georgia (TA–W–59,362), including employees of Mount Vernon Mills, Inc., Trion Denim Mill Division, Trion, Georgia located in Verona, New Jersey (TA–W–59,362A) and Riedsville, North Carolina (TA–W–59,362B), who became totally or partially separated from employment on or after May 9, 2005, through May 31, 2008, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 4th day of February 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–2620 Filed 2–12–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–58,623L; TA–W–58,623GG]

WestPoint Home, Inc., Formerly WestPoint Stevens, Inc., Sales and Marketing Office, New York, NY; Including an Employee of WestPoint Home, Inc., Formerly WestPoint Stevens, Inc., Sales and Marketing Office, New York, NY, Working at the Following Location; Seneca, SC; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and Section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Notice of Determination Regarding Eligibility To Apply for Worker Adjustment Assistance on February 21, 2006, applicable to workers of WestPoint Home, Inc., formerly WestPoint Stevens, Inc., Sales and Marketing Office, New York, New York. The notice was published in the **Federal Register** on March 22, 2006 (71 FR 14549).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm.

New information shows that a worker separation has occurred involving an employee of the Sales and Marketing Office, New York, New York of WestPoint Home, Inc., formerly WestPoint Stevens, Inc. located in Seneca, South Carolina. Mr. Gerry Bednar provided various support services for the manufacture of comforters, sheets, pillowcases, towels and blankets produced by WestPoint Home, Inc., formerly WestPoint Stevens, Inc.

Based on these findings, the Department is amending this certification to include an employee of the Sales and Marketing Office New York, New York facility of WestPoint Home, Inc., formerly WestPoint Stevens, Inc. located in Seneca, South Carolina.

The intent of the Department's certification is to include all workers of WestPoint Home, Inc., formerly WestPoint Stevens, Inc., Sales and Marketing Office, New York, New York who were adversely affected by increased company and customer imports.

The amended notice applicable to TA–W–58,623L is hereby issued as follows:

All workers of WestPoint Home, Inc., formerly WestPoint Stevens, Inc., Sales and Marketing Office, New York, New York (TA–W–58,623L), including an employee reporting to this office but working in Seneca, South Carolina (TA–W–58,623GG), who became totally or partially separated from employment on or after January 12, 2005, through February 21, 2008, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 5th day of February 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–2619 Filed 2–12–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of *January 28 through February 1, 2008.*

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or

an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (i.e., conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–62,476; Elixir Industries, Division 34, Crossville, TN: November 9, 2006.

TA–W–62,523; Wolverine Tube, Inc., On-Site Workers From Lyons HR, Decatur, AL: November 30, 2006.

TA–W–62,523A; Wolverine Tube, Inc., Booneville, MS: November 30, 2006.

TA–W–62,523B; Wolverine Tube, Inc., Huntsville, AL: November 30, 2006.

TA–W–62,642; North State Industries, Inc., Nevis, MN: January 4, 2007.

TA–W–62,530; Cooper Standard Automotive, Fluids Division, New Lexington, OH: November 27, 2006.

TA–W–62,559; Hyde Tools, Inc., Southbridge, MA: December 10, 2006.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–62,473; Pfizer, Inc., Global Manufacturing Division, Groton, CT: November 15, 2006.

TA–W–62,572; Ethicon, A Johnson and Johnson Company, San Angelo, TX: June 9, 2007.

TA–W–62,629; Giant Merchandising, Inc., Priority Temp. Services, Partners & Apple One, Commerce, CA: December 10, 2006.

TA–W–62,615; Idearc Media, Valley Forge Ad Production, On-Site Leased Workers of Tac Worldwide, Norristown, PA: December 28, 2006.

TA–W–62,709; ITT Corporation, Koni Friction Prod. Div., Staffmark & Ambassador, Searcy, AR: January 18, 2007.

TA–W–62,736; Meade Instruments Corporation, Leased Workers of the Quest Staffing and Select Remedy, Irvine, CA: January 24, 2007.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section

222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

None.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department has determined that criterion (1) of Section 246 has not been met. The firm does not have a significant number of workers 50 years of age or older.

None.

The Department has determined that criterion (2) of Section 246 has not been met. Workers at the firm possess skills that are easily transferable.

None.

The Department has determined that criterion (3) of Section 246 has not been met. Competition conditions within the workers' industry are not adverse.

None.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

TA–W–62,317; Kemira Chemicals, Washougal, WA.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–62,607; Chrysler LLC, Belvidere Assembly Plant, Belvidere, IL.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–62,170; United Machine Works, Inc., Greenville, NC.

TA–W–62,618; Allflex-Boulder, Boulder, Co.

TA–W–62,630; Llink Technologies, LLC, Brown City, MI.

TA–W–62,614; Weyerhauser Green Mountain Lumber Mill, Toutle, WA.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–62,258; Chemtura Corporation, Corporate Headquarters, Middlebury, CT.

TA–W–62,550; Nelson Staffing, Working of Site at Oracle Corp. Global Financial Services Dept. Redwood, Redwood Shore, CA.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

I hereby certify that the aforementioned determinations were issued during the period of *January 28 through February 1, 2008.* Copies of these determinations are available for inspection in Room C–5311, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: February 7, 2008.

Ralph DiBattista,

Director, Division of Trade Adjustment Assistance.

[FR Doc. E8–2618 Filed 2–12–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221 (a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than February 25, 2008.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than February 25, 2008.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 6th day of February 2008.

Ralph DiBattista,

Director, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 1/28/08 and 2/1/08]

TA–W	Subject Firm (petitioners)	Location	Date of institution	Date of petition
62746	Reed and Barton Corporation (Comp)	Taunton, MA	01/28/08	01/25/08
62747	Thomas Brothers Maps and Rand McNally Company (State).	Irvine, CA	01/28/08	01/25/08
62748	Panasonic Primary Battery Corporation of America (Comp)	Columbus, GA	01/28/08	01/25/08

APPENDIX—Continued

[TAA petitions instituted between 1/28/08 and 2/1/08]

TA–W	Subject Firm (petitioners)	Location	Date of institution	Date of petition
62749	Industrial Wire Products (Wkrs)	Sullivan, MO	01/28/08	01/23/08
62750	Carson's of High Point (Wkrs)	Archdale, NC	01/28/08	01/16/08
62751	Saco Lowell Parts, LLC (Comp)	Easley, SC	01/28/08	01/11/08
62752	DynAmerica Manufacturing, LLC (Wkrs)	Muncie, IN	01/28/08	01/26/08
62753	Aerotek (State)	Flint, MI	01/29/08	01/28/08
62754	Silicon Laboratories, Inc. (Wkrs)	Austin, TX	01/29/08	01/28/08
62755	Geiger Manufactured Products Group (Comp)	Lewiston, ME	01/29/08	01/17/08
62756	Wacco Scaffolding and Equipment (Comp)	Cleveland, OH	01/29/08	01/28/08
62757	Meadowcraft, Inc. (Comp)	Birmingham, AL	01/29/08	01/28/08
62758	Parker International Products, Inc. (Comp)	Worcester, MA	01/29/08	01/16/08
62759	Inverness Corporation (Wkrs)	Fairlawn, NJ	01/29/08	01/28/08
62760	Delphi Automotive Systems (Wkrs)	Kokomo, IN	01/29/08	01/28/08
62761	TI Automotive (Plant #27) (Comp)	Marysville, MI	01/29/08	01/28/08
62762	Pembrook Chair Corporation, Inc. (Wkrs)	Claremont, NC	01/29/08	01/25/08
62763	Ruerson/Briteline (Wkrs)	Chicago, IL	01/30/08	01/28/08
62764	Pineer Manufacturing Company, Inc. (Wkrs)	Rillton, PA	01/30/08	01/29/08
62765	Unisys (Comp)	Plymouth, MI	01/30/08	01/29/08
62766	School Apparel, Inc. (State)	Star City, AR	01/30/08	01/29/08
62767	Masterbrand Cabinets (Comp)	Crossville, TN	01/30/08	01/29/08
62768	North Barre Granite, Inc. (Comp)	Barre, VT	01/30/08	01/21/08
62769	Nemak USA, Inc. (Wkrs)	Dickson, TN	01/30/08	01/12/08
62770	Diamond Tool and Die Company (Wkrs)	Dayton, OH	01/30/08	01/24/08
62771	Parlex USA (Wkrs)	Methuen, MA	01/30/08	01/29/08
62772	Ramtex Yarns and Fabrics, LLC (Comp)	Ramseur, NC	01/30/08	01/29/08
62773	Computer Sciences Corporation (Wkrs)	San Diego, CA	01/30/08	01/28/08
62774	Agfa Corporation (Comp)	Wilmington, MA	01/31/08	01/30/08
62775	American Standard (Union)	Tiffin, OH	01/31/08	01/30/08
62776	Tree Top, Inc (IBT)	Cashmere, WA	01/31/08	01/29/08
62777	Brunswick Bowling and Billiards (IAMAW)	Antigo, WI	01/31/08	01/30/08
62778	Lear Corporation (Union)	Fenton, MI	01/31/08	01/30/08
62779	Visteon Concordia (UAW)	Concordia, MO	01/31/08	01/29/08
62780	Xantrex Technology, Inc. (Comp)	Arlington, WA	01/31/08	01/30/08
62781	Dillan Chenille, Inc. (Comp)	Martinsville, VA	01/31/08	01/29/08
62782	Quality Services, Inc. (Comp)	Lordstown, OH	01/31/08	01/30/08
62783	Kemet Electronics Corporation, Fountain Inn, SC (Comp)	Fountain Inn, SC	02/01/08	01/25/08
62784	Kemet Electronics Corp., Simpsonville, SC (Comp)	Simpsonville, SC	02/01/08	01/25/08
62785	Sappi Fine Paper (Comp)	Allentown, PA	02/01/08	02/01/08
62786	Springs Global U.S. , Inc. (Rep)	Lancaster, SC	02/01/08	01/31/08
62787	Hasbro, Inc./Milton Bradley (Comp)	East Longmeadow, MA	02/01/08	01/30/08
62788	Amity/Rolfs, Inc. (Wkrs)	West Bend, WI	02/01/08	01/31/08
62789	Bollman Hat Company (Comp)	Adamstown, Pa	02/01/08	01/31/08
62790	Donaldson Company, Inc. (State)	Grinnell, IA	02/01/08	01/31/08
62791	Jacquart Fabric Products, Inc. (Comp)	Ironwood, MI	02/01/08	01/31/08
62792	Erisco Industries, Inc. (Wkrs)	Erie, PA	02/01/08	01/30/08

[FR Doc. E8–2617 Filed 2–12–08; 8:45 am]
BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,184; TA–W–62,184A]

Mark Eyelet, Inc., Including On-Site Leased Workers of Jaci Carroll Staffing, Watertown, CT; Ozzi II, Inc., (DBA OC Eyelet), Including On-Site Leased Workers of Watertown, CT; Notice of Negative Determination on Reconsideration

On January 7, 2007, the Department issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of the subject firm. The notice was published in the **Federal Register** on January 16, 2008 (73 FR 2941).

The initial investigation resulted in a negative determination based on the finding that imports of eyelet parts and miniature stamping did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

The company official of the subject firm filed a request for reconsideration and provided a list of customers which allegedly are importing products.

On reconsideration the Department of Labor surveyed these declining customers regarding their purchases of like or directly competitive products with eyelet parts and miniature stampings purchased from the subject firm in 2005, 2006, and during January through September 2007 over the corresponding 2006 period. The survey revealed that the customers did not import eyelet parts and miniature stampings during the relevant period.

The petitioner also stated that the subject firm did not shift production of eyelet parts and miniature stamping abroad, but the customers of the subject firm shifted production of automotive and electronic parts production to China, thus negatively impacting production at the subject firm.

The fact that subject firm's customers are shifting their production abroad is not relevant to this investigation. According to section (a)(2)(B) of the

Trade Act, in order to be eligible for TAA on the basis of a shift in production abroad, the shift in production must be implemented by the subject firm or its subdivision.

In this case, the subject firm did not import eyelet parts and miniature stampings nor was there a shift in production from subject firm abroad during the relevant period.

Conclusion

After reconsideration, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of Mark Eyelet, Inc., including on-site leased workers of Jaci Carroll Staffing Watertown, Connecticut (TA–W–62,184) and Ozzi II, Inc., (dba OC Eyelet), including on-site leased workers of Jaci Carroll Staffing, Watertown, Connecticut (TA–W–62,184A).

Signed at Washington, DC this 6th day of February, 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–2622 Filed 2–12–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–62,507]

Chester Bednar Rental Realty, Washington, PA; Notice of Negative Determination on Reconsideration

On January 8, 2008, the Department issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of the subject firm. The Department's Notice of determination was published in the **Federal Register** on January 16, 2008 (73 FR 2941).

The initial negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA) and Alternative Trade Adjustment Assistance (ATAA) applicable to workers and former workers of the subject firm was based on the Department's findings that the subject firm did not separate or threaten to separate from employment a significant number or proportion of workers as required by Section 222 of the Trade Act of 1974.

The request for reconsideration implied that the subject firm had separated more than three employees from employment.

During the reconsideration investigation, the Department requested that the company official provide documentation that the subject firm had separated or threaten to separate from employment a significant number or proportion of workers.

Based on the company official's response, the Department affirms that the subject firm did not separate or threaten to separate from employment a significant number or proportion of workers.

The Department finds that Section 222 of the Trade Act of 1974 was not satisfied and that the group eligibility criteria for TAA certification were not met.

In order for the Department to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA), the subject worker group must be certified eligible to apply for Trade Adjustment Assistance (TAA). Since the subject workers are denied eligibility to apply for TAA, the workers cannot be certified eligible for ATAA.

Conclusion

After careful reconsideration, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of Chester Bednar Rental Realty, Washington, Pennsylvania.

Signed at Washington, DC this 6th day of February 2008.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E8–2616 Filed 2–12–08; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0088]

Requests Nominations for Employer, Employee and Public Representatives To Serve on the Advisory Committee on Construction Safety and Health

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: OSHA requests nominations for employer, employee and public representatives to serve on the Advisory Committee on Construction Safety and Health (ACCSH).

SUMMARY: The Secretary of Labor invites interested parties to submit nominations, and materials in support of nominations, for membership on ACCSH.

DATES: Nominations for ACCSH must be submitted (postmarked, sent or received) by March 14, 2008.

ADDRESSES: You may submit nominations and supporting materials for ACCSH, identified with the agency name, OSHA, and the Docket No. OSHA–2007–0088 by any of the following methods:

Electronically: You may make electronic submissions at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions on-line for submitting comments.

Facsimile: If the nomination, including supporting materials, is not longer than 10 pages, you may fax it to the OSHA Docket Office at (202) 693–1648.

Mail, express delivery, hand delivery, messenger or courier service: If you want to submit a nomination or supporting materials, in hard copy, you must send three copies to the OSHA Docket Office, Room N–2625, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210; telephone (202) 693–2350 (OSHA's TTY number is (877) 889–5627). The deliveries will be accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.–4:45 p.m., e.t.

Submission requirements, instructions, and cautions: See the **SUPPLEMENTARY INFORMATION** section below.

Assistance with on-line submissions and docket access: User Tips—*http://www.regulations.gov/fdmspublic/component/main;* or OSHA Docket Office, telephone (202) 693–2350 (OSHA's TTY number is (877) 889–5627).

FOR FURTHER INFORMATION CONTACT: Mr. Michael M.X. Buchet, OSHA, Directorate of Construction-Office of Construction Services, Room N–3468, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC. 20210; telephone 202–693–2020; e-mail address *buchet.michael@dol.gov.*

SUPPLEMENTARY INFORMATION: The Assistant Secretary of Labor for Occupational Safety and Health invites interested parties to submit nominations and materials in support of nominations for membership on ACCSH to OSHA.

Background: ACCSH is a continuing advisory committee established under Section 107(e) of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704(d)(4)), which is required to advise the Secretary in formulating

construction safety and health standards and other regulations, as well as on policy matters arising in carrying out these requirements. In addition, 29 CFR 1912.3(a) provides that the Assistant Secretary shall consult ACCSH whenever the Agency proposes occupational safety or health standards for construction activities.

As originally constituted ACCSH had nine members, three each representing: contractors, primarily building trade employees, and the public, appointed by the Secretary of Labor. Section 29 CFR 1912.3(c) explains that pursuant to Section 105 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3706) it had been found necessary and proper in the public interest and in order to prevent possible injustice to conform ACCSH's composition to that of Occupational Safety and Health Act Section 7(b) (29 U.S.C. 656) advisory committees and to increase its membership to 15 members. Under 29 CFR 1912.3(b), the Assistant Secretary of Labor for Occupational Safety and Health appoints fifteen members to ACCSH. One of the members is appointed to chair the committee.

ACCSH operates in compliance with the provisions of the Construction Safety Act, section 7 of the OSH Act, and the Federal Advisory Committee Act (5 U.S.C. App. 2), and regulations issued pursuant to those statutes (29 CFR 1912, 41 CFR part 101–6 and 102–3). ACCSH meets two to four times per year for one or two days per meeting.

ACCSH Membership: ACCSH members appointed by the Assistant Secretary serve staggered two-year terms. The categories of ACCSH membership including the number of new members to be appointed in conjunction with this notice are as follows:

- Five members who are qualified by experience and affiliation to present the viewpoint of employers in the construction industry: Three employer representatives will be appointed.
- Five members who are similarly qualified to present the viewpoint of employees in the construction industry: Three employee representatives will be appointed.
- Two representatives of State safety and health agencies: None will be appointed; the current representatives' terms expire in November 2009.
- Two public members, qualified by knowledge and experience to make a useful contribution to the work of ACCSH, such as those who have professional or technical experience and competence with occupational safety and health in the construction industry: One public representative will be appointed.
- One representative designated by the Department of Health and Human Services (HHS), National Institute of Occupational Safety and Health (NIOSH): The HHS representative serves an indefinite term. The current HHS designated representative from NIOSH will continue to serve indefinitely.

ACCSH members serve two-year terms, unless they resign, become unable to serve, cease to be qualified to serve, or are removed by the Secretary [29 CFR 1912.3(e)]. However, an ACCSH member whose term has expired may continue to serve until a successor is appointed. ACCSH members may serve successive terms as long as they remain otherwise qualified. Any member absent from two consecutive meetings may be removed or replaced.

The Department of Labor is committed to equal opportunity in the workplace and seeks broad-based and diverse ACCSH membership. Nominations for a specific category of ACCSH membership should come from groups or people within the category. Others are invited and encouraged to submit endorsements in support of particular nominees.

Submission requirements: Nominations must include the following information:

(1) Nominee's resume or curriculum vitae, including prior membership on ACCSH or with other relevant organizations or associations;

(2) Categories of membership (employer, employee, public) for which the nominee can serve;

(3) A summary of background, experience and qualifications that addresses the nominee's suitability for each of the nominated membership categories;

(4) Articles or other documents the nominee has authored that indicate his or her knowledge, experience and expertise in occupational safety and health, particularly as it pertains to the construction industry;

(5) The nominee's contact information (address, phone, e-mail); and

(6) A written commitment from the nominee of his or her willingness to attend meetings regularly and participate in good faith, and a statement that the nominee has no apparent conflicts of interest that would preclude unbiased service on ACCSH.

Submission instructions and cautions: All nominations, supporting documents, attachments and other materials must identify the Agency name, OSHA, and include the Docket No. OSHA–2007–0088. You may submit all materials in the following ways: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal by following on-line instructions; or (2) by facsimile (FAX) to the OSHA Docket Office at (202) 693–1648 or (3) by sending three (3) hard copies to the OSHA Docket Office, Room N–2625, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210; telephone (202) 693–2350 (OSHA's TTY number is (877) 889–5627).

You may supplement electronic submissions by attaching uploaded electronic document files. Alternatively, you may supplement electronic submissions with hard copy documents delivered by U.S. Mail, express delivery, hand delivery, messenger or courier service to OSHA Docket Office. Hard copy supplemental materials must be submitted in triplicate. All the materials must clearly identify your electronic nomination by Agency, OSHA, nominee name, date, and Docket No. OSHA–2007–0088 so that the new materials can be attached to the correct nomination packet.

All submissions in response to this **Federal Register** notice are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download on-line. All submissions, including materials not available on-line (*e.g.* copyrighted material), are available for inspection and copying at the OSHA Docket Office (See **ADDRESSES** section.). All submissions, including personal information provided, will be posted without change. Because all materials are available to the public either on-line or through the OSHA Docket Office, OSHA cautions interested parties about submitting personal information such as social security numbers and dates of birth.

Materials submitted using U.S. Postal Service mail may experience significant delays because of security-related procedures. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Assistance with on-line submissions and with docket access: Guidance for submitting nominations and materials in support of nominations is available on-line at the *http://www.regulations.gov* Web site User Tips link and by telephone, (202) 693–2350, (TTY, (877) 889–5627) at the OSHA Docket Office. Similar information, about on-line access to Docket No. OSHA–2007–0088 and about access to

materials not available on-line, can be found at the same two sources.

Member Selection: In addition to other relevant sources of information, the information received through this nomination process will assist the Assistant Secretary in making appointments to ACCSH. In selecting ACCSH members, the Assistant Secretary will consider individuals nominated in response to this **Federal Register** notice, as well as other qualified individuals. OSHA will publish the new ACCSH membership list in the **Federal Register**.

Federal Register *Access:* Electronic copies of this **Federal Register** document are available at *http://www.regulations.gov* and at *http://www.gpoaccess.gov/fr/*. Also this document, as well as news releases and other relevant information, is available at OSHA's Webpage, *http://www.osha.gov*.

Authority and Signature

Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice under the authority granted by section 7 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 656), section 107 of the Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 3701, *et seq.*), the Federal Advisory Committee Act (5 U.S.C. App. 2), and Secretary of Labor's Order No. 5–2007 (72 FR 31159).

Signed at Washington, DC, this 7th day of February 2008.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor for Occupational Safety & Health.

[FR Doc. E8–2625 Filed 2–12–08; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2008–0008]

Design of Cave-in Protection Systems; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comment.

SUMMARY: OSHA solicits comments concerning its request for an extension of the information collection requirements contained in 29 CFR 1926.652, Requirements for Protective Systems.

DATES: Comments must be submitted (postmarked, sent, or received) by April 14, 2008.

ADDRESSES: *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit three copies of your comments and attachments to the OSHA Docket Office, OSHA Docket No. OSHA–2008–0008, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number for the ICR (OSHA–2008–0008). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Michael Buchet at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Michael Buchet, Directorate of Construction, OSHA, U.S. Department of Labor, Room N–3468, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2020.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (i.e., employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651, *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

Paragraphs (b) and (c) of § 1926.652 (''Requirements for Protective Systems''; the ''Standard'') contain paperwork requirements that impose burden hours or costs on employers. These paragraphs require employers to use protective systems to prevent cave-ins during excavation work; these systems include sloping the side of the trench, benching the soil away from the excavation, or using a support system or shield (such as a trench box). The Standard specifies allowable configuration and slopes for excavations, and provides appendices to assist employers in designing protective systems. However, paragraphs (b)(3) and (b)(4) of the Standard permit employers to design sloping or benching systems based on tabulated data (Option 1), or to use a design approved by a registered professional engineer (Option 2).

Under Option 1, employers must provide the tabulated data in a written form that also identifies the registered professional engineer who approved the data and the parameters used to select the sloping or benching system drawn from the data, as well as the limitations of the data (including the magnitude and configuration of slopes determined to be safe); the document must also provide any explanatory information necessary to select the correct benching system based on the data. Option 2

requires employers to develop a written design approved by a registered professional engineer. The design information must include the magnitude and configuration of the slopes determined to be safe, and the identity of the registered professional engineer who approved the design.

Paragraphs (c)(2), (c)(3), and (c)(4) allow employers to design support systems, shield systems, and other protective systems based on tabulated data provided by a system manufacturer (Option 3) or obtained from other sources and approved by a registered professional engineer (Option 4); they can also use a design approved by a registered professional engineer (Option 5). If they select Option 3, employers must complete a written form that provides the manufacturer's specifications, recommendations, and limitations, as well as any deviations approved by the manufacturer. The paperwork requirements of Option 4 are the same as for Option 1. Option 5 requires a written form that provides a plan indicting the sizes, types, and configurations of the materials used in the protective system and the identity of the registered professional engineer who approved the design.

Each of these provisions requires employers to maintain a copy of the documents described in these options at the jobsite during construction. After construction is complete, employers may store the documents off-site provided they make them available to an OSHA compliance officer on request. These documents provide both the employer and the compliance officer with information needed to determine if the selection and design of a protective system are appropriate to the excavation work, thereby assuring employees of maximum protection against cave-ins.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

The Agency is requesting that OMB extend its approval of the information collection requirements contained in 29 CFR 1926.652, Requirements for Protective Systems. The Agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements contained in the Standard.

Type of Review: Extension of currently approved information collection requirements.

Title: Design of Cave-in Protection System.

OMB Number: 1218–0137.

Affected Public: Business or other for-profits.

Number of Respondents: 20,000.

Frequency of Response: On occasion.

Total Responses: 20,000.

Average Time per Response: Two hours to obtain information on the design of cave-in protection systems.

Estimated Total Burden Hours: 20,022 hours.

Estimated Cost (Operation and Maintenance): $815,400.

IV. Public Participation—Submission of Comments on this Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (FAX); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2008–0008). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506, *et seq.*) and Secretary of Labor's Order No. 5–2007 (72 FR 31159).

Signed at Washington, DC, on February 7, 2008.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. E8–2624 Filed 2–12–08; 8:45 am]

BILLING CODE 4510–26–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–64; EA–07–195]

In the Matter of: Certain 10 CFR Part 72 Licensees Who Have Near-Term Plans To Store Spent Fuel in an ISFSI Under General License Provision of 10 CFR Part 72 Order Modifying License (Effective Immediately)

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Issuance of Order for Implementation of Additional Security Measures and Fingerprinting for Unescorted Access to Certain Spent Fuel Storage Licensees.

FOR FURTHER INFORMATION CONTACT: L. Raynard Wharton, Senior Project Manager, Licensing and Inspection Directorate, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards (NMSS), U.S. Nuclear Regulatory Commission (NRC), Rockville, MD 20852. Telephone: (301) 492–3316; fax

number: (301) 492–3350; e-mail: *LRW@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

Pursuant to 10 CFR 2.106, NRC (or the Commission) is providing notice, in the matter of Certain 10 CFR part 72 Licensees Who Have Near-Term Plans To Store Spent Fuel in an ISFSI Under General License Provisions of 10 CFR part 72 Order Modifying License (Effective Immediately).

II. Further Information

The licensees identified in Attachment 3 to this Order hold licenses issued by the U.S. Nuclear Regulatory Commission (NRC or the Commission), authorizing the operation of an Independent Spent Fuel Storage Installation (ISFSI), in accordance with the Atomic Energy Act of 1954, as amended, and Title 10 of the *Code of Federal Regulations* (10 CFR) Part 72. This Order is being issued to these licensees because they have identified near-term plans to store spent fuel in an ISFSI under the general license provisions of 10 CFR part 72. The Commission's regulations at 10 CFR 72.212(b)(5) and 10 CFR 73.55(h)(1) require licensees to maintain safeguards and contingency plan procedures to respond to threats of radiological sabotage and to protect the spent fuel against the threat of radiological sabotage, in accordance with 10 CFR part 73, Appendix C. Specific safeguards requirements are contained in 10 CFR 73.51 or 73.55, as applicable.

Inasmuch as an insider has an opportunity equal to, or greater than, any other person, to commit radiological sabotage, the Commission has determined these measures to be prudent. This Order or comparable Orders have been issued to all licensees that currently store spent fuel or have identified near-term plans to store spent fuel in an ISFSI.

II

On September 11, 2001, terrorists simultaneously attacked targets in New York, NY, and Washington, DC, using large commercial aircraft as weapons. In response to the attacks and intelligence information subsequently obtained, the Commission issued a number of Safeguards and Threat Advisories to its licensees, to strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility. On October 16, 2002, the Commission issued Orders to the licensees of operating ISFSIs, to place the actions taken in response to the Advisories into the established regulatory framework and to implement additional security enhancements that emerged from NRC's ongoing comprehensive review. The Commission has also communicated with other Federal, State, and local government agencies and industry representatives to discuss and evaluate the current threat environment in order to assess the adequacy of security measures at licensed facilities. In addition, the Commission has conducted a comprehensive review of its safeguards and security programs and requirements.

As a result of its consideration of current safeguards and security requirements, as well as a review of information provided by the intelligence community, the Commission has determined that certain additional security measures (ASMs) are required to address the current threat environment, in a consistent manner throughout the nuclear ISFSI community. Therefore, the Commission is imposing requirements, as set forth in Attachments 1 and 2 of this Order, on all licensees of these facilities. These requirements, which supplement existing regulatory requirements, will provide the Commission with reasonable assurance that the public health and safety and common defense and security continue to be adequately protected in the current threat environment. These requirements will remain in effect until the Commission determines otherwise.

The Commission recognizes that licensees may have already initiated many of the measures set forth in Attachments 1 and 2 to this Order, in response to previously issued advisories, or on their own. It also recognizes that some measures may not be possible or necessary at some sites, or may need to be tailored to accommodate the specific circumstances existing at the licensee's facility, to achieve the intended objectives and avoid any unforeseen effect on the safe storage of spent fuel.

Although the ASMs implemented by licensees in response to the Safeguards and Threat Advisories have been sufficient to provide reasonable assurance of adequate protection of public health and safety, the Commission concludes that these actions must be supplemented further because the current threat environment continues to persist. Therefore, it is appropriate to require certain ASMs, and these measures must be embodied in an Order, consistent with the established regulatory framework.

To provide assurance that licensees are implementing prudent measures to achieve a consistent level of protection to address the current threat environment, licenses issued pursuant to 10 CFR 72.210 shall be modified to include the requirements identified in Attachments 1 and 2 to this Order. In addition, pursuant to 10 CFR 2.202, I find that, in light of the common defense and security circumstances described above, the public health, safety, and interest require that this Order be immediately effective.

III

Accordingly, pursuant to sections 53, 103, 104, 147, 149, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR parts 50, 72, and 73, IT IS HEREBY ORDERED, EFFECTIVE IMMEDIATELY, THAT YOUR GENERAL LICENSE IS MODIFIED AS FOLLOWS:

A. The licensee shall comply with the requirements described in Attachments 1 and 2 to this Order, except to the extent that a more stringent requirement is set forth in the licensee's security plan. The licensee shall immediately start implementation of the requirements in Attachments 1 and 2 to the Order and shall complete implementation no later than 180 days from the date of this Order, with the exception of the ASM B.4 of Attachment 1 [''Additional Security Measures (ASMs) for Physical Protection of Dry Independent Spent Fuel Storage Installations (ISFSIs)''], which shall be implemented no later than 365 days from the date of this Order. In any event, the licensee shall complete implementation of all ASMs before the first day that spent fuel is initially placed in the ISFSI.

B. 1. The licensee shall, within twenty (20) days of the date of this Order, notify the Commission: (1) if they are unable to comply with any of the requirements described in Attachments 1 and 2; (2) if compliance with any of the requirements is unnecessary, in its specific circumstances; or (3) if implementation of any of the requirements would cause the licensee to be in violation of the provisions of any Commission regulation or the facility license. The notification shall provide the licensee's justification for seeking relief from, or variation of, any specific requirement.

2. If the licensee considers that implementation of any of the requirements described in Attachments 1 and 2 to this Order would adversely impact the safe storage of spent fuel, the licensee must notify the Commission, within twenty (20) days of this Order, of the adverse safety impact, the basis for

its determination that the requirement has an adverse safety impact, and either a proposal for achieving the same objectives specified in Attachments 1 and 2 requirements in question, or a schedule for modifying the facility, to address the adverse safety condition. If neither approach is appropriate, the licensee must supplement its response, to Condition B.1 of this Order, to identify the condition as a requirement with which it cannot comply, with attendant justifications, as required under Condition B.1.

C. 1. The licensee shall, within twenty (20) days of this Order, submit to the Commission, a schedule for achieving compliance with each requirement described in Attachments 1 and 2.

2. The licensee shall report to the Commission when it has achieved full compliance with the requirements described in Attachments 1 and 2.

D. All measures implemented or actions taken in response to this Order shall be maintained until the Commission determines otherwise.

The licensee's response to Conditions B.1, B.2, C.1, and C.2, above, shall be submitted in accordance with 10 CFR 72.4. In addition, submittals that contain Safeguards Information shall be properly marked and handled, in accordance with 10 CFR 73.21.

The Director, Office of Nuclear Material Safety and Safeguards, may, in writing, relax or rescind any of the above conditions, for good cause.

IV

In accordance with 10 CFR 2.202, the licensee must, and any other person adversely affected by this Order may, submit an answer to this Order within 20 days of the date of the Order. In addition, the licensee and any other person adversely affected by this Order, may request a hearing on this Order within 20 days of the date of the Order. Where good cause is shown, consideration will be given to extending the time to answer or request a hearing. A request for extension of time must be made, in writing, to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and include a statement of good cause for the extension.

The answer may consent to this Order. If the answer includes a request for a hearing, it shall, under oath or affirmation, specifically set forth the matters of fact and law on which the licensee relies and the reasons as to why the Order should not have been issued. If a person other than the licensee requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d).

A request for a hearing must be filed in accordance with the NRC E–Filing rule, which became effective on October 15, 2007. The NRC E-filing Final Rule was issued on August 28, 2007, (72 Fed. Reg. 49,139) and codified in pertinent part at 10 CFR Part 2, Subpart B. The E–Filing process requires participants to submit and serve documents over the internet or, in some cases, to mail copies on electronic optical storage media. Participants may not submit paper copies of their filings unless they seek waivers in accordance with the procedures described below.

To comply with the procedural requirements associated with E–Filing, at least five (5) days prior to the filing deadline the requestor must contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV,* or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E–Submittal server for any NRC proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding [even in instances when the requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate]. Each requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E–Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate also is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.*

Once a requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, they can then submit a request for a hearing through EIE. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the filer submits its document through EIE. To be timely, electronic filings must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E–Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, any others who wish to participate in the proceeding (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request is filed so that they may obtain access to the document via the E–Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737.

Participants who believe that they have good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First-class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville, Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair-Use application, Participants are requested

not to include copyrighted materials in their works.

If a hearing is requested by the licensee or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), the licensee may, in addition to requesting a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the grounds that the Order, including the need for immediate effectiveness, is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions as specified in section III shall be final twenty (20) days from the date of this Order without further Order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions as specified in section III shall be final when the extension expires, if a hearing request has not been received. AN ANSWER OR A REQUEST FOR HEARING SHALL NOT STAY THE IMMEDIATE EFFECTIVENESS OF THIS ORDER.

Dated at Rockville, Maryland, this 28th day of January, 2008

For the Nuclear Regulatory Commission.

Michael F. Weber,

Director, Office of Nuclear Material Safety and Safeguards.

Attachment 1—Additional Measures (ASMs) for Physical Protection of Dry Independent Spent Fuel Storage Installations (ISFSIs) contains Safeguards Information and is not included in the Federal Register Notice

Attachment 2—Additional Security Measures for Access Authorization and Fingerprinting at Independent Spent Fuel Storage Installations

A. General Basis Criteria

1. These additional security measures (ASMs) are established to delineate an independent spent fuel storage installation (ISFSI) licensee's responsibility to enhance security measures related to authorization for unescorted access to the protected area of an ISFSI in response to the current threat environment.

2. Licensees whose ISFSI is collocated with a power reactor may choose to comply with the NRC-approved reactor access authorization program for the associated reactor as an alternative means to satisfy the provisions of sections B through G below. Otherwise, licensees shall comply with the access authorization and fingerprinting requirements of section B through G of these ASMs.

3. Licensees shall clearly distinguish in their 20-day response which method they intend to use in order to comply with these ASMs.

B. Additional Security Measures for Access Authorization Program

1. The licensee shall develop, implement and maintain a program, or enhance their existing program, designed to ensure that persons granted unescorted access to the protected area of an ISFSI are trustworthy and reliable and do not constitute an unreasonable risk to the public health and safety or the common defense and security, including a potential to commit radiological sabotage.

a. To establish trustworthiness and reliability, the licensee shall develop, implement, and maintain procedures for conducting and completing background investigations, prior to granting access. The scope of background investigations must address at least the past 3 years and, as a minimum, must include:

i. Fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check (CHRC). Where an applicant for unescorted access has been previously fingerprinted with a favorably completed CHRC, (such as a CHRC pursuant to compliance with orders for access to safeguards information) the licensee may accept the results of that CHRC, and need not submit another set of fingerprints, provided the CHRC was completed not more than 3 years from the date of the application for unescorted access.

ii. Verification of employment with each previous employer for the most recent year from the date of application.

iii. Verification of employment with an employer of the longest duration during any calendar month for the remaining next most recent two years.

iv. A full credit history review.

v. An interview with not less than two character references, developed by the investigator.

vi. A review of official identification (e.g., driver's license, passport, government identification, state, province or country of birth issued certificate of birth) to allow comparison of personal information data provided by the applicant. The licensee shall maintain a photocopy of the identifying document(s) on file, in accordance with ''Protection of Information,'' Section G of these ASMs.

vii. Licensees shall confirm eligibility for employment through the regulations of the U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS), and shall verify and ensure to the extent possible, the accuracy of the provided social security number and alien registration number as applicable.

b. The procedures developed or enhanced shall include measures for confirming the term, duration, and character of military service, and academic enrollment and attendance in lieu of employment, for the past 3 and 5 years respectively.

c. Licensees need not conduct an independent investigation for individuals employed at a facility who possess active ''Q'' or ''L'' clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

d. A review of the applicant's criminal history, obtained from local criminal justice resources, may be included in addition to the FBI CHRC, and is encouraged if the results of the FBI CHRC, employment check, or credit check disclose derogatory information. The scope of the applicant's local criminal history check shall cover all residences of record for the past 3 years from the date of the application for unescorted access.

2. The licensee shall use any information obtained as part of a CHRC solely for the purpose of determining an individual's suitability for unescorted access to the protected area of an ISFSI.

3. The licensee shall document the basis for its determination for granting or denying access to the protected area of an ISFSI.

4. The licensee shall develop, implement, and maintain procedures for updating background investigations for persons who are applying for reinstatement of unescorted access. Licensees need not conduct an independent reinvestigation for individuals who possess active ''Q'' or ''L'' clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

5. The licensee shall develop, implement, and maintain procedures for reinvestigations of persons granted unescorted access, at intervals not to exceed 5 years. Licensees need not conduct an independent reinvestigation for individuals employed at a facility who possess active ''Q'' or ''L'' clearances or possess another active U.S. Government granted security clearance, i.e., Top Secret, Secret or Confidential.

6. The licensee shall develop, implement, and maintain procedures designed to ensure that persons who have been denied unescorted access authorization to the facility are not allowed access to the facility, even under escort.

7. The licensee shall develop, implement, and maintain an audit program for licensee and contractor/vendor access authorization programs that evaluate all program elements and include a person knowledgeable and practiced in access authorization program performance objectives to assist in the overall assessment of the site's program effectiveness.

C. Fingerprinting Program Requirements

1. In a letter to the NRC, the licensee must nominate an individual who will review the results of the FBI CHRCs to make trustworthiness and reliability determinations for unescorted access to an ISFSI. This individual, referred to as the ''reviewing official,'' must be someone who requires unescorted access to the ISFSI. The NRC will review the CHRC of any individual nominated to perform the reviewing official function. Based on the results of the CHRC, the NRC staff will determine whether this individual may have access. If the NRC determines that the nominee may not be granted such access, that individual will be prohibited from obtaining access.[1] Once the NRC approves a reviewing official, the reviewing official is the only individual permitted to make access determinations for other individuals who have been identified by the licensee as having the need for unescorted access to the ISFSI, and have been fingerprinted and have had a CHRC in accordance with these ASMs. The reviewing official can only make access determinations for other individuals, and therefore cannot approve other individuals to act as reviewing officials. Only the NRC can approve a reviewing official. Therefore, if the licensee wishes to have a new or additional reviewing official, the NRC must approve that individual before he or she can act in the capacity of a reviewing official.

2. No person may have access to SGI or unescorted access to any facility subject to NRC regulation if the NRC has determined, in accordance with its administrative review process based on fingerprinting and an FBI identification and CHRC, that the person may not have access to SGI or unescorted access to any facility subject to NRC regulation.

3. All fingerprints obtained by the licensee pursuant to this Order must be submitted to the Commission for transmission to the FBI.

4. The licensee shall notify each affected individual that the fingerprints will be used to conduct a review of his/her criminal history record and inform the individual of the procedures for revising the record or including an explanation in the record, as specified in the ''Right to Correct and Complete Information'' in section F of these ASMs.

5. Fingerprints need not be taken if the employed individual (*e.g.*, a licensee employee, contractor, manufacturer, or supplier) is relieved from the fingerprinting requirement by 10 CFR 73.61, has a favorably adjudicated U.S. Government CHRC within the last five (5) years, or has an active federal security clearance. Written confirmation from the Agency/employer who granted the federal security clearance or reviewed the CHRC must be provided to the licensee. The licensee must retain this documentation for a period of three (3) years from the date the individual no longer requires access to the facility.

D. Prohibitions

1. A licensee shall not base a final determination to deny an individual unescorted access to the protected area of an ISFSI solely on the basis of information received from the FBI involving: an arrest more than one (1) year old for which there is no information of the disposition of the case, or an arrest that resulted in dismissal of the charge or an acquittal.

2. A licensee shall not use information received from a CHRC obtained pursuant to this Order in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States, nor shall the licensee use the information in any way which would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

E. Procedures for Processing Fingerprint Checks

1. For the purpose of complying with this Order, licensees shall, using an appropriate method listed in 10 CFR 73.4, submit to the NRC's Division of Facilities and Security, Mail Stop T–6E46, one completed, legible standard fingerprint card (Form FD–258, ORIMDNRCOOOZ) or, where practicable, other fingerprint records for each individual seeking unescorted access to an ISFSI, to the Director of the Division of Facilities and Security, marked for the attention of the Division's Criminal History Check Section. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by calling (301) 415–5877, or by e-mail to *forms@nrc.gov.* Practicable alternative formats are set forth in 10 CFR 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards.

2. The NRC will review submitted fingerprint cards for completeness. Any Form FD–258 fingerprint record containing omissions or evident errors will be returned to the licensee for corrections. The fee for processing fingerprint checks includes one re-submission if the initial submission is returned by the FBI because the fingerprint impressions cannot be classified. The one free resubmission must have the FBI Transaction Control Number reflected on the re-submission. If additional submissions are necessary, they will be treated as initial submittals and will require a second payment of the processing fee.

3. Fees for processing fingerprint checks are due upon application. The licensee shall submit payment of the processing fees electronically. In order to be able to submit secure electronic payments, licensees will need to establish an account with Pay.Gov (*https://www.pay.gov*). To request an account, the licensee shall send an e-mail to *det@nrc.gov.* The email must include the licensee's company name, address, point of contact (POC), POC e-mail address, and phone number. The NRC will forward the request to Pay.Gov; who will contact the licensee with a password and user lD. Once licensees have established an account and submitted payment to Pay.Gov, they shall obtain a receipt. The licensee shall submit the receipt from Pay.Gov to the NRC along with fingerprint cards. For additional guidance on making electronic payments, contact the Facilities Security Branch, Division of Facilities and Security, at (301) 415–7739. Combined payment for multiple applications is acceptable. The application fee (currently $36) is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an NRC processing fee, which covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission will

[1] The NRC's determination of this individual's unescorted access to the ISFSI, in accordance with the process is an administrative determination that is outside the scope of the Order.

directly notify licensees who are subject to this regulation of any fee changes.

4. The Commission will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for criminal history records checks, including the FBI fingerprint record.

F. Right To Correct and Complete Information

1. Prior to any final adverse determination, the licensee shall make available to the individual the contents of any criminal history records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the licensee for a period of one (1) year from the date of notification.

2. If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (*i.e.*, law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation Identification Division, Washington, DC 20537–9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. The licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of a FBI CHRC after the record is made available for his/her review. The licensee may make a final access determination based upon the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination on access to an ISFSI, the licensee shall provide the individual its documented basis for denial. Access to an ISFSI shall not be granted to an individual during the review process.

G. Protection of Information

1. The licensee shall develop, implement, and maintain a system for personnel information management with appropriate procedures for the protection of personal, confidential information. This system shall be designed to prohibit unauthorized access to sensitive information and to prohibit modification of the information without authorization.

2. Each licensee who obtains a criminal history record on an individual pursuant to this Order shall establish and maintain a system of files and procedures, for protecting the record and the personal information from unauthorized disclosure.

3. The licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining suitability for unescorted access to the protected area of an ISFSI. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have the appropriate need-to-know.

4. The personal information obtained on an individual from a criminal history record check may be transferred to another licensee if the gaining licensee receives the individual's written request to re-disseminate the information contained in his/her file, and the gaining licensee verifies information such as the individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

5. The licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the NRC to determine compliance with the regulations and laws.

Attachment 3—Independent Spent Fuel Storage Installation Addressee List

Timothy J. O'Connor, Site Vice-President, Monticello Nuclear Generating Plant, Nuclear Management Company, LLC, Docket No. 72–58, 2807 West County Road 75, Monticello, MN 55362–9637.

David A. Christian, Senior Vice-President and Chief Nuclear Officer, Innsbrook Technical Center, Kewaunee Power Station, Docket No. 72–64, 5000 Dominion Boulevard, Glen Allen, VA 23060–6711.

Christopher M. Crane, President and Chief Nuclear Officer, Exelon Nuclear, Exelon Generation Company, LLC, Limerick Generating Station, Docket No. 72–65, 200 Exelon Way, KSA 3–E, Kennett Square, PA 19348.

Stewart B. Minahan, Vice President-Nuclear and CNO, Nebraska Public Power District, Cooper Nuclear Station, Docket No. 72–66, 72676 648A Avenue, Brownville, NE 68321.

[FR Doc. E8–2714 Filed 2–12–08; 8:45 am]
BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–266 and 301]

Nuclear Management Company, LLC; Notice of Withdrawal of Application for Amendment To Renewed Facility Operating License Nos. DPR–24 and DPR–27; FPL Energy Point Beach, LLC; Point Beach Nuclear Plant, Units 1 and 2

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of FPL Energy Point Beach, LLC, (the licensee) to withdraw its October 1, 2007, application for proposed amendment to Renewed Facility Operating License Nos. DPR–24 and DPR–27 for the Point Beach Nuclear Plant, Units No. 1 and 2, located in Manitowoc County, Wisconsin.

The proposed amendment would have revised the accident source term in the design-basis radiological consequences analyses and the associated Technical Specifications (TSs), pursuant to Section 50.67 of Part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR 50.67).

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on November 20, 2007, (72 FR 65366). However, by letter dated January 30, 2008, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated October 1, 2007, and the licensee's letter dated January 30, 2008, which withdrew the application for a 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 6th day of February 2008.

For the Nuclear Regulatory Commission.

Jack Cushing,

Senior Project Manager, Plant Licensing Branch III–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–2711 Filed 2–12–08; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57289; File No. SR–Amex–2008–06]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Amex Rule 3–AEMI

February 7, 2008.

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 31, 2007, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Exchange filed the proposal pursuant to section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Amex Rule 3–AEMI to include provisions regarding the prevention of the misuse of material nonpublic information by members, member organizations, or persons associated with such members, pursuant to the Act. The text of the proposed rule change is available at Amex, the Commission's Public Reference Room, and *http://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 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. Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposal is to amend Amex Rule 3–AEMI to include provisions regarding the prevention of the misuse of material nonpublic information by members, member organizations, or persons associated with such members, pursuant to section 15(f) of the Act.[5] section 15(f) requires that every registered broker or dealer establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such broker's or dealer's business, to prevent the misuse of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer. The Commission previously approved proposals by the Amex to amend non-AEMI Amex Rule 3 to require members to establish, maintain and enforce written policies and procedures to prevent the misuse of material nonpublic information.[6] This filing proposes to update Amex Rule 3–AEMI to adopt the rules in non-AEMI Amex Rule 3 concerning the prevention of the misuse of material nonpublic information, as previously approved by the Commission.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with section 6(b) of the Act[7] in general, and furthers the objectives of section 6(b)(5)[8] 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

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 proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder. As required under Rule 19b–4(f)(6)(iii) under the Act, the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of the filing of the proposed rule change.

A proposed rule change filed under 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. 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. Waiver of the 30-day operative delay would enable the Exchange to implement and enforce the new provisions relating to the prevention of the misuse of material nonpublic information in Amex Rule 3–AEMI immediately. For this reason, the Commission therefore designates the

[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] 15 U.S.C. 78o(f).

[6] *See* Securities Exchange Act Release No. 34–54983 (Dec. 20, 2006), 71 FR 78476 (Dec. 29, 2006) (File No. SR–Amex–2006–86). *See also* Securities Exchange Act Release No. 34–55187 (Jan. 29, 2007), 72 FR 5467 (Feb. 6, 2007) (File No. SR–Amex–2006–110).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

proposal to become operative immediately.

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–Amex–2008–06 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–2008–06. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such 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–2008–06 and should be submitted on or before March 5, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2614 Filed 2–12–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57285; File No. SR–CBOE–2008–10]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Exchange Membership Fees

February 7, 2008.

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 22, 2008, 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 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

Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') proposes to amend its Fees Schedule relating to its membership application fees. The text of the proposed rule change is available at the CBOE, on the Exchange's Web site at *http://www.cboe.org/legal,* and in 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, CBOE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. 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 CBOE Fees Schedule relating to its membership application fees to add a trading firm renewal fee (''Trading Firm Renewal Fee''). Membership application fees are set forth in section 11 of the CBOE Fees Schedule as well as in a regulatory circular (''Membership Fee Circular'').

The proposed Trading Firm Renewal Fee will apply to a former CBOE trading firm member that reapplies for CBOE membership within 9 months of its membership termination date and becomes an effective CBOE member within 1 year of its membership termination date. The Trading Firm Renewal Fee will encompass the trading firm application, and related documentation, and one nominee[3] who is either (i) an existing individual CBOE member desiring to change membership status or (ii) a former individual CBOE member who reapplies for membership within 9 months of their membership termination date and becomes an effective member within 1 year of their membership termination date.

The Trading Firm Renewal Fee will be $2,000.

2. Statutory Basis

The proposed rule change is consistent with section 6(b) of the Act,[4] in general, and furthers the objectives of section 6(b)(4)[5] 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.

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A nominee is an individual who is authorized by a trading firm member, in accordance with CBOE Rule 3.8, to represent such trading firm member in all matters relating to the Exchange.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

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 Act[6] and subparagraph (f)(2) of Rule 19b–4[7] 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.

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–2008–10 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–CBOE–2008–10. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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–2008–10 and should be submitted on or before March 5, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2612 Filed 2–12–08; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57286; File No. SR–CBOE–2007–122]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Granting Approval of a Proposed Rule Change as Modified by Amendment No. 1 Thereto Amending Its Obvious Error Rule for Options on Indices, ETFs, and HOLDRS

February 7, 2008.

On October 31, 2007, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend CBOE Rule 24.16 (''Rule 24.16'' or ''Rule''), which is the Exchange's rule applicable to the nullification and adjustment of transactions in index options, options on exchange-traded funds (''ETFs''), and options on HOLding Company Depository ReceiptS (''HOLDRS''), to change the manner in which the Rule applies the obvious price error provision to transactions occurring as part of the Hybrid Opening System (''HOSS'') process. On December 14, 2007, the CBOE submitted Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on December 28, 2007.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change, as amended.

Currently, Rule 24.16 provides that an obvious price error will be deemed to have occurred when the execution price of a buy (sell) transaction is above (below) the fair market value of the option by at least the prescribed minimum error amount, as set forth in the Rule. For purposes of transactions occurring on HOSS, ''fair market value'' is currently defined as the midpoint of the first quote after the transaction(s) in question that does not reflect the erroneous transaction(s). The Exchange proposes to revise the definition of fair market value to provide additional conditions that would apply during regular HOSS rotations and during HOSS rotations in index options series that are being used to calculate the final settlement price of volatility indexes on the final settlement day. According to CBOE, the additional conditions are intended to reasonably factor the amount of available liquidity into the fair market value calculation during these rotations.

With respect to regular HOSS rotations, the Exchange proposes to add a condition that the option contract quantity subject to nullification or adjustment cannot exceed the size of the first quote after the transaction(s) in question that does not reflect the erroneous transaction(s). Any nullification or adjustment would occur on a *pro rata* basis and would take into account the overall size of the HOSS opening trade.

With respect to HOSS rotations in index options series that are used to calculate the final settlement price of a volatility index on the final settlement day, the Exchange proposes to add a condition that the first quote after the transaction(s) in question that does not reflect the erroneous transaction(s) must be for at least the overall size of the HOSS opening trade. If the size of the quote is less than the overall size of the HOSS opening trade, then the obvious price error provision shall not apply.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 57005 (December 20, 2007), 72 FR 73919.

rules and regulations thereunder applicable to a national securities exchange [4] and, in particular, the requirements of section 6(b) of the Act [5] and the rules and regulations thereunder. Specifically, the Commission finds that the proposal is consistent with section 6(b)(5) of the Act,[6] in that the proposal is designed to promote just and equitable principles of trade, remove impediments and perfect the mechanisms of a free and open market, and to protect investors and the public interest.

The Commission considers that in most circumstances trades that are executed between parties should be honored. On rare occasions, the price of the executed trade indicates an ''obvious error'' may exist, suggesting that it is unrealistic to expect that the parties to the trade had come to a meeting of the minds regarding the terms of the transaction. In the Commission's view, the determination of whether an ''obvious error'' has occurred and the process for reviewing such a determination should be based on specific and objective criteria and subject to specific and objective procedures.

The Commission believes that the Exchange's proposal to revise Rule 24.16 by modifying the manner in which the Rule applies its obvious price error provision to transactions in index options, options on ETFs, and options on HOLDRS that occur as part of the HOSS process during regular opening rotations and during opening rotations on the final settlement day for volatility indexes is appropriate. The proposal provides for an objective standard because in each of the foregoing situations, the fair market value calculation must take into account the size of the quote.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[7] that the proposed rule change (SR–CBOE–2007–122), as amended, is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2613 Filed 2–12–08; 8:45 am]

BILLING CODE 8011–01–P

[4] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57283; File No. SR–DTC–2007–11]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Amendment No. 1 to Proposed Rule Change To Amend Its Operational Arrangements as It Applies to Structured Securities

February 6, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder [2] notice is hereby given that on September 7, 2007, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change. The proposed rule change was published for comment in the **Federal Register** on November 26, 2007.[3] The Commission received four comments on the original proposal.[4] On December 14, 2007, DTC filed Amendment No. 1 to the proposed rule change.[5] The filing, as amended, is described in Items I, II, and III below, which items have been prepared primarily by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change seeks approval to amend DTC's ''Operational Arrangements Necessary for an Issue to Become and Remain Eligible for DTC Services'' (''Operational Arrangements'') as it applies to Structured Securities. DTC's Operational Arrangements is a contractual agreement between DTC, issuers, and paying agents that outlines the procedural and operational requirements for an issue to become and remain DTC eligible.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 34–56795 (November 15, 2007), 72 FR 66009.

[4] Simon Griffiths, Vice President, JP Morgan (December 10, 2007); Tom Migneron, Principal, Edward Jones (December 11, 2007); Dan W. Schneider, Baker & McKenzie LLP, Counsel to the Association of Global Custodians, Chicago, Illinois (December 12, 2007); Norman Eaker, Chairman, Securities Industry and Financial Markets Association, Operations Committee, Gussie Tate, President, Securities Industry and Financial Markets Association, Dividend Division, and Thomas Hamilton, Vice Chairman, Securities Industry and Financial Markets Association, MBS and Securitized Products Division Executive Committee (December 19, 2007).

[5] Amendment No. 1 replaces and supersedes the original filing in its entirety. Amendment No. 1 corrects an inadvertent reference to ''issuer'' instead of ''underwriter'' in Section 2(ii).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[6]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The proposed rule change seeks to amend DTC's Operational Arrangements as it applies to Structured Securities in order to: extend the deadline by which paying agents of such securities must submit periodic payment rate information to DTC; establish an exception processing fee applied to certain Structured Securities whose features prevent paying agents from complying with the extended deadline; and provide that DTC track and make publicly available reports on paying agent performance as it relates to timeliness and accuracy of Structured Securities payment rate information submitted to DTC.

1. Background

On September 7, 2007, DTC filed with the Commission proposed rule change DTC–2007–11. Amendment No. 1 removes reference to the imposition of a processing fee on January 1, 2008, and corrects the identity of the party that will identify an issue as conforming or non-conforming and will submit a written attestation giving the reason for non-conformance.

A Structured Security, such as a collateralized mortgage obligation or asset-backed security (''ABS''), is a bond backed by a pool of underlying financial assets. The underlying assets generally consist of receivables such as mortgages, credit card receivables, or student or other bank loans for which the timing of principal payments by the underlying obligors may be variable and unpredictable. A Structured Security may also incorporate credit enhancements or other rights that affect

[6] The Commission has modified the text of the summaries prepared by DTC.

the amount and timing of payments to investors.

Communication of periodic payment rates of principal and interest (''P&I'') to the end investors in Structured Securities depends on application of stringent time frames for information reporting and significant interdependencies among servicers of the underlying assets, specifically trustees, custodians, paying agents on the securities, DTC, and the financial intermediaries that act on behalf of the investors. Given the complexity of structure and calculations of cash flow from the underlying assets through the issuer to the end investor and the interdependencies on timeliness and accuracy of performance throughout the chain of servicers and intermediaries, timely and accurate submission of payment rate information on Structured Securities may be difficult to achieve. As a result, payment rates typically are announced late on a significant number of issues, and the number of post-payable adjustments made to correct inaccurate payments resulting from inaccurate payment rate information is higher than for any other security type. Furthermore, the volume of P&I payments for Structured Securities processed through DTC has grown rapidly in recent years and currently represents approximately 25% of all P&I payments processed through DTC. Incorrect and late payment rate reporting causes increased operations processing costs, inefficient cash management, and loss of income.

Accordingly, DTC formed a cross-industry working group to study the severity of the problem of processing Structured Securities P&I and to analyze possible solutions.[7] In its analysis, the working group studied the payment rate reporting history of various Structured Securities, noting factors such as paying agent and type of deal structure. The working group determined that extending the date by which paying agents must submit rate information to DTC would allow a greater number of Structured Securities to meet DTC's requirements and thus be eligible for DTC services. It also concluded that there is a significant subset of Structured Securities for which the paying agent may not be able to comply even with an extended time frame for delivery of payment rate information because of features inherent in the structure of the security issue. It determined these securities should be expressly identified and handled as issues that require exception processing. Finally, it concluded that paying agent rate reporting performance on all Structured Securities should be evaluated and made publicly available to participants and other relevant parties. Accordingly, DTC proposes to implement the changes set forth below.

2. Proposed Amendments to Operational Arrangements

DTC's Operational Arrangements governs issue eligibility for deposit at DTC and issuer and agent obligations regarding servicing of the issue thereafter. Regarding notification on issues that pay P&I periodically or that pay interest at a variable rate, the Operational Arrangements currently requires the paying agent on the security to provide payment rate information to DTC preferably five business days but no later than two business days prior to the payable date.

(i) Extending the Deadline for Reporting on Payment Detail

Currently, the majority of Structured Securities have features that prevent paying agents from being able to adhere to the current Operational Arrangements rate reporting deadline. DTC is proposing to amend the Operational Arrangements to require that the payment notification regarding Structured Securities be provided to DTC by the paying agent preferably five business days but no later than one business day prior to the payable date. In addition, DTC will extend its current processing deadline for receipt of payment rate files from 7 p.m. to 11:30 p.m. The extended deadlines should allow paying agents to provide rates in a timely and accurate fashion for a majority of Structured Securities issues and should permit the securities to remain eligible for DTC's services while still providing DTC with adequate time to process the information and make timely payments to its participants.

(ii) Securities Classifications

Due to the complexity of certain Structured Securities, it is anticipated that the paying agents for certain issues will still not be able to meet the amended Operational Arrangements requirements for timely payment rate reporting even with the extended reporting period.[8] Therefore, DTC proposes to distinguish between ''conforming'' and ''non-conforming'' Structured Securities. Non-conforming Structured Securities will be issues for which the underwriter and paying agent have concluded that the security has features that will likely preclude the paying agent from submitting rate information to DTC in conformity with the requirements of the Operational Arrangements. The conforming/non-conforming identification will be made at the time the security is made eligible at DTC. For each Structured Securities underwriting that the underwriter and paying agent identify as non-conforming, the underwriter and paying agent shall submit a written attestation giving the reason for non-conformance. DTC will in turn identify non-conforming Structured Securities to participants and other relevant parties and will add an indicator to the appropriate DTC systems functions to denote non-conforming securities. Paying agents also shall be required to evaluate their entire portfolio of Structured Securities that have previously been made eligible and are currently on deposit at DTC to identify non-conforming securities.

(iii) Exception Processing Fee Applicable to Non-Conforming Securities

Securities processing inefficiencies and rate inaccuracies associated with late payment rate reporting lead to increased costs. In order to recoup the increased processing costs, DTC is proposing to impose an exception processing fee to the managing underwriter of the non-conforming issue at the time of underwriting. No fee will be charged retroactively on issues already on deposit at DTC prior to the implementation of the fee.

The exception processing fee of $4,200 per CUSIP was calculated based upon anticipated excess costs of P&I processing for non-conforming Structured Securities. The fee was filed with the SEC as part of DTC's annual establishment of fees.[9]

The aggregate net amount of the exception processing fees will be allocated and rebated on a pro rata basis annually to the DTC participants for whom DTC processed Structured Securities P&I allocations. For each participant, DTC would compare the participant's total number of allocations to the total number of all participants' allocations, and the resulting percentage would be applied against the total exception processing fund with the

[7] The group consisted of representatives from the Securities Industry and Financial Markets Association (SIFMA), major paying agents, servicers and master servicers, underwriters, and major retail and institutional broker-dealers and custodians.

[8] Although approximately 15% of Structured Security issues currently fail to have rates submitted to DTC in a timely manner, it is estimated that approximately only half of these have structural impediments to meeting the new requirements. Failures in timely rate reporting in other instances are believed to be curable by improved servicing and reporting on the securities.

[9] Securities Exchange Act Release No. 34–57193 (January 24, 2008), 73 FR 5614.

resulting amount being rebated to the participant. The total exception processing fund would be calculated as the sum of all exception processing fees less DTC's cost to administer the program.

(iv) Evaluation and Publication of Paying Agent Performance

DTC is proposing to track and evaluate paying agent performance with regard to timeliness and accuracy of payment rate reporting on Structured Securities and to make these evaluations available to DTC participants and to the public. The purpose of these evaluations is to identify poor payment and reporting performance for which a paying agent should be able, based on its attestation, to correct any underlying servicing issues associated with the payment and information flows.

DTC plans to expand evaluation reports (''Report Cards'') that are currently used to compare rate submission performance and accuracy of Structured Securities paying agents. Currently the Report Cards are only distributed among the paying agents being compared. DTC is proposing to make the Report Cards available on its Web site. The Report Card tracks and reports performance for a given month by paying agent with respect to the number of collateralized mortgage obligations and asset-backed securities announcements processed, the number of late and amended announcements, the payment dollars, late payment dollars, and the number of payments and late payments. Timeliness of payment rate notification on non-conforming Structured Securities will not be included in the proposed paying agent performance evaluation based on the paying agent's attestation that the Structured Security is a non-conforming issue. The other factors will be included with respect to both conforming and non-conforming securities.

(v) Conclusion

In summary, altering the Operational Arrangements to allow paying agents additional time in which to report payment rates will allow more issues of Structured Securities to be eligible at DTC. Identification of issues that cannot meet the proposed extended reporting deadlines and reporting on paying agent performance will allow the industry to anticipate processing inefficiencies associated with certain Structured Securities issues. Furthermore, imposition of an exception processing fee on Structured Securities that cannot meet the extended reporting deadlines due to deal structure will shift the expense associated with these securities to the underwriters and issuers that create the structure.

DTC believes that the proposed rule change is consistent with the requirements of section 17A of the Act[10] and the rules and regulations thereunder because the proposed changes removes impediments to and perfects the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change will have any impact or impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Commission received four written comment letters to the original proposed rule change, which was published for comment in the **Federal Register** on November 26, 2007.[11] These comments to the proposed rule change and any received to its amended version will be summarized and responded to in a future Commission release.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period: (i) As the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve 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 Number SR–DTC–2007–11 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-DTC–2007–11. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings also will be available for inspection and copying at the principal office of DTC and on DTC's Web site at: *http://www.dtcc.com/downloads/legal/rule_filings/2007/dtc/2007–11-amendment.pdf*. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–DTC–2007–11 and should be submitted on or before February 28, 2008.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2577 Filed 2–12–08; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78q–1.

[11] *Supra*, note 3.

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57291; File No. SR–NYSE–2007–113]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change To Amend Annual Fees Applicable to Groups of Real Estate Investment Trusts Under Common External Management

February 7, 2008.

I. Introduction

On December 20, 2007, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Annual Fees applicable to groups of Real Estate Investment Trusts (''REITs'') under common external management. The proposed rule change was published for comment in the **Federal Register** on January 4, 2008.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to amend section 902 of the Listed Company Manual by inserting proposed new section 902.03A. In its filing, the Exchange stated that in a limited number of cases, a single entity or affiliated entities may externally manage more than one REIT. As an incentive for all of the REITs in such a group to list on the Exchange, the Exchange is proposing to offer a group discount on Annual Fees when there are at least three REITs under common external management.

REITs will continue to be subject to the Annual Fees applicable to listed equity securities as set forth in section 902.03. However, section 902.03A will provide that, where all of the operations of each of a group of three or more listed REITs are externally managed by the same entity or by affiliated entities, each REIT in the group will receive a 30% discount on the applicable Annual Fees in relation to any year in which the common management relationship exists as of January 1. A newly-listed REIT that qualifies for the discount will receive it in relation to the part of the year for which it pays a prorated Annual Fee upon initial listing. For example, a REIT that lists on July 1 and whose outstanding number of shares would subject it to a $100,000 Annual Fee would normally pay a prorated amount of $50,000 because it would be listed for exactly half of the first year of listing. If that REIT qualifies for the group discount, it would pay $35,000 (70% of the prorated Annual Fee that would otherwise be payable). This filing seeks approval to apply the discount retroactively to January 1, 2008.

III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[4] In particular, the Commission finds that the proposal is consistent with section 6(b)(4) of the Act,[5] which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Commission also finds that the proposal is consistent with section 6(b)(5) of the Act,[6] which requires, *inter alia*, that the rules of a national securities exchange be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and not designed to permit unfair discrimination between issuers.

The Commission notes that the Exchange does not believe the limitation of the proposed discount to groups of three or more REITS under common external management is unfairly discriminatory. In support of this the Exchange states that: (i) It has a reasonable competitive justification for the discount; (ii) if it applied the discount to groups of less than three REITS it could lead to a significant loss of revenue to the Exchange; and (iii) it is not increasing the Annual Fees for REITs, and other, issuers. The Commission also notes that the Exchange has represented that the loss of revenue from the discount, as proposed, will not hinder its ability to fulfill its regulatory responsibilities.

The Commission believes it is reasonable for the Exchange to balance its need to remain competitive, while at the same time ensuring adequate revenue to meet its regulatory responsibilities. The Commission further notes that the Annual Fees applicable to all other REITs and operating companies are remaining unchanged, so no company that is not qualified for the discount is being asked to pay higher Annual Fees than it is currently paying.

In light of these arguments, the Commission agrees that the proposed discount, which is retroactively effective to January 1, 2008, does not constitute an inequitable allocation of reasonable dues, fees, and other charges, does not permit unfair discrimination between issuers, and is generally consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[7] that the proposed rule change (SR–NYSE–2007–113) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2610 Filed 2–12–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57284; File No. SR–NYSEArca–2008–16]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rules Pertaining to the Terms of Index Option Contracts

February 7, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 30, 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 substantially by NYSE Arca. NYSE Arca filed the proposed rule change as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders it effective

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57061 (December 28, 2007), 73 FR 0902.

[4] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(2).

[8] 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).

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 5.19(a) (Terms of Index Option Contracts) to allow the listing of up to seven expiration months for options on certain broad-based indexes. NYSE Arca proposes to implement the proposed rule change immediately.

The text of the proposed rule change is available at *http://www.nyse.com,* the principal office of NYSE Arca, and 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, NYSE Arca 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. 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

NYSE Arca proposes to amend Rule 5.19 (Terms of Index Options Contracts) to allow the Exchange to list up to seven expiration months for broad-based security index options upon which a constant three-month volatility index is calculated. Currently, Rule 5.19(a)(3) permits the Exchange to list only six expiration months in any index options at any one time.

Volatility products offer investors a unique set of tools for hedging. For example, the Chicago Board Options Exchange (''CBOE'') Volatility Index (''VIX'') options, first introduced in February 2006, have proven to be one of CBOE's most successful new products ever listed, currently averaging over 90,000 contracts traded per day. In a recent proposal, CBOE explained that it plans to introduce new volatility products and new volatility indexes in the near future, including the CBOE S&P 500 Three-Month Volatility Index (''VXV'').[5] Similar to the VIX, the VXV is a measure of S&P 500 implied volatility, the volatility implied by S&P option prices. Instead of reflecting a constant one-month implied volatility period, however, VXV is designed to reflect the implied volatility of an option with a constant three months to expiration. Since there is only one day on which an option has exactly three months to expiration, VXV is calculated as a weighted average of options expiring immediately before and immediately after the three-month standard.

Accordingly, an index calculator would need to use four consecutive expiration months in order to calculate a constant three-month volatility index. Under the current application of NYSE Arca Rule 5.19(a)(3), the Exchange generally lists three consecutive near term months and three months on a quarterly expiration cycle. One of the three consecutive near term months is always a quarterly month; however, that near term contract month (which is also a quarterly month) is not included as part of the three months listed on a quarterly expiration cycle. Therefore, in order to permit the addition of four consecutive near term months under current Rule 5.19(a)(3), the Exchange would only be able to list two months on a quarterly expiration cycle. Because of customer demand and other investment strategy reasons for having three months on a quarterly expiration cycle, the Exchange is seeking to increase, from six to seven, the number of expiration months for broad-based security index options upon which a constant three-month volatility index is calculated.

Proposed Rule 5.19(a)(3)(A) will permit the Exchange to list up to seven expiration months at any one time for any broad-based security index option contracts (e.g., NDX, RUT) upon which any exchange calculates a constant three-month volatility index.

Without this proposed rule, if a three-month volatility index is calculated using only three consecutive near term months, this would result in the VXV's being calculated with options expiring three months apart about one-third of the time. Another one-third of the time, VXV would be calculated with options expiring two months apart. And the final one-third of the time, VXV would be calculated with options expiring one month apart. As a result, the calculation of the three-month VXV under the current rules would render the VXV subject to inconsistencies that may make the index unattractive as an underlying for volatility products. The proposed rule change will permit the Exchange, eight times a year, to add an additional seventh month in order to maintain four consecutive near term contract months.[6]

Therefore, the Exchange believes that the addition of a fourth consecutive near term month for broad-based security index options upon which a constant three-month volatility index is calculated will result in a consistent calculation in which the option series that bracket three months to expiration will always expire one month apart. In order to accommodate the listing of a fourth consecutive near term month and to maintain the listing of three months on a quarterly expiration cycle, the Exchange proposes to increase, from six to seven, the number of expiration months for broad-based security indexes on which a constant three-month volatility index is calculated.

The Exchange also proposes making minor technical changes to certain subparagraphs contained in Rule 5.19(a) in order to accommodate the new rule.

NYSE Arca has analyzed its capacity and represents that it believes the Exchange and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the additional listing of a seventh contract month in order to maintain four consecutive near term contract months for those broad-based security index options upon which a constant three-month volatility index is calculated.

2. Statutory Basis

The proposed rule change is consistent with the provisions of section 6 of the Act,[7] in general, and with sections 6(b)(1) and (b)(5) of the Act,[8] in particular, in that the proposal is designed 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. NYSE Arca believes that the proposed rule

[5] CBOE calculates volatility indexes on other broad-based security indexes, such as the Dow Jones Industrial Average index (''DJX''), the Nasdaq-100 index (''NDX''), and the Russell 2000 index (''RUT''). CBOE may calculate a constant three-month volatility index on DJX, NDX, or RUT in the future. *See* Securities Exchange Act Release No. 56821 (November 20, 2007), 72 FR 66210 (November 27, 2007) (SR–CBOE–2007–82) (''CBOE proposal'').

[6] Examples illustrating the need for a seventh month in order to maintain four consecutive near term contract months can be found in the CBOE proposal, *supra* note 5.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(1) and (b)(5).

change is needed to remain competitive with other self-regulatory organizations that have listed the additional option series.

B. Self-Regulatory Organization's Statement on Burden on Competition

NYSE Arca 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 were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed under 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[11] However, Rule 19b–4(f)(6)(iii) [12] 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, to permit the Exchange to list options on the Fund immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission notes that another self-regulatory organization recently adopted a substantially similar rule change that was effective upon filing,[13] and that this filing raises no new regulatory issues.

The Commission believes that increasing, from six to seven, the number of expiration months for broad-based security indexes on which an Exchange calculates a constant three-month volatility index (to accommodate a fourth consecutive near-term month while maintaining the listing of three months on a quarterly expiration cycle) will result in a more consistent and predictable calculation in which the option series that bracket three months to expiration will always expire one month apart, thereby promoting just and equitable principles of trade while protecting investors and the public interest. The Commission also notes the Exchange's representations that it possesses the necessary systems capacity to handle the additional traffic associated with the additional listing of a seventh contract month in order to maintain four consecutive near-term contract months for those broad-based security index options upon which the Exchange calculates a constant three-month volatility index. The Commission hereby grants the Exchange's request and designates the proposal as operative upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–NYSEArca–2008–16 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–NYSEArca–2008–16. 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, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NYSE Arca. 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–2008–16 and should be submitted on or before March 5, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2611 Filed 2–12–08; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NYSE Arca has complied with this requirement.

[12] *Id.*

[13] *See* Securities Exchange Act Release No. 57104 (January 4, 2008), 73 FR 2070 (January 11, 2008) (SR–ISE–2007–113).

[14] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6095]

Announcement of Meetings of the International Telecommunication Advisory Committee

Summary: This notice announces a meeting of the International Telecommunication Advisory Committee (ITAC) to prepare advice on the World Telecommunication Standardization Assembly 2008 (WTSA 08).

The ITAC will meet to prepare advice for the U.S. on preparations for the World Telecommunication Standardization Assembly 2008 (WTSA 08) including positions on cybersecurity, study program restructuring, and leadership on Tuesday afternoon February 26, 2008 2–

4 p.m. EST in the Washington, DC metro area. Meeting details and detailed agendas will be posted on the mailing list *itac@eblist.state.gov*. People desiring to participate on this list may apply to the secretariat at *minardje@state.gov*.

The meeting is open to the public.

Dated: February 4, 2008.

James G. Ennis,

International Communications & Information Policy, Department of State.

[FR Doc. E8–2654 Filed 2–12–08; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF STATE

[Public Notice 6072]

Overseas Security Advisory Council (OSAC) Meeting Notice; Closed Meeting

The Department of State announces a meeting of the U.S. State Department—Overseas Security Advisory Council on February 28, 2008 at the Boeing Company, Arlington, Virginia. Pursuant to section 10 (d) of the Federal Advisory Committee Act and 5 U.S.C. 552b(c)(4) and 5 U.S.C. 552b(c)(7)(E), it has been determined that the meeting will be closed to the public. The meeting will focus on an examination of corporate security policies and procedures and will involve extensive discussion of proprietary commercial information that is considered privileged and confidential, and will discuss law enforcement investigative techniques and procedures. The agenda will include updated committee reports, a global threat overview, and other matters relating to private sector security policies and protective programs and the protection of U.S. business information overseas.

For more information, contact Marsha Thurman, Overseas Security Advisory Council, Department of State, Washington, DC 20522–2008, phone: 571–345–2214.

Dated: January 23, 2008.

Patrick D. Donovan,

Director of the Diplomatic Security Service, Acting Department of State.

[FR Doc. E8–2653 Filed 2–12–08; 8:45 am]

BILLING CODE 4710–43–P

DEPARTMENT OF STATE

[Public Notice 6079]

Shipping Coordinating Committee; Notice of Meeting

The Subcommittee for the Prevention of Marine Pollution of the Shipping Coordinating Committee (SHC) will conduct an open meeting at 9:30 a.m. on Wednesday, March 12, 2008, in Room 2415 of the United States Coast Guard Headquarters Building, 2100 2nd Street SW., Washington, DC 20593–0001. The primary purpose of the meeting is to prepare for the 57th Session of the International Maritime Organization's (IMO) Marine Environment Protection Committee (MEPC) to be held by the IMO, at the Royal Horticultural Halls and Conference Centre in London, England from March 31 to April 4, 2008. The primary matters to be considered include:

—Harmful aquatic organisms in ballast water;
—Recycling of ships;
—Prevention of air pollution from ships;
—Interpretation and amendments of MARPOL 73/78 and related instruments;
—Implementation of the International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC) Convention and the OPRC-Hazardous Noxious Substance (OPRC–HNS) Protocol and relevant conference resolutions;
—Identification and protection of Special Areas and Particularly Sensitive Sea Areas;
—Inadequacy of reception facilities;
—Reports of IMO sub-committees;
—Work of other bodies;
—Status of IMO Conventions;
—Harmful anti-fouling systems for ships;
—Promotion of implementation and enforcement of MARPOL 73/78 and related instruments;
—Follow-up to the United Nations Conference on Environment and Development (UNCED) and World Summit on Sustainable Development (WSSD);
—Technical co-operation programme;
—Role of the human element;
—Formal safety assessment;
—Work program of the MEPC and subsidiary bodies;
—Application of the MEPC's Guidelines; and
—Consideration of the report of the MEPC.

Please note that hard copies of documents associated with MEPC 57 will not be provided at this meeting. To request documents in electronic format (via e-mail or CD–ROM), please write to the address provided below, or request documents via the following Internet link: *http://www.uscg.mil/hq/g-m/mso/IMOMEPC.htm*.

Members of the public may attend this meeting up to the seating capacity of the room. Interested persons may seek information by writing to Lieutenant Heather St. Pierre, Commandant (CG–5224), U.S. Coast Guard Headquarters, 2100 Second Street SW., Room 1601, Washington, DC 20593–0001 or by calling (202) 372–1432.

Dated: February 5, 2008.

Mark W. Skolnicki,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. E8–2649 Filed 2–12–08; 8:45 am]

BILLING CODE 4710–09–P

TENNESSEE VALLEY AUTHORITY

Meetings; Sunshine Act

AGENCY HOLDING THE MEETING: Tennessee Valley Authority (Meeting No. 08–01).

TIME AND DATE: 11 a.m. EST, February 15, 2008, TVA Chattanooga Office Complex, 1101 Market Street, Chattanooga, Tennessee.

Agenda

Old Business

Approval of minutes of November 29, 2007, Board Meeting.

New Business

1. Chairman's Report
   A. Ad Hoc Committee on energy efficiency, demand response, and renewable energy
   B. Report on committee memberships
2. President's Report
3. Report of the Finance, Strategy, and Rates Committee
   C. Customer issues
   i. Rate adjustment
   ii. Renewable portfolio compliance for customers
   iii. Seven States (customer-owned generation)
4. Report of the Operations, Environment, and Safety Committee
   A. Radiological waste processing contract
5. Report of the Audit and Ethics Committee
6. Report of the Community Relations Committee
   A. Appointment to Regional Resource Stewardship Council
7. Report of the Corporate Governance Committee
   A. Amendments to TVA Bylaws
   B. TVA Board Practice on Approval of Settlements of Claims and Litigation
   C. TVA Board Practice on Board Member Continuing Education Opportunities
   D. Election of Chair
8. Ike Zeringue Engineer of the Year Award.

FOR MORE INFORMATION CONTACT: TVA Media Relations at (865) 632–6000,

Knoxville, Tennessee. People who plan to attend the meeting and have special needs should call (865) 632–6000. Anyone who wishes to comment on any of the agenda in writing may send their comments to: TVA Board of Directors, Board Agenda Comments, 400 West Summit Hill Drive, Knoxville, Tennessee 37902.

Dated: February 8, 2008.

Ralph E. Rodgers,

Assistant General Counsel and Assistant Secretary.

[FR Doc. 08–676 Filed 2–11–08; 9:49 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Request To Release Airport Property at Monroe Regional Airport, Monroe, LA.

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Request for public comment.

SUMMARY: The FAA proposes to rule and invites public comment on the release of land at Monroe Regional Airport under the provisions of title 49, U.S.C. section 47153(c).

DATES: Comments must be received on or before March 14, 2008.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Mr. Lacey D. Spriggs, Manager, Federal Aviation Administration, Southwest Region, Airports Division, LA/NM Airports Development Office, ASW–640, Fort Worth, Texas 76193–0640.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mayor James E. Mayo at the following address: Office of the Mayor, P.O. Box 123, Monroe, LA 71210.

FOR FURTHER INFORMATION CONTACT: Lacey D. Spriggs, Manager, Federal Aviation Administration, LA/NM Airports Development Office, ASW–640, 2601 Meacham Blvd., Fort Worth, Texas 76193–0640.

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 Monroe Regional Airport.

On February 4, 2008, the FAA determined that the request to release property at Monroe Regional Airport submitted by the City of Monroe 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 March 17, 2008.

The following is a brief overview of the request: The City of Monroe, Louisiana requests the release of 14.378 acres of airport property. The release of property will allow for construction of a new facility for storage of materials and supplies, which would serve as a warehouse for Sol's Pipe & Steel, Inc., to proceed. The sale is estimated to provide $160,700.00, whereas the proceeds will go toward construction of the new Terminal Building on the airport.

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 application, notice, and other documents germane to the application in person at the Monroe Regional Airport, Monroe, Louisiana.

Issued in Fort Worth, Texas on February 4, 2008.

Kelvin L. Solco,

Manager, Airports Division.

[FR Doc. 08–619 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Fifth 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/SYS).

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 213, Enhanced Flight Vision Systems/ Synthetic Vision System (EFVS/SVS).

DATES: The meeting will be held March 4–6, 2008 from 8:30 a.m. – 5 p.m.

ADDRESSES: The meeting will be held at Augusta Marriott Hotel, 2 Tenth Street, Augusta, Georgia 30901.

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. Contact: Ken Elliott, Jetcraft Corporation, telephone (706) 722–8900.

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:

- March 4th:
- Opening Plenary Session (Welcome, Introductions, and Agenda Review).
- Review SC–213 Objectives, Action Items, and SC–213 Web site content.
- Approve minutes from previous meeting.
- Review initial reports from WG 1, and WG 2.
- Industry Presentations.
- WG 1 and WG 2 meetings:
- WG 1: Review/edit most recent MASPS; Consensus of draft MASPS among WG 1.
- WG 2: Review/edit draft MASPS.
- March 5th:
- Continuation of WG 1 and WG 2 meetings.
- WG 2B: Continue to formulate plan performance criteria.
- March 6th:
- Plenary consensus of WG 1 draft MASPS.
- Review of action items.
- Define next steps for continued MASPS development.
- Closing Plenary Session (Other Business, Establish date and time for 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 5, 2008.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. 08–618 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Tier 1 Environmental Impact Statement: East Baton Rouge, West Baton Rouge, Iberville, Ascension, and Livingston Parishes, LA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that a Tier 1 Environmental Impact Statement (EIS)

will be prepared for a proposed toll highway facility in the vicinity of Baton Rouge, Louisiana.

FOR FURTHER INFORMATION CONTACT: Mr. Carl M. Highsmith, Project Delivery Team Leader, Federal Highway Administration, 5304 Flanders Drive, Suite A, Baton Rouge, Louisiana 70808, Telephone: (225) 757–7615, or Mr. Bryan K. Harmon, City of Baton Rouge, Parish of East Baton Rouge, Department of Public Works, Engineering Division, Deputy Director/Chief Engineer, Room 409, Municipal Building, 300 North Boulevard, Post Office Box 1471, Baton Rouge, LA 70821, Telephone: (225) 389–3186. Project information can be found at the project Internet Web site at *http://www.brloop.com*.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Capital Area Expressway Authority, and the City of Baton Rouge, Parish of East Baton Rouge, Louisiana will prepare a Tier 1 EIS on corridor alternatives for the proposed Baton Rouge Loop. The Baton Rouge Loop is planned on new location around Baton Rouge, Louisiana connecting I–10 west of Baton Rouge to I–10 south of Baton Rouge, I–10 west of Baton Rouge to I–12 east of Baton Rouge (which includes an interchange with I–110), and I–10 south of Baton Rouge to I–12 east of Baton Rouge. The project would include one or two major bridge crossings of the Mississippi River. the prototype corridor is approximately 77 miles long. The proposed facility would be controlled access toll road on new location that would initially have four lanes with provision to expand to six lanes. Major arterials that must be traversed, or incorporated into the complete Loop project may include: Interstate 10, Interstate 12, Interstate 100, US 190 (West Baton Rouge Parish), Scenic Highway (US 61), Airline Highway (US 190), Plank Road (LA 67), Harding Boulevard/Hooper Road (LA 408), Blackwater Road (LA 410), Joor Road (LA 946), Range Road (LA 16), Arnold Road (LA 1025), Walker Road North (LA 447), River Road (LA 327), Gardere Lane (LA 327), Bluebonnet Boulevard, Nicholson Road (LA 30), Airline Highway (US 61), LA 42, LA 44, and Walker Road South (LA 447).

The new facility is considered necessary to provide for existing and future traffic demand and to improve the hurricane evacuation system. At a minimum, the current project will examine, in addition to the no build alternative, three corridor build alternatives to be identified in the Baton Rouge Loop Implementation Plan, which is a planning study to identify engineering, environmental, financial, and community input factors that are important elements in the identification of potential loop corridors. The Tier 1 EIS is being initiated concurrently with the completion of the latter stages of the Implementation Plan. When the full loop corridor is established as a result of the Tier 1 EIS, one or more Tier 2 EIS's will be initiated to select an alignment within the corridor and detailed design features for individual segments of independent utility.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, local agencies, tribes, elected officials and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. Numerous public meetings will be held throughout the term of the project. The first of these meetings, a series of public scoping meetings, will be conducted to provide the public with information about the project and an opportunity to assist in formulating the scope of the study. The public scoping meetings are scheduled as follows:

- February 25th—East Baton Rouge Parish—BREC Headquarters.
- February 26th—Ascension Parish—Gonzales Civic Center.
- February 27th—Livingston Parish—North Park Recreation Center.
- February 28th—West Baton Rouge Parish—Port Allen Community Center.
- March 3rd—Iberville Parish—Plaquemine Civic Center.

A formal scoping meeting for agency input will be scheduled soon after initiation of the EIS. In addition, a public hearing will be held. Public notice will be given of the time and place of the public hearing. The draft EIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of issues related to this proposed project are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation of Federal programs and activities, apply to this program.)

Authority: 23 U.S.C., 315; 23 CFR 771.123.

Issued on: February 6, 2008.

Charles "Wes" Bolinger,

Division Administrator, FHWA, Louisiana Division, Baton Rouge, LA.

[FR Doc. 08–629 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–99–5748, FMCSA–00–8398, FMCSA–03–15892, FMCSA–03–16241, FMCSA–03–16564, FMCSA–05–22194, FMCSA–05–22727]

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 20 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 exemption renewals will provide a level of safety that is 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 March 5, 2008. Comments must be received on or before March 14, 2008.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–99–5748, FMCSA–00–8398, FMCSA–03–15892, FMCSA–03–16241, FMCSA–03–16564, FMCSA–05–22194, FMCSA–05–22727, using any of the following methods.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment 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 DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78; Apr. 11, 2000). This information is also available at *http://DocketInfo.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202)–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

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.

Exemption Decision

This notice addresses 20 individuals who have requested a renewal of their exemption in accordance with FMCSA procedures. FMCSA has evaluated these 20 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Eric D. Bennett
Lee A. Burke
Barton C. Caldara
Charlie F. Cook
Allan Darley
John K. DeGolier
Robin S. England
Richard Hailey, Jr.
Robert V. Hodges
George R. Knavel
John R. Knott, III
John K. Love
Roger D. Mollak
Edward D. Pickle
Ezequiel M. Ramirez
Kent S. Reining
James L. Schmitt
Earl W. Sheets
Thomas E. Voyles, Jr.
James T. Wortham, Jr.

These exemptions are extended subject to the following conditions: (1) That each individual have a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retain a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by 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 20 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (64 FR 40404; 64 FR 66962; 66 FR 66969; 68 FR 69432; 71 FR 6825; 65 FR 78256; 66 FR 16311; 68 FR 64944; 70 FR 67776; 68 FR 52811; 68 FR 61860; 70 FR 61165; 68 FR 61857; 68 FR 75715; 71 FR 644; 68 FR 74699; 69 FR 10503; 71 FR 6829; 70 FR 57353; 70 FR 72689; 70 FR 71884; 71 FR 4632; 68 FR 75715; 71 FR 6825). Each of these 20 applicants has requested 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 14, 2008.

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 20 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: February 5, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–2605 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket Nos. FMCSA–99–5578, FMCSA–99–6480, FMCSA–00–7363, FMCSA–01–10578, FMCSA–02–11426, FMCSA–05–21711, FMCSA–05–22194]

Qualification of Drivers; Exemption Renewals; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA previously announced its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 26 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has reviewed the comments submitted in response to the previous announcement and 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.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, 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 Federal Document Management System (FDMS) at *http://www.regulations.gov.*

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-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 statutes also allow the Agency to renew exemptions at the end of the 2-year period. The Notice was published on December 19, 2007. The comment period ended on January 18, 2008.

Discussion of Comments

FMCSA received one comment in this proceeding. The comment is considered and discussed below.

Advocates for Highway and Auto Safety (Advocates) expressed opposition to FMCSA's policy to grant exemptions from the FMCSR, including the driver qualification standards. Specifically, Advocates: (1) Objects to the manner in which FMCSA presents driver information to the public and makes safety determinations; (2) objects to the Agency's reliance on conclusions drawn from the vision waiver program; (3) claims the Agency has misinterpreted statutory language on the granting of exemptions (49 U.S.C. 31136(e) and 31315); and finally (4) suggests that a 1999 Supreme Court decision affects the legal validity of vision exemptions.

The issues raised by Advocates were addressed at length in 64 FR 51568 (September 23, 1999), 64 FR 66962 (November 30, 1999), 64 FR 69586 (December 13, 1999), 65 FR 159 (January 3, 2000), 65 FR 57230 (September 21, 2000), and 66 FR 13825 (March 7, 2001). We will not address these points again here, but refer interested parties to those earlier discussions.

Conclusion

The Agency has not received any adverse evidence on any of these drivers that indicates that safety is being compromised. Based upon its evaluation of the 26 renewal applications, FMCSA renews the Federal vision exemptions for, Bruce W. Barrett, Anthony Brandano, Stanley E. Elliott, Elmer E. Gockley, Glenn T. Hehner, Edward E. Hooker, Vladimir Kats, Alfred Keehn, Martin D. Keough, Randall B. Laminack, Norman R. Lamy, Robert W. Lantis, James A. Lenhart, Dennis L. Lockhart, Sr., Jerry J. Lord, Raymond P. Madron, Ronald S. Mallory, Eldon Miles, Jack E. Potts, Jr., Neal A. Richard, John E. Rogstad, Rene R. Trachsel, John H. Voigts, Kendle F. Waggle, Jr., DeWayne Washington, and Daniel G. Wilson.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 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 and 31315.

Issued on: February 5, 2008.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E8–2604 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2007–0023, Notice No. 1]

Federal Railroad Administration Review of the New Quiet Zone in Little Falls, MN

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of quiet zone review.

SUMMARY: In accordance with 49 CFR 222.51(c), FRA is providing notice of its intent to review the New Quiet Zone that has been established in Little Falls, MN. According to recent quiet zone risk calculations, the Quiet Zone Risk Index (QZRI) for the New Quiet Zone in Little Falls has undergone a dramatic increase and is now at a level above the Risk Index With Horns (RIWH). As it appears that safety systems and measures implemented within the quiet zone do not fully compensate for the absence of the locomotive horn due to a substantial increase in risk, FRA intends to review existing conditions within the New Quiet Zone to determine whether the quiet zone should be terminated or whether additional safety measures may be necessary to ensure motorist safety.

DATES: *Written Comments:* Comments must be received by March 14, 2008. Comments received after this date will be considered to the extent possible without incurring additional expense or delay.

ADDRESSES: All communications concerning these proceedings should

identify the appropriate docket number (Docket Number FRA–2007–0023) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading below.

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 (65 FR 19477–19478), or you may visit *http://DocketsInfo.dot.gov.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald Ries, Office of Safety, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202–493–6299); or

Ms. Kathryn Shelton, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202–493–6038).

SUPPLEMENTARY INFORMATION:

Background

The City of Little Falls established a New Quiet Zone for the following four highway-rail grade crossings through submission of a Notice of Quiet Zone Establishment:

1. 9th Avenue NW;
2. Broadway Avenue W;
3. Minnesota Power Company (a private highway-rail grade crossing); and
4. Highland Avenue (8th Avenue SE).

According to the Notice of Quiet Zone Establishment, which was dated October 24, 2006, this crossing corridor qualified for quiet zone status on the basis of having a QZRI that was below the RIWH. (The Notice of Quiet Zone Establishment indicated that the QZRI was 64,457 and that the RIWH was 69,396.) In other words, the Notice of Quiet Zone Establishment indicated that the City of Little Falls had taken sufficient measures to compensate for the excess risk that results from silencing routine train horn sounding at the four highway-rail grade crossings that were identified in the notice. Therefore, the Little Falls New Quiet Zone took effect on November 14, 2006.

Recent FRA Calculations

According to recent quiet zone calculations performed by FRA, the QZRI (i.e., the measure of risk to the motoring public at highway-rail grade crossings within the quiet zone) for the Little Falls New Quiet Zone has increased to 92,176. It appears that this increase in the quiet zone risk has been caused by several factors pertaining to the Broadway Avenue W Crossing, including increased highway traffic counts and a train/pedestrian incident that occurred at the crossing on September 9, 2006. This new QZRI is well over the RIWH that was used to establish the quiet zone.

Since the QZRI is now at a level above the RIWH (i.e., the measure of risk to the motoring public that would exist if locomotive horns were routinely sounded at every public highway-rail grade crossing within the quiet zone), it appears that safety systems and measures implemented within the New Quiet Zone in Little Falls fail to fully compensate for the absence of the locomotive horn. Therefore, FRA is initiating a review of existing conditions within the Little Falls New Quiet Zone, pursuant to 49 CFR 222.51(c), in order to determine whether the New Quiet Zone should be terminated or whether additional safety measures may be necessary to ensure motorist safety.

Interested parties are therefore invited to submit written comments on the Little Falls New Quiet Zone to the electronic docket. In particular, FRA is interested in obtaining information about any ''near-hit'' incidents involving train crews and motorists that may have occurred at the Broadway Avenue W Crossing during recent months, as well as information about the frequency with which crossing gate arms are being replaced due to motorist intrusion. FRA is also interested in obtaining information about any proposed safety improvements for the quiet zone that may be under serious consideration by the City of Little Falls. Please refer to the **ADDRESSES** section above for guidance on the submission of written comments to the electronic docket.

Issued in Washington, DC, on February 8, 2008.

Michael J. Logue,

Deputy Associate Administrator for Safety Compliance and Program Implementation.

[FR Doc. E8–2688 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a temporary waiver of compliance from certain requirements of Federal railroad safety regulations. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's argument in favor of relief.

South Carolina Public Railways

[Docket Number FRA–2008–0004]

South Carolina Public Railways (SCPR) has submitted a request for a temporary waiver from the requirements of 49 CFR Part 236, Subpart H, in order to allow SCPR to utilize Railsoft System, Inc.'s TrackAccess Electronic Block Register System in the autonomous mode on approximately 15.3 miles of track belonging to its subsidiary, the East Cooper & Berkeley Railroad (ECBR), until a Railroad Safety Program Plan (RSPP) and a Product Safety Plan (PSP) are completed, submitted to FRA, and approved. The TrackAccess system is presently utilized on ECBR in the assisted mode. Maximum speed on TrackAccess controlled track will be 20 mph.

Neither an RSPP, PSP, or an Informational Filing to allow testing, as are required under 49 CFR 236.905, 236.907, or 236.913 respectively, have yet been submitted. SCPR anticipates the necessary RSPP and PSP will be completed and submitted to FRA no later than June 2008.

As described by SCPR, the TrackAccess system is a computer application that is capable of electronically generating and/or delivering exclusive track occupancy permission for both trains and roadway workers on designated track. TrackAccess may be operated in one of two modes-assisted or autonomous. In

the assisted mode, a track authority is obtained from the system and electronically issued to the individual requesting the authority by a controller or dispatcher. In the autonomous mode, the authority is electronically obtained directly from TrackAccess by the individual requesting the authority, and no dispatcher is involved. TrackAccess is designed for low traffic shortline, branchline, and yard rail operations. In the view of the petitioner, TrackAccess protects train movements, it does not direct train movements.

According to SCPR, safety features of TrackAccess include: (1) protection against the issuance of overlapping permissions; (2) positive identification and verification of individuals requesting and receiving permissions; (3) verification of receipt of safety bulletins prior to issuance of permissions; and (4) required ''three-part communication'' procedures for telephony transactions.

Although the current petition is from the named party, FRA anticipates that, should relief be granted to the named petitioner, other petitioners may step forward. In order to avoid duplicative publications and filings related to this request for temporary relief, FRA also requests comments regarding whether, and under what conditions, FRA should permit other parties similarly situated to subscribe to any relief provided in this docket.

FRA notes that the instant petition was not accompanied by supporting safety data. However, FRA is advised that such data will be filed. Accordingly, potential commenters are requested to monitor the docket status and respond when such data is filed.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2008–0004) and may be submitted by one of the following methods:

Web site: *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Fax: 202–493–2251.

Mail: Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.

Hand Delivery: 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC. 20590, between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

Communications received within 30 days of the date of this notice or within 30 days following the filing of supporting safety data, whichever is later, will be considered by FRA before final action being taken. Comments received after this period will be considered as far as practicable.

All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov*.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing 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 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC, on February 8, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–2660 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for a waiver of compliance with certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

The LB Railco

[Docket Number FRA–2007–28613]

The LB Railco (LBRR), seeks a waiver of compliance from certain provisions of Safety Glazing Standards, 49 CFR Part 223, that requires certified glazing for two self-propelled switcher locomotives.

LBRR has been operating for the past several years as an industrial switcher for the Port of San Francisco. LBRR plans to expand its operation from currently four (4) miles to seven (7) miles of track as the primary shortline railroad operator for the Port of San Francisco once a new bridge is completed. LBRR plans to continue to use the Port's two historic ALCO S–2 switcher locomotives (LB 1 and LB 2) to service their current two customers and any customers that may require switching service at the Port in the future.

LBRR operates at a maximum speed of 20 mph with an average speed of 5 mph. The two ALCO S–2 switcher locomotives both have their original glass in the cabs, consisting of 13 separate windows in each cab. The glazing in these windows do not conform to 49 CFR Part 223 Safety Glazing Standards; however, the locomotives have been operating for the past 62 years in and around the same area of San Francisco, in which they currently operate and the glass has remained intact without damage.

LBRR requests a waiver from 49 CFR Part 223 requirements for these two locomotives because the locomotives operate at very slow speeds in a safe area. Both locomotives have historic significance and by replacing the glazing would diminish the historic value with an estimated cost of $15,000.00 to modify the glazing in each locomotive which would be prohibitively expensive.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA–2007–28613) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.

• *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and 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).

Issued in Washington, DC on February 8, 2008.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E8–2686 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2008 0006]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel KIPANY.

SUMMARY: As authorized by Public Law 105–383 and Public Law 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2008 0006 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Public Law 105–383 and MARAD's regulations at 46 CFR Part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before March 14, 2008.

ADDRESSES: Comments should refer to docket number MARAD–2008–0006. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel KIPANY is:

Intended Use: ''Uninspected passenger vessel/charter.''

Geographic Region: ''Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, and the USVI.''

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).

Dated: January 28, 2008.

By order of the Maritime Administrator.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. E8–2643 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Assistance to Small Shipyards Grant Program

AGENCY: Maritime Administration, Department of Transportation, Office of Shipyards and Marine Financing.

ACTION: Amendment to Notice of Establishment of New Grant Program.

Catalog of Federal Domestic Assistance Number: 20.814.

FOR FURTHER INFORMATION CONTACT: Jean E. McKeever, Associate Administrator for Business and Workforce Development, Maritime Administration, 1200 New Jersey Ave., SE., Washington, DC 20590; phone: (202) 366–5737; fax: (202) 366–3511; or e-mail: *jean.mckeever@dot.gov.*

Background: By notice in the **Federal Register** dated January 10, 2008 (Vol. 73, No. 7, PP. 1912–1913), the Maritime Administration announced the establishment of a new grant program to provide assistance to small shipyards. The notice stated that the grants are for ''* * * capital improvements, and related infrastructure improvements at qualified shipyards that will facilitate the efficiency, cost-effectiveness, and quality of domestic ship construction for commercial and Federal Government use.'' The notice also specified information that should be provided in a grant application. Item No. 4 asks in part for information as to how the proposed project '' * * * will facilitate the efficiency, cost-effectiveness, and quality of domestic ship construction for commercial and Federal Government use.'' Item No. 7 asks for ''most recent audited financial statements.''

Amendment: In order to properly reflect the scope of Congressional intent in authorizing the small shipyard assistance program in Section 3506 of the National Defense Authorization Act for Fiscal Year 2006 (Pub. L. 109–163), the description of the grant program set

forth above is amended to read that the grants are for ''* * * capital improvements, and related infrastructure improvements at qualified shipyards that will facilitate the efficiency, cost-effectiveness, and quality of domestic ship construction, ship conversion and/or ship repair for commercial and Federal Government use.'' Item No. 4 is amended in pertinent part to request information concerning how the project ''* * * will facilitate the efficiency, cost-effectiveness, and quality of domestic ship construction, ship conversion, and/or ship repair for commercial and Federal Government use.''

Because many small shipyards do not have audited financial statements, Item No. 7 is amended to add at the end the following sentence: ''If audited financial statements are not available, compiled financial statements by an independent Certified Public Accountant should be submitted.''

All other terms, conditions and deadline dates remain as set forth in the January 10, 2008 **Federal Register** Notice.

(Authority: 49 CFR 1.66.)

Dated: February 8, 2008.

By Order of the Maritime Administrator.

Murray A. Bloom,

Acting Secretary, Maritime Administration.

[FR Doc. E8–2661 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2008–0007]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel HEAVEN CAN WAIT.

SUMMARY: As authorized by Public Law 105–383 and Public Law 107–295, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2008–0007 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with Public Law 105–383 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before March 14, 2008.

ADDRESSES: Comments should refer to docket number MARAD–2008–0007. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel HEAVEN CAN WAIT is:

INTENDED USE: ''Luxury term charters (carrying passengers for hire).''

GEOGRAPHIC REGION: ''Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, and the U.S. Virgin Islands''

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).

Dated: January 29, 2008.

By order of the Maritime Administrator.

Christine Gurland,

Acting Secretary, Maritime Administration.

[FR Doc. E8–2738 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket Number NHTSA–2008–0026]

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for public comment on proposed collection of information.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections. This document describes one collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before April 14, 2008.

ADDRESSES: You may submit comments [identified by DOT Docket No. NHTSA–2008–0026] by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. Telephone: 1–800–647–5527.
- *Fax:* 202–493–2251.

Instructions: All submissions must include the agency name and docket number for this proposed collection of information. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

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 (65 FR 19477–78) or you may visit *http://DocketInfo.dot.gov.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Complete copies of each request for collection of information may be obtained at no charge from Markus Price, NHTSA, 1200 New Jersey Avenue, SE., W43–472 NVS–121, Washington, DC 20590. Mr. Markus Price's telephone number is (202) 366–0098. Please identify the relevant collection of information by referring to its OMB Control Number.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) how to enhance the quality, utility, and clarity of the information to be collected;

(iv) how to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following proposed collections of information:

Title: Compliance Labeling of Retroreflective Materials Heavy Trailer Conspicuity.

OMB Number: 2127–0569.

Type of Request: Extension of currently approved collection.

Affected Public: Business or other for profit organizations.

Abstract: Federal Motor Vehicle Safety Standard No. 108, ''Lamps, Reflective Devices, and Associated Equipment,'' specifies requirements for vehicle lighting for the purposes of reducing traffic accidents and their tragic results by providing adequate roadway illumination, improved vehicle conspicuity, appropriate information transmission through signal lamps, in day, night, and other conditions of reduced visibility. For certifications and identification purposes, the Standard requires the permanent marking of the letters DOT–C2, DOT–C3, or DOT–C4 at least 3 mm high at regular intervals on retroreflective sheeting material having adequate performance to provide effective trailer conspicuity.

The manufacturers of new tractors and trailers are required to certify that their products are equipped with retroreflective material complying with the requirements of the standard. The Federal Highway Administration (FHWA) Office of Motor Carrier Safety enforces this and other standards through roadside inspections of trucks. There is no practical field test for the performance requirements, and labeling is the only objective way of distinguishing trailer conspicuity grade material from lower performance material. Without labeling, FHWA will not be able to enforce the performance requirements of the standard and the compliance testing of new tractors and trailers will be complicated. Labeling is also important to small trailer manufacturers because it may help them to certify compliance. Because wider stripes or material of lower brightness also can provide the minimum safety performance, the marking system serves the additional role of identifying the minimum stripe width required for retroreflective brightness of the particular material. Since the differences between the brightness grades of suitable retroreflective conspicuity material is not obvious from inspection, the marking system is necessary for tractor and trailer manufacturers and repair shops to assure compliance and for FHWA to inspect tractors and trailers in use.

Permanent labeling is used to identify retroreflective material having the minimum properties required for effective conspicuity of trailers at night. The information enables the FHWA to make compliance inspections, and it aids tractor and trailer owners and repairs shops in choosing the correct repair materials for damaged tractors and trailers. It also aids smaller trailer manufacturers in certifying compliance of their products.

The FHWA will not be able to determine whether trailers are properly equipped during roadside inspections without labeling. The use of cheaper and more common reflective materials, which are ineffective for the application, would be expected in repairs without the labeling requirement.

Estimated Total Annual Burden: 1.

Estimated Number of Respondents: 6.

Issued: February 5, 2008.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. 08–609 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–59–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Reports, Forms and Record Keeping Requirements Agency Information Collection Activity Under OMB Review; Correction

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice; correction.

SUMMARY: National Highway Traffic Safety Administration, DOT published a document in the **Federal Register** of January 30, 2008, concerning request for comments on proposed collection of information in compliance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3501 *et seq.*]. The document contained incorrect dates.

FOR FURTHER INFORMATION CONTACT: Paul Simmons, 202–366–2315.

Correction

In the **Federal Register** of January 30, 2008, in FR Doc. 08–377, on page 5627, in the second column, correct the **DATES** caption to read:

DATES: Comments must be received on or before February 29, 2008.

Issued in Washington, DC, on February 7, 2008.

Kathleen C. DeMeter,

Director, Office of Defects Investigation.

[FR Doc. E8–2694 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2008–0018 (Notice No. 08–1)]

Information Collection Activities Under OMB Review; 2008 Renewals

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Requests (ICR) abstracted below will be forwarded to the Office of Management and Budget (OMB) for review and comments. The ICRs describe the nature of the information collections and their expected burden. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following collections of information was published in the **Federal Register** on November 30, 2007 [72 FR 67782] under Docket No. PHMS–2007–27181 (Notice No. 07–11). No comments pertaining to the renewal of these information collections were received.

DATES: Interested persons are invited to submit comments on or before March 14, 2008.

ADDRESSES: Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget (OMB), Attention: Desk Officer for PHMSA, 725 17th Street, NW., Washington, DC 20503. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: Deborah Boothe or T. Glenn Foster, U.S. Department of Transportation, Office of Hazardous Materials Standards (PHH–11), Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., East Building, 2nd Floor, Washington, DC 20590–0001, Telephone (202) 366–8553.

SUPPLEMENTARY INFORMATION: Section 1320.8(d), Title 5, Code of Federal Regulations requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies information collection requests that PHMSA will be submitting to OMB for renewal and extension. These information collections are contained in 49 CFR parts 110 and 130 and the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180). PHMSA has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on changes in proposed or final rules published since the information collections were last approved. The following information is provided for each information collection: (1) Title of the information collection, including former title if a change is being made; (2) OMB control number; (3) abstract of the information collection activity; (4) description of affected public; (5) estimate of total annual reporting and recordkeeping burden; and (6) frequency of collection. PHMSA will request a three-year term of approval for each information collection activity and, when approved by OMB, publish notice of the approval in the **Federal Register**.

PHMSA requests comments on the following information collections:

Title: Testing, Inspection and Marking Requirements for Cylinders.

OMB Control Number: 2137–0022.

Type of Request: Extension of a currently approved information collection.

Abstract: Requirements in § 173.301 for qualification, maintenance and use of cylinders require that cylinders be periodically inspected and retested to ensure continuing compliance with packaging standards. Information collection requirements address registration of retesters and marking of cylinders by retesters with their identification number and retest date following conduct of tests. Records showing the results of inspections and retests must be kept by the cylinder owner or designated agent until expiration of the retest period or until the cylinder is reinspected or retested, whichever occurs first. These requirements are intended to ensure that retesters have the qualifications to perform tests and to identify to cylinder fillers and users that cylinders are qualified for continuing use. Information collection requirements in § 173.303 require that fillers of acetylene cylinders keep, for at least 30 days, a daily record of the representative pressure to which cylinders are filled.

Affected Public: Fillers, owners, users and retesters of reusable cylinders.

Recordkeeping:

Estimated Number of Respondents: 139,352.

Estimated Number of Responses: 153,287.

Estimated Annual Burden Hours: 168,431.

Frequency of collection: On occasion.

Title: Approvals for Hazardous Materials.

OMB Control Number: 2137–0557.

Type of Request: Extension of a currently approved information collection.

Abstract: Without these requirements there is no means to: (1) Determine whether applicants who apply to become designated approval agencies are qualified to evaluate package design, test packages, classify hazardous materials, etc.; (2) verify that various containers and special loading requirements for vessels meet the requirements of the HMR; and (3) assure that regulated hazardous materials pose no danger to life and property during transportation.

Affected Public: Businesses and other entities which must meet the approval requirements in the HMR.

Recordkeeping:

Estimated Number of Respondents: 10,723.

Estimated Number of Responses: 11,074.

Estimated Annual Burden Hours: 25,605.

Frequency of collection: On occasion.

Title: Rail Carrier and Tank Car Tank Requirements.

OMB Control Number: 2137–0559.

Type of Request: Extension of a currently approved information collection.

Abstract: This information collection consolidates and describes the information provisions in parts 172, 173, 174, 179, and 180 of the HMR on the transportation of hazardous materials by rail and the manufacture, qualification, maintenance and use of tank cars. The types of information collected include:

(1) *Approvals of the Association of American Railroads (AAR) Tank Car*

Committee: An approval is required from the AAR Tank Car Committee for a tank car to be used for a commodity other than those specified in part 173 and on the certificate of construction. This information is used to ascertain whether a commodity is suitable for transportation in a tank car. AAR approval also is required for an application for approval of designs, materials and construction, conversion or alteration of tank car tanks constructed to a specification in part 179 or an application for construction of tank cars to any new specification. This information is used to ensure that the design, construction or modification of a tank car or the construction of a tank car to a new specification is performed in accordance with the applicable requirements.

(2) *Progress Reports:* Each owner of a tank car that is required to be modified to meet certain requirements specified in § 173.31(b) must submit a progress report to the Federal Railroad Administration (FRA). This information is used by FRA to ensure that all affected tank cars are modified before the regulatory compliance date.

(3) *FRA Approvals:* An approval is required from FRA to transport a bulk packaging (such as a portable tank, IM portable tank, intermediate bulk container, cargo tank, or multi-unit tank car tank) containing a hazardous material in container-on-flat-car or trailer-on-flat-car service other than as authorized by § 174.63. FRA uses this information to ensure that the bulk package is properly secured using an adequate restraint system during transportation. Also an FRA approval is required for the movement of any tank car that does not conform to the applicable requirements in the HMR. PHMSA proposed (September 30, 1999; 64 FR 53169) to broaden this provision to include the movement of covered hopper cars, gondola cars, and other types of railroad equipment when they no longer conform to Federal law but may safely be moved to a repair location. These latter movements are currently being reported under the information collection for special permit applications.

(4) *Manufacturer Reports and Certificate of Construction:* These documents are prepared by tank car manufacturers and are used by owners, users and FRA personnel to verify that rail tank cars conform to the applicable specification.

(5) *Quality Assurance Program:* Facilities that build, repair, and ensure the structural integrity of tank cars are required to develop and implement a quality assurance program. This information is used by the facility and DOT compliance personnel to ensure that each tank car is constructed or repaired in accordance with the applicable requirements.

(6) *Inspection Reports:* A written report must be prepared and retained for each tank car that is inspected and tested in accordance with § 180.509 of the HMR. Rail carriers, users, and the FRA use this information to ensure that rail tank cars are properly maintained and in safe condition for transporting hazardous materials.

Affected Public: Manufacturers, owners and rail carriers of tank cars.

Recordkeeping:

Estimated Number of Respondents: 266.

Estimated Number of Responses: 16,782.

Estimated Annual Burden Hours: 2,689.

Frequency of collection: Annually.

Title: Inspection and Testing of Meter Provers.

OMB Control Number: 2137–0620.

Type of Request: Extension of a currently approved information collection.

Abstract: This information collection and recordkeeping burden is the result of efforts to eliminate special permits that are no longer needed and incorporate the use, inspection, and maintenance of mechanical displacement meter provers (meter provers) used to check the accurate flow of liquid hazardous materials into bulk packagings, such as portable tanks and cargo tank motor vehicles, under the HMR. These meter provers are used to ensure that the proper amount of liquid hazardous materials is being loaded and unloaded involving bulk packagings, such as cargo tanks and portable tanks. These meter provers consist of a gauge and several pipes that always contain small amounts of the liquid hazardous material in the pipes as residual material; and, therefore, must be inspected and maintained in accordance with the HMR to ensure they are in proper calibration and working order. These meter provers are not subject to the specification testing and inspection requirements in Part 178. However, these meter provers must be visually inspected annually and hydrostatic pressure tested every five years in order to ensure they are properly working as specified in § 173.5a of the HMR. Therefore, this information collection requires that:

(1) Each meter prover must undergo and pass an external visual inspection annually to ensure that the meter provers used in the flow of liquid hazardous materials into bulk packagings are accurate and in conformance with the performance standards in the HMR.

(2) Each meter prover must undergo and pass a hydrostatic pressure test at least every five years to ensure that the meter provers used in the flow of liqiuid hazardous materials into bulk packagings are accurate and in conformance with the performance standards in the HMR.

(3) Each meter prover successfully completing the test and inspection must be marked in accordance with § 180.415(b) and in accordance with § 173.5a.

(4) Each owner must retain a record of the most recent visual inspection and pressure test until the meter prover is requalified.

Affected Public: Owners of meter provers used to measure liquid hazardous materials flow into bulk packagings such as cargo tanks and portable tanks.

Recordkeeping:

Estimated Number of Respondents: 50.

Estimated Number of Responses: 250.

Estimated Annual Burden Hours: 175.

Frequency of collection: On occasion.

Title: Requirements for United Nations (UN) Cylinders.

OMB Control Number: 2137–0621.

Type of Request: Extension of a currently approved information collection.

Abstract: This information collection and recordkeeping burden is the result of efforts to amend the HMR to adopt standards for the design, construction, maintenance and use of cylinders and multiple-element gas containers (MEGCs) based on the standards contained in the United Nations (UN) Recommendations on the Transport of Dangerous Goods. Aligning the HMR with the UN Recommendations will promote flexibility, permit the use of technological advances for the manufacture of the pressure receptacles, provide for a broader selection of pressure receptacles, reduce the need for exemptions, and facilitate international commerce in the transportation of compressed gases. Information collection requirements address domestic and international manufacturers of cylinders that request approval by the approval agency for cylinder design types. The approval process for each cylinder design type includes review, filing, and recordkeeping of the approval application. The approval agency is required to maintain a set of the approved drawings and calculations for

each design it reviews and a copy of each initial design type approval certificate approved by the Associate Administrator for not less than 20 years.

Affected Public: Fillers, owners, users, and retesters of UN cylinders.

Recordkeeping:

Estimated Number of Respondents: 50.

Estimated Number of Responses: 150.

Estimated Annual Burden Hours: 900.

Frequency of collection: On occasion.

Issued in Washington, DC on February 8, 2008.

Edward T. Mazzullo,

Director, Office of Hazardous Materials Standards.

[FR Doc. E8–2662 Filed 2–12–08; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 664 (Sub–No. 1)]

Use of a Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry's Cost of Capital

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice and request for comments.

SUMMARY: The Board is seeking comments on the use of a multi-stage Discounted Cash Flow Model to complement the use of the Capital Asset Pricing Model in determining the railroad industry's cost of capital.

DATES: Comments are due on or before April 14, 2008.

ADDRESSES: Send Comments (an original and 10 copies) referring to [STB Ex Parte No. 664 (Sub-No.1)] to: Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Paul Aguiar, (202) 245–0323. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: Each year the Board measures the cost of capital for the railroad industry in the prior year. The Board then uses this cost-of-capital figure for a variety of regulatory purposes. It is used to evaluate the adequacy of individual railroads' revenues for that year.[1] It is also employed in cases involving rail rate review, feeder line applications, rail line abandonment proposals, trackage rights compensation cases, and rail merger review, as well as in our Uniform Rail Costing System (URCS).

The Board calculates the cost of capital as the weighted average of the cost of debt and the cost of equity, with the weights determined by the capital structure of the railroad industry (*i.e.*, the proportion of capital from debt or equity on a market-value basis). While the cost of debt is observable and readily available, the cost of equity (the expected return that equity investors require) can only be estimated. How best to calculate the cost of equity is the subject of a vast amount of literature. In each case, however, because the cost of equity cannot be directly observed, estimating the cost of equity requires adopting a finance model and making a variety of simplifying assumptions.

In *Methodology to be Employed in Determining the Railroad Industry's Cost of Capital,* STB Ex Parte No. 664 (STB served Jan. 17, 2008), the Board changed the methodology that it will use to calculate the railroad industry's cost of equity. We concluded that the time had come to modernize our regulatory process and replace the aging single-stage DCF model that had been employed since 1981. We decided to calculate the cost of equity using a Capital Asset Pricing Model (CAPM). Many parties had urged that the Board use a multi-stage Discounted Cash Flow model (DCF) in conjunction with CAPM. The record in that proceeding did not support adopting any particular DCF model. However, we did not want to foreclose the possibility of augmenting CAPM with a DCF approach. As we explained in the January 2008 decision (footnotes omitted):

> There may be merit to the idea of using both models to estimate the cost of equity. While CAPM is a widely accepted tool for estimating the cost of equity, it has certain strengths and weaknesses, and it may be complemented by a DCF model. In theory, both approaches seek to estimate the true cost of equity for a firm, and if applied correctly should produce the same expected result. The two approaches simply take different paths towards the same objective. Therefore, by taking an average of the results from the two approaches, we might be able to obtain a more reliable, less volatile, and ultimately superior estimate than by relying on either model standing alone.

Ultimately, both CAPM and DCF are economic models that seek to measure the same thing. CAPM seeks to do so by estimating the level of expected returns that investors would demand given the perceived risks associated with the company. By contrast, DCF models estimate the expected rate of return based on the present value of the cash flows that the company is expected to generate. Both approaches are plausible and intuitive, but are merely models.

The Federal Reserve Board noted in its testimony in STB Ex Parte No. 664 that ''academic studies had demonstrated that using multiple models will improve estimation techniques when each model provides new information. * * *''[2] There is, in fact, robust economic literature confirming that in many cases combining forecasts from different models is more accurate than relying on a single model.[3]

Though the record before us in STB Ex Parte No. 664 was insufficient for us to adopt a DCF model, it did illuminate a number of criteria to guide us in this effort. First, and foremost, the DCF model should be a *multi-stage model.* From 1981 through 2005, the agency relied on a single-stage DCF. That model required few inputs and few judgment calls, permitting the agency to promptly develop an estimate of the cost-of-equity component of the cost of capital. The simplicity of this model, however, was due in part to an assumption that the 5-year growth rate would remain constant thereafter. That assumption proved problematic. In recent years, railroad earnings have grown at a very rapid pace, exceeding the long-run growth rate of the economy as a whole. While it is certainly possible that railroad earnings will continue to grow rapidly for many years, they cannot do so *forever* as the single-stage DCF model assumes. Thus, in years when the 5-year growth rate is very high, this model may overstate the cost of equity. Similarly, in years when the railroads experience a downturn and the predicted 5-year growth rate is very low, the model may understate the cost of equity.

Second, the DCF model should not focus on dividend payments only. Finance theory suggests that the value of a firm should be independent of its dividend policy.[4] Certainly, changes in

[1] *See* 49 U.S.C. 10704(a)(2),(3); *Standards for Railroad Revenue Adequacy,* 364 I.C.C. 803 (1981), *modified,* 3 I.C.C.2d 261 (1986), *aff'd sub nom. Consolidated Rail Corp.* v. *United States,* 855 F.2d 78 (3d Cir. 1988).

[2] February 2007 Hearing Tr. at 18.

[3] See generally David F. Hendry & Michael P. Clements, Pooling of Forecasts, VII Econometrics Journal 1 (2004); J.M. Bates & C.W.J. Granger, The Combination of Forecasts in Essays in Econometrics: Collected Papers of Clive W.J. Granger. Vol. I: Spectral Analysis, Seasonality, Nonlinearity, Methodology, and Forecasting 391–410 (Eric Ghysels, Norman R. Swanson, & Mark W. Watson, eds., 2001); Spyros Makridakis and Robert L. Windler, Averages of Forecasts: Some Empirical Results, XXIX Management Science 987 (1983).

[4] *See, e.g.,* Franco Modigliani & Merton H. Miller, *The Cost of Capital, Corporation Finance, and the Theory of Investment,* 48 Am. Econ. Rev., 261–97 (1958). By integrating tax- and information-related considerations on capital structure and dividend policy choices, Modigliani and Miller greatly

dividends do influence stock prices, but only because these changes are ''news'' to which the market responds in valuing the stock; it is the ''news,'' not the dividend distribution itself, that drives the change in prices. Moreover, companies return profits to their shareholders in ways other than increasing dividends, including buying back shares. As a result, we no longer think that a simple dividend distribution model is an acceptable framework for valuing firms. Rather, broader measures of cash flow or shareholder returns should be incorporated.

Third, the DCF model should be limited to those firms that pass the screening criteria we set forth in *Railroad Cost of Capital—1984*, 1 I.C.C.2d 989 (1985).[5] Thus, while the general approach used in the Morningstar/Ibbotson multi-stage DCF model might prove satisfactory, we cannot consider the model as it applies to firms that do not meet our screening criteria.

Fourth, we must be satisfied that any multi-stage DCF we might adopt would, when used in combination with the CAPM model, enhance the precision of the resulting cost-of-equity estimate. In other words, we must be persuaded that, over a sufficiently lengthy historical analysis period, the combination forecast would result in a lower variance than reliance on the CAPM approach alone.

In addition to these four criteria, interested parties are invited to identify and address any other criteria the Board should consider in evaluating a multi-stage DCF. For example, parties to STB Ex Parte No. 664 indicated that atypically large capital investment by the railroads could affect the results of a DCF analysis. Parties should address this concern and show how a multi-stage DCF would account for such investments.

Finally, all interested parties are invited to submit comments on an appropriate multi-stage DCF for use in the Board's cost-of-equity determination. Parties should include any workpapers needed to demonstrate that their proposal combining CAPM and DCF is more precise than the Board's CAPM methodology alone. Comments and workpapers are due to the Board on April 14, 2008. If we are not ultimately persuaded that use of a particular multi-stage DCF model would improve the Board's cost-of-equity calculation, we will terminate this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: February 7, 2008.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. E8–2707 Filed 2–12–08; 8:45 am]

BILLING CODE 4915–01–P

influenced subsequent developments in the field of finance. *See* Sudipto Bhattacharya, *Corporate Finance and the Legacy of Miller and Modigliani,* 2 J. Econ. Perspectives 135–47 (1988).

[5] Under those criteria, we include in the analysis only those Class I carriers that: (1) Had rail assets greater than 50% of their total assets; (2) had a debt rating of at least BBB (Standard & Poors) and Baa (Moody's); (3) are listed on either the New York or American Stock Exchange; and (4) paid dividends throughout the year. A Class I railroad is one having annual carrier operating revenues of at least $250 million in 1991 dollars. 49 CFR 1201.1–1.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–209793–95 (TD 8697)]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, REG–209793–95 (TD 8697), Simplification of Entity Classification Rules (§ 301.7701–3).

DATES: Written comments should be received on or before April 14, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Simplification of Entity Classification Rules.

OMB Number: 1545–1486.

Regulation Project Number: REG–209793–95 (TD 8697).

Abstract: This regulation provides rules to allow certain unincorporated business organizations to elect to be treated as corporations or partnerships for federal tax purposes. The election is made by filing Form 8832, Entity Classification Election. The information collected on the election will be used to verify the classification of electing organizations.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: Businesses or other for-profit organizations, and state, local or tribal governments.

The burden for the collection of information in this regulation is reflected in the burden estimates of Form 8832.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 6, 2008.

Glenn Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8–2590 Filed 2–12–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–209673–93 (TD 8700)]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, REG–209673–93 (TD 8700), Mark to Market for Dealers in Securities (§§ 1.475(b)–4, and 1.475(c)–1).

DATES: Written comments should be received on or before April 14, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Mark to Market for Dealers in Securities.

OMB Number: 1545–1496.

Regulation Project Number: REG–209673–93 (TD 8700).

Abstract: Under section 1.475(b)–4, the information required to be recorded is required by the IRS to determine whether exemption from mark-to-market treatment is properly claimed, and will be used to make that determination upon audit of taxpayers' books and records. Also, under section 1.475(c)–1(a)(3)(iii), the information is necessary for the Service to determine whether a consolidated group has elected to disregard inter-member transactions in determining a member's status as a dealer in securities.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 3,400.

Estimated Time Per Respondents: 52 minutes.

Estimated Total Annual Burden Hours: 2,950.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 6, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8–2591 Filed 2–12–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[IA–5–92]

Proposed Collection; Comment Request For Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, IA–5–92 (TD 8537), Carryover of Passive Activity Losses and Credits and At-Risk Losses to Bankruptcy Estates of Individuals (§§ 1.1398–1 and 1.1398–2).

DATES: Written comments should be received on or before April 14, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6129, 1111 Constitution Ave., NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Carryover of Passive Activity Losses and Credits and At Risk Losses to Bankruptcy Estates for Individuals.

OMB Number: 1545–1375.

Regulation Project Number: IA–54–92.

Abstract: These regulations provide rules for the carryover of a debtor's passive activity loss and credit under section 469 and any ''at risk'' losses under section 465 to the bankruptcy estate. The regulations apply to cases under chapter 7 or chapter 11 of title 11 of the United States Code.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 500.

Estimated Time Per Respondent: 12 Minutes.

Estimated Total Annual Burden Hours: 100.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 6, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8–2592 Filed 2–12–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[PS–264–82]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, PS–264–82 (TD 8508), Adjustments to Basis of Stock and Indebtedness to Shareholders of S Coprorations and Treatment of Distributions by S Corporations to Shareholders. (Regulation §§ 1.1367–1(f), 1.1368–1(f), 1.1368–1(g).)

DATES: Written comments should be received on or before April 14, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to R. Joseph Durbala at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Adjustments to Basis of Stock and Indebtedness to Shareholders of S Corporations and Treatment of Distributions by S Corporations to Shareholders.

OMB Number: 1545–1139.

Regulation Project Number: PS–264–82.

Abstract: The regulation provides the procedures and the statements to be filed by S corporations for making the election provided under Internal Revenue Code section 1368, and by shareholders who choose to reorder items that decrease their basis. Statements required to be filed will be used to verify that taxpayers are complying with the requirements imposed by Congress.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit organizations and individuals.

Estimated Number of Respondents: 2,000.

Estimated Time Per Respondent: 6 minutes.

Estimated Total Annual Burden Hours: 200.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 5, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8–2593 Filed 2–12–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8842.

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8842, Election To Use Different Annualization Periods for Corporate Estimated Tax.

DATES: Written comments should be received on or before April 14, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Election To Use Different Annualization Periods for Corporate Estimated Tax.

OMB Number: 1545–1409.

Form Number: 8842.

Abstract: Form 8842 is used by corporations, tax-exempt organizations subject to the unrelated business income tax, and private foundations to annually elect the use of an annualization period under Internal Revenue Code section 6655(e)(2)(C)(i) or (ii) for purposes of figuring the corporation's estimated tax payments under the annualized income installment method.

Current Actions: There are no changes being made to the Form 8842 at this time.

Type of Review: Extension of a current OMB approval.

Affected Public: Business, or other for-profit organizations.

Estimated Number of Respondents: 1700.

Estimated Time Per Respondent: 2 hrs., 33 min.

Estimated Total Annual Burden Hours: 4,335.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 6, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8–2594 Filed 2–12–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 12196

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 12196, Small Business Office Order Blank.

DATES: Written comments should be received on or before April 14, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, at (202) 622–3634, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Small Business Office Order Blank.

OMB Number: 1545–1638.

Form Number: Form 12196.

Abstract: Form 12196 is used by Small Business Information and Development Centers and One-Stop Capital Shops to order IRS tax forms and publications for distribution to their clients. The form can be faxed directly to the IRS Area Distribution Center for order fulfillment, packaging and mailing.

Current Actions: There are currently no changes to Form 12196.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 500.

Estimated Time Per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 42.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 6, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8–2595 Filed 2–12–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Forms 8329 and 8330

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8329, Lender's Information Return for Mortgage Credit Certificates (MCCs) and Form 8330, Issuer's Quarterly Information Return for Mortgage Credit Certificates (MCCs).

DATES: Written comments should be received on or before April 14, 2008, to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, Room 6129, 1111 Constitution Ave., NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, Room 6129, 1111 Constitution Ave., NW., Washington, DC 20224, or through the Internet at *RJoseph.Durbala@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Form 8329, Lender's Information Return for Mortgage Credit Certificates (MCCs) and Form 8330, Issuer's Quarterly Information Return for Mortgage Credit Certificates (MCCs).

OMB Number: 1545–0922.

Form Number: Forms 8329 and 8330.

Abstract: Form 8329 is used by lending institutions and Form 8330 is used by state and local governments to provide the IRS with information on the issuance of mortgage credit certificates (MCCs) authorized under Internal Revenue Code section 25. IRS matches the information supplied by lenders and issuers to ensure that the credit is computed properly.

Current Actions: There are no changes being made to these forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and state, local or tribal governments.

Estimated Number of Responses: 10,000—Form 8329; 2,000—Form 8330.

Estimated Time per Response: 5 hours, 53 minutes—Form 8329; 7 hours, 28 minutes—Form 8330.

Estimated Total Annual Burden Hours: 58,800—Form 8329; 14,920—Form 8330.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 5, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8–2596 Filed 2–12–08; 8:45 am]

BILLING CODE 4830–01–P

Corrections

Federal Register

Vol. 73, No. 30

Wednesday, February 13, 2008

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.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA-HQ-OAR-2005-0526; FRL-8508-6]

RIN 2060-AN21

National Emission Standards for Hazardous Air Pollutants: Paint Stripping and Miscellaneous Surface Coating Operations at Area Sources

Correction

In rule document E7–24718 beginning on page 1738 in the issue of Wednesday, January 9, 2008, make the following corrections:

§ 63.11173 [Corrected]

1. On page 1761, in the second column, in § 63.11173(b), in the seventh line from the bottom, ''more'' should read ''less''.

2. On the same page, in the same column, in the same section, in the same paragraph, in the fifth line from the bottom, ''management practices'' should read ''requirements''.

[FR Doc. Z7–24718 Filed 2–12–08; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 97

[EPA-R05-OAR-2007-0390; FRL-8519-6]

Approval and Promulgation of Air Quality Implementation Plans; Ohio; Clean Air Interstate Rule

Correction

In rule document E8–1804 beginning on page 6034 in the issue of Friday, February 1, 2008, make the following corrections:

Appendix A to Subpart IIII of Part 97 [Corrected]

1. On page 6041, in the first column, in amendatory instruction 8, in the first line, ''Appendix A to Subpart IV'' should read ''Appendix A to Subpart IIII''.

2. On the same page, in the same column, in the last appendix heading, in the first line, ''**Appendix A to Subpart IV of Part 97**'' should read ''**Appendix A to Subpart IIII of Part 97**''.

[FR Doc. Z8–1804 Filed 2–12–08; 8:45 am]

BILLING CODE 1505–01–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 75

[EPA–HQ-OAR–2005–0132; FRL–8511–1]

RIN 2060–AN16

Revisions to the Continuous Emissions Monitoring Rule for the Acid Rain Program, NO_x Budget Trading Program, Clean Air Interstate Rule, and the Clean Air Mercury Rule

Correction

In rule document E7–25071 beginning on page 4312 in the issue of Thursday, January 24, 2008 make the following correction:

Appendix F to Part 75 [Corrected]

On page 4373, the equation should read as set forth below:

$$F = \sum_{i=1}^{n} X_i F_i \qquad F_c = \sum_{i=1}^{n} X_i \left(F_c\right)_i \qquad \text{(Eq. F-8)}$$

[FR Doc. Z7–25071 Filed 2–12–08; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 563

[Docket No. NHTSA-2008-0004]

RIN 2127-AK12

Event Data Recorders

Correction

In rule document E8–407 beginning on page 2168 in the issue of Monday, January 14, 2008, make the following correction:

§563.7 [Corrected]

On page 2182, in §563.7(b), Table II is corrected to read as follows:

TABLE II.—DATA ELEMENTS REQUIRED FOR VEHICLES UNDER SPECIFIED MINIMUM CONDITIONS

Data element name	Condition for requirement	Recording interval/time [1] (relative to time zero)	Data sample rate (per second)
Lateral acceleration	If recorded [2]	0 to 250 ms	100
Longitudinal acceleration	If recorded	0 to 250 ms	100

TABLE II.—DATA ELEMENTS REQUIRED FOR VEHICLES UNDER SPECIFIED MINIMUM CONDITIONS—Continued

Data element name	Condition for requirement	Recording interval/time [1] (relative to time zero)	Data sample rate (per second)
Normal acceleration	If recorded	0 to 250 ms	100
Delta–V, lateral	If recorded	0 to 250 ms, or 0 to End of Event Time plus 30 ms, whichever is shorter.	100
Maximum delta–V, lateral	If recorded	0 to 300 ms, or 0 to End of Event Time plus 30 ms, whichever is shorter.	N/A
Time, maximum delta–V, lateral	If recorded	0 to 300 ms, or 0 to End of Event Time plus 30 ms, whichever is shorter.	N/A
Time, maximum delta–V, resultant	If recorded	0 to 300 ms, or 0 to End of Event Time plus 30 ms, whichever is shorter.	N/A
Engine RPM	If recorded	–5.0 to 0 sec	2
Vehicle roll angle	If recorded	–1.0 up to 5.0 sec [3]	10
ABS activity (engaged, non-engaged)	If recorded	–5.0 to 0 sec	2
Stability control (on, off, engaged)	If recorded	–5.0 to 0 sec	2
Steering input	If recorded	–5.0 to 0 sec	2
Safety belt status, right front passenger (buckled, not buckled).	If recorded	–1.0 sec	N/A
Frontal air bag suppression switch status, right front passenger (on, off, or auto).	If recorded	–1.0 sec	N/A
Frontal air bag deployment, time to nth stage, driver [4].	If equipped with a driver's frontal air bag with a multi-stage inflator.	Event	N/A
Frontal air bag deployment, time to nth stage, right front passenger [4].	If equipped with a right front passenger's frontal air bag with a multi-stage inflator.	Event	N/A
Frontal air bag deployment, nth stage disposal, driver, Y/N (whether the nth stage deployment was for occupant restraint or propellant disposal purposes).	If recorded	Event	N/A
Frontal air bag deployment, nth stage disposal, right front passenger, Y/N (whether the nth stage deployment was for occupant restraint or propellant disposal purposes).	If recorded	Event	N/A
Side air bag deployment, time to deploy, driver.	If recorded	Event	N/A
Side air bag deployment, time to deploy, right front passenger.	If recorded	Event	N/A
Side curtain/tube air bag deployment, time to deploy, driver side.	If recorded	Event	N/A
Side curtain/tube air bag deployment, time to deploy, right side.	If recorded	Event	N/A
Pretensioner deployment, time to fire, driver.	If recorded	Event	N/A
Pretensioner deployment, time to fire, right front passenger.	If recorded	Event	N/A
Seat track position switch, foremost, status, driver.	If recorded	–1.0 sec	N/A
Seat track position switch, foremost, right front passenger.	If recorded	–1.0 sec	N/A
Occupant size classification, driver	If recorded	–1.0 sec	N/A
Occupant size classification, right front passenger.	If recorded	–1.0 sec	N/A
Occupant position classification, driver	If recorded	–1.0 sec	N/A
Occupant position classification, right front passenger.	If recorded	–1.0 sec	N/A

[1] Pre-crash data and crash data are asynchronous The sample time accuracy requirement for pre-crash time is –0.1 to 1.0 sec (e.g., T = –1 would need to occur between –1.1 and 0 seconds)

[2] "If recorded" means if the data is recorded in non-volatile memory for the purpose of subsequent downloading

[3] "Vehicle roll angle" may be recorded in any time duration –1.0 to 5.0 seconds is suggested

[4] List this element n—1 times, once for each stage of a multi-stage air bag system

[FR Doc. Z8–407 Filed 2–12–08; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Wednesday,
February 13, 2008

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Berberis nevinii (Nevin's barberry); Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R8–ES–2008–0011; 92210–1117–0000–B4]

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: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are designating critical habitat for *Berberis nevinii* (Nevin's barberry) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 6 acres (ac) (3 hectares (ha)) in Riverside County, California, fall within the boundaries of the final critical habitat designation.

DATES: This rule becomes effective on March 14, 2008.

ADDRESSES: The final rule, final economic analysis, and map of critical habitat will be available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/carlsbad/*. Supporting documentation we used in preparing this final rule will be available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, telephone 760–431–9440 (see **ADDRESSES** section). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

It is our intent to discuss only those topics directly relevant to the development and designation of critical habitat in this final rule. For additional information on the description, biology, and ecology of *Berberis nevinii*, refer to the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54956), and the proposed critical habitat rule published in the **Federal Register** on February 6, 2007 (72 FR 5552).

Species Description and Reproduction

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. In both the proposed critical habitat rule (72 FR 5552; February 6, 2007) and the final listing rule (63 FR 54956; October 13, 1998) for the species, we reported *Berberis nevinii* to be rhizomatous. Some members of the genus *Berberis* have underground stems (rhizomes) that give rise to aerial shoots. Some species have long slender-branched rhizomes while others, including *B. nevinii*, have short stout-branched rhizomes. Because aerial stems commonly arise in this manner, a single genetic individual may appear to be a dense or diffuse grouping of aerial stems of different age classes. As mentioned in the Primary Constituent Elements section of the proposed critical habitat rule, *B. nevinii* is not known to reproduce by vegetative means through the process of separation of rhizomes between groupings of aerial stems, as is the case with some other members of the genus *Berberis* (Mistretta and Brown 1989, p. 5; Boyd 2006, p. 1). According to White (2007, p. 1), the now-extirpated *B. nevinii* occurrence in San Timoteo Canyon was likely resprouting from a large basal burl, similar to what is seen in other chaparral shrub species. Generally, the term burl is reserved for those more condensed rounded woody structures that produce aerial stems (e.g., some *Arctostaphylos* (Manzanita) species) when plants are older or existing stems have sustained damage. Various authors have used either of these terms (burl or rounded woody structures) to refer to the underground portions of *B. nevinii*. We will continue to consider the basal structures that routinely produce new aerial stems as woody rhizomes. For a detailed description of *B. nevinii*, please refer to the proposed critical habitat designation published in the **Federal Register** on February 6, 2007 (72 FR 5552) and the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54956).

In the proposed critical habitat rule (72 FR 5552; February 6, 2007), we discussed the relationship between *Berberis nevinii*'s life history and wildfire in southern California chaparral (72 FR 5556, 5560). Aerial stems of *B. nevinii* resprout following fire (Soza and Fraga 2003, p. 2; Mistretta and Brown 1989, p. 5; USFS 2005, p. 237). Because *B. nevinii* fruits appear to be adapted for dispersal by animals (most likely birds), the accumulation of a seed bank seems unlikely (White 2007, p. 1). Seed germination rates, even without special treatment, are high (Mistretta and Brown 1989, p. 5). These life history features appear to match Keeley's (1991, p. 107) description of the ''non-refractory seed'' (fire-resister) syndrome (White 2007, p. 1). Shrubs with this life history strategy have seeds that do not require fire-associated cues for germination and generally recruit into chaparral in the absence of fire, potentially requiring long fire-free periods to do so (White 2007, p. 1). This appears to contradict California Department of Fish and Game's (CDFG) characterization of *B. nevinii* as a fire responsive species (CDFG 2005, p. 272). The specific response of *B. nevinii* to changes in the natural fire regime (fire frequency, intensity, or timing) may not be fully understood (63 FR 54964, 54965). Fires that follow abnormally long fire-free periods likely have more severe impacts to the native occurrences because of accumulation of standing and downed fuel loads that may cause the fire to be more destructive and burn at higher temperatures. However, it is also likely that too-frequent fire could pose a threat to this species by killing mature, seeding adults and resprouting individuals prior to seed set or recovery from earlier fires, as well as young plants before they have reached reproductive age. Furthermore, too-frequent fire can lead to the conversion of native shrublands to weedy annual grasslands (D'Antonio and Vitousek 1992, pp. 74–75; White 2007, p. 1).

Species Distribution

In general, *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, California, with the largest native occurrence (as defined by the California Natural Diversity Database (CNDDB)) consisting of several stands and totaling about 134 individuals to the south of Vail Lake in Riverside County (Boyd 1987; CNDDB 2007). *B. nevinii* typically occurs at elevations from 900 to 2,000 ft (300 to 650 m) (63 FR 54956), but most native occurrences are between 1,400 and 1,700 ft (427 to 518 m) in elevation (Boyd 1987, p. 2; CNDDB 2007). For a detailed discussion and summary of the distribution of *B. nevinii*, please refer to the proposed critical habitat designation published in the **Federal Register** on February 6, 2007 (72 FR 5552, please refer to pages 5554–5556).

In the proposed critical habitat rule (72 FR 5552; February 6, 2007), we inadvertently failed to mention an

occurrence of *Berberis nevinii* in Riverside, California, that was known at the time of listing but is not recorded in the CNDDB (CNDDB 2007). This occurrence consists of a single plant growing in a granite crevice on a low hill and is suspected to be of cultivated origin due to its isolation from known wild occurrences of *B. nevinii* (White 2001, p. 36). As stated in the proposed rule, we do not believe that single plant occurrences, which do not exhibit any evidence of reproduction, are likely to contribute to recovery of this species and, therefore, are not essential to the conservation of this species. Furthermore, the conservation role of introduced populations is unknown. We did not propose to include any occurrences suspected to be of cultivated origin or any occurrences that supported a single plant. However, we will continue to explore the potential conservation value of naturalized occurrences and consider these occurrences in future recovery actions as appropriate.

As stated in the proposed rule (72 FR 5552; February 6, 2007), potential habitat within the species' range has been extensively botanically explored or surveyed (Boyd 1987, p. 3), including potential habitat on the San Bernardino National Forest (SBNF) in 1988 and 1989, which yielded no new occurrences (Mistretta 1989, unpaginated; 72 FR 5555). Since publication of the proposed rule, we were informed by the Cleveland National Forest (CNF) that surveys of potential habitat on the SBNF have been conducted since 1989, also with negative results. Recent discoveries of native occurrences of *Berberis nevinii* have been limited to individual plants or small stands (Boyd 1987, p. 3; Boyd and Banks 1995, unpaginated; Soza and Boyd 2000, p. 4), and additional survey efforts are unlikely to identify new large occurrences of this species.

Suitable *Berberis nevinii* habitat may occur in Los Angeles and San Bernardino counties on or adjacent to the Angeles National Forest (ANF) in the Liebre Mountains and on the south slope of the San Gabriel Mountains (Soza and Boyd 2000, p. 4). Specifically in the San Gabriel Mountains, suitable habitat may occur in the foothills, from Pacoima Canyon and Lopez Canyon, both adjacent to the San Fernando Valley, and in canyons in the vicinity of San Antonio Wash near Claremont (Soza 2003, based on expertise of Boyd, Rancho Santa Ana Botanic Garden). In San Bernardino County, there is potential for suitable habitat in the Crafton Hills area near Redlands off of National Forest lands and in Cajon Canyon (erroneously stated to be in the ANF in the proposed rule) on SBNF lands. In Riverside County, there is potential for suitable habitat:

(1) On the west side of the San Jacinto Mountains in the vicinity of Bautista Canyon (Soza 2003, unpaginated; Holtrop 2007, p. 1), although surveys in these areas have failed to locate any plants to date (Holtrop 2007, p. 1);

(2) In the area between Kolb Creek and Temecula Creek, south and east of Vail Lake (e.g., Temecula Creek drainage, the hills between Temecula Creek and Wilson Creek);

(3) In the canyons draining Big Oak Mountain north of Vail Lake (Boyd et al. 1989, p. 16; Soza 2003, unpaginated); and

(4) On the northern edge of the Agua Tibia Wilderness in the CNF straddling Riverside and San Diego counties (Boyd and Banks 1995, unpaginated; Reiser 2001, unpaginated; Soza 2003, unpaginated).

Previous Federal Actions

As discussed in the proposed rule (72 FR 5552; February 6, 2007), the Service agreed, as part of a settlement agreement, to submit to the **Federal Register** a proposed rule to designate critical habitat, if prudent, on or before January 30, 2007, and a final rule by January 30, 2008 (72 FR 5556, 5557). We also published a notice of availability (NOA) of the draft economic analysis (DEA) of the 2007 proposed rule in the **Federal Register** on October 17, 2007 (72 FR 58793). In this notice, we announced revisions to proposed critical habitat subunits 1B, 1D, and 1E. We revised these subunits based on information received during the first comment period, as well as data obtained during the development of the DEA (see Summary of Changes from Proposed Rule section below for a detailed discussion). This final rule satisfies the December 21, 2004, settlement agreement with respect to *Berberis nevinii*. For a discussion of additional previous Federal actions involving this species, please refer to the listing rule (63 FR 54956; October 13, 1998) or the proposed critical habitat rule (72 FR 5552; February 6, 2007).

Summary of Comments and Recommendations

We requested comments from the public on the proposed designation of critical habitat for *Berberis nevinii* during two comment periods. The first comment period opened on February 6, 2007, the date of publication of the proposed rule (72 FR 5552), and closed on April 9, 2007. We did not receive any requests for a public hearing during this comment period. We also requested comments on the proposed rule and DEA during a comment period that opened on October 17, 2007 and closed on November 16, 2007 (72 FR 58793). We contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and DEA during these two comment periods.

During the first comment period, we received five comments directly addressing the proposed critical habitat designation: one from a peer reviewer, one from a Federal agency, one from a local agency, and two from organizations or individuals. During the second comment period, we received no comment letters on the proposed critical habitat designation or DEA. We reviewed all comments received during both comment periods for substantive issues and new information regarding the designation of critical habitat for *Berberis nevinii*, addressed them in the following summary, and incorporated them into the final rule as appropriate.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from four knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received a response from one of the four peer reviewers from which we requested comments.

Peer Reviewer Comments

(1) *Comment:* After review of personal files, the peer reviewer concurred with our description of the occurrences of *Berberis nevinii* described in the proposed rule and was not aware of any occurrences outside of the areas described in the proposed rule. However, the reviewer recommended that the Service review the most current CNDDB and Consortium of California Herbaria records to identify any additional occurrences of *B. nevinii* before publishing the final rule.

Our Response: For the proposed rule, we based our understanding of the current distribution of *Berberis nevinii* on the most current occurrence records in the CNDDB (2006), and utilized the Consortium of California Herbaria records for information on specific occurrences. Since publication of the proposed rule, we conducted another search of the CNDDB database and Consortium records. No new occurrence records were found from either source. Two separate occurrences, likely

introduced, were found in Griffith Park in the Hollywood Hills of Los Angeles County. One was documented with a herbarium specimen (Consortium of California Herbaria, *Berberis nevinii*, Soza et al. 1060, RSA 679741). Based on our review of these information sources and the fact that the only additional occurrence information received during the first comment period from this peer reviewer was in reference to a single, isolated individual likely of cultivated origin, we believe that we based the proposed and this final designation on the best available information.

(2) *Comment:* The peer reviewer commented that he was unable to critically review the proposed exclusion of critical habitat covered under the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP), but suggested that the Service review his extensive peer review comments provided on November 3, 2004, on the proposed exclusion of critical habitat for *Atriplex coronata* var. *notatior* (San Jacinto Valley crownscale) (69 FR 59844; October 6, 2004) covered under the MSHCP.

Our Response: The content and scope of the reviewer's comments provided on November 4, 2004, related to the Western Riverside County MSHCP also are considered applicable to the proposed critical habitat designation for *Berberis nevinii*. Per the reviewer's recommendation, we addressed the specified remarks incorporated by reference in the submitted peer review regarding the exclusion of critical habitat for *Atriplex coronata* var. *notatior* covered under the MSHCP. These comments included assertions that: (1) It is important to include a clear, detailed explanation of the MSHCP, its associated Implementing Agreement, the Service's formal section 7 consultation for the MSHCP, and the Service's responsibilities and authority under the MSHCP as they relate to covered species in the final rule; (2) the Service failed to provide an adequate basis for the exclusion of lands from the critical habitat designation and that our decision to do so based on the MSHCP's ability to protect the taxon's habitat was not adequately supported; and (3) the rule should include further explanation of how the designation of critical habitat for *B. nevinii* may impede cooperative conservation efforts, such as those implemented by the MSHCP.

In response to the peer reviewer's concerns regarding the MSHCP and its associated documents, we have added information to our discussion of the exclusion of areas occupied by *Berberis nevinii* covered by the Western Riverside County MSHCP in this final rule, including a detailed explanation of the MSHCP and its ability to protect the taxon's habitat and the Service's responsibilities and authority under the MSHCP as they relate to covered species (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act section below). Also, since the October 6, 2004, proposed critical habitat designation for *Atriplex coronata* var. *notatior* (69 FR 59844), we have revised our discussion of the benefits of including lands in critical habitat (see Benefits of Designating Critical Habitat section below) to include a discussion of how designation of critical habitat may impede cooperative conservation efforts (see Conservation Partnerships on Non-Federal Lands section below for a detailed discussion).

(3) *Comment:* The peer reviewer noted that the map of proposed critical habitat in the proposed rule did not indicate which lands were proposed for exclusion and did not indicate land ownership, and suggested including this information on the map in the final rule.

Our Response: While we did not include a map in the proposed rule identifying the location of areas that were proposed for exclusion, a map containing such information was available on our Web site (*http://www.fws.gov/carlsbad*) during both public comment periods. We appreciate the peer reviewer's suggestion, and will consider including maps identifying areas proposed for exclusion in future proposed critical habitat rules. It is our practice to only publish maps of designated critical habitat in final rules.

(4) *Comment:* The peer reviewer commented that the proposed rule incorrectly identifies the location of CNDDB Element Occurrence 10 as ''Big Tejunga Wash'' instead of ''Big Tujunga Wash.''

Our *Response:* We appreciate the correction to the misspelling of this location in the proposed rule. We made the correction in the October 17, 2007, notice of availability for the DEA (72 FR 58793) (please see the Public Comments Solicited section of that notice).

(5) *Comment:* The peer reviewer provided additional information and clarification on *Berberis nevinii* life history, including reproductive strategy (resprouting, seed banks, seedling recruitment) and its response to wildfire and overly frequent fire. The reviewer further commented that *B. nevinii* is probably not rhizomatous, as described in the final listing rule and the proposed critical habitat rule, and that the reported vegetative reproduction in San Timoteo Canyon is probably from resprouting from a large basal burl, as is often seen in other chaparral shrubs. The reviewer also provided the Service with updated information on *B. nevinii* in the form of a species account (prepared by the reviewer and dated March 2001) for the Bureau of Land Management's (BLM) planned section 7 consultation with the Service on its revision of the South Coast Resource Management Plan.

Our Response: We appreciate the additional information and clarifications on *Berberis nevinii*'s life history, status and distribution, and response to wildfire. We have included this information in this final rule (please see Background and Primary Constituent Elements sections). The Service considers the reviewer's use of the term ''burl'' inappropriate in describing the short rhizomatous structures found in *B. nevinii*. However, the Service concedes that often both these terms have been used to describe this species. The short-branched woody rhizomes that almost always annually give rise to new aerial stems in this species are unlike the essentially unbranched rounded burls commonly associated with *Arctostaphylos* (Manzanita) and other chaparral taxa. Burls normally produce new aerial stems from among the myriad of dormant surface buds only when the existing stems are damaged or of considerable age.

Public Comments

Comments Related to the Western Riverside County MSHCP

(6) *Comment:* One commenter stated strong support for the designation of critical habitat for *Berberis nevinii,* but expressed concern about the proposed exclusion of over 92 percent of occupied habitat under the Western Riverside County MSHCP, including the area with the largest known occurrence of the species. The commenter questioned the ability of the ''untested'' Western Riverside County MSHCP to prevent extinction of this species or provide for its conservation and recovery due to: (1) Uncertain funding mechanisms; (2) understaffing in agencies involved with implementing the plan; (3) the complexity of the plan; and (4) the intense development pressure within the area covered by the plan. The commenter stated that designating critical habitat in this area would provide a safety net to protect this endangered plant based on the consultation requirements under section 7 of the Act. Another commenter expressed concern that the exclusion of lands within the boundaries of the

MSHCP would not leave enough land within the critical habitat designation for *B. nevinii* to thrive.

Our Response: As discussed in the proposed rule and in this final rule, we have determined that the physical and biological features essential to the conservation of *Berberis nevinii* will be adequately protected by the Western Riverside County MSHCP and that the exclusion of lands covered by this regional plan will not jeopardize the continued existence of the species. The conservation objectives in the MSHCP for *B. nevinii* include: (1) Conservation and management of at least 8,000 ac (3,238 ha) of suitable habitat, including all known locations for this species in the Vail Lake area; (2) implementation of specific management and monitoring practices to help ensure the conservation of *B. nevinii* in the MSHCP Conservation Area; (3) maintenance of the physical and ecological characteristics of occupied habitat; and (4) surveys and other required procedures to ensure avoidance of impacts to at least 90 percent of suitable habitat determined important to the long-term conservation of *B. nevinii* (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion of the MSHCP). The conservation and management of *B. nevinii* habitat as described in the Western Riverside County MSHCP will remove or reduce known threats to *B. nevinii* and its habitat, providing for the survival and recovery of this species.

We consider the regulatory (or consultation) benefit of critical habitat on these private lands to be low, as these lands may not have a Federal nexus under which to initiate consultation. Furthermore, any measures taken on private lands to minimize effects to a plant species or its habitat are completely voluntary. Under the Implementing Agreement of the Western Riverside County MSHCP, mandatory conservation measures provide for conservation of *B. nevinii* and its habitat. The MSHCP addresses conservation from a coordinated, integrated perspective rather than a piecemeal, project-by-project approach as would be achieved through multiple site-by-site, section 7 consultations involving critical habitat. Therefore, the Western Riverside County MSHCP provides a conservation benefit to *B. nevinii* and the physical and biological features essential to its conservation above the regulatory requirements associated with the designation of critical habitat.

The exclusion of critical habitat does not dismiss or lessen the value of the Vail Lake and Oak Mountain areas to the overall conservation of this species. Rather, we believe that the judicious exclusion of specific areas of non-Federal lands from critical habitat designations, where we have developed close partnerships with non-Federal land owners that have resulted in the development of HCPs or other voluntary conservation plans, can contribute to species recovery and provide a superior level of conservation than the designation of critical habitat alone. As described in detail in the Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act section below, we have determined that the benefits of excluding areas within the Western Riverside County MSHCP (Subunits 1C, 1D, 1E, and 1F) outweigh the benefits of designating these lands, and that this exclusion will not result in the extinction of *B. nevinii.* Furthermore, we expect that this species will be conserved and recovered on MSHCP lands and do not believe that the plant will become restricted solely to designated lands as suggested by one commenter.

(7) *Comment:* One commenter supported the proposed exclusion of private lands within the boundaries of the Western Riverside County MSHCP plan area from the designation of final critical habitat because the MSHCP adequately provides for the survival and recovery of the species. However, this commenter expressed concern about language in the proposed rule that states that this area will be included in the final designation of critical habitat if the Secretary determines that the benefits of including these lands outweigh the benefits of excluding them. They further stated that under the provisions of the MSHCP and the associated Implementing Agreement, no critical habitat for *Berberis nevinii* should be designated in the MSHCP plan area.

Our Response: We have determined that private lands within the boundaries of the Western Riverside County MSHCP contain the physical and biological features essential to the conservation of *Berberis nevinii*, and meet the definition of critical habitat (see Criteria Used to Identify Critical Habitat section below). However, we have also determined that the benefits of excluding these private lands covered by the Western Riverside County MSHCP outweigh the benefits of designating critical habitat in these areas, and that this exclusion will not result in the extinction of *B. nevinii*; therefore, we have excluded all private lands from this final designation (see Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act section below for a detailed discussion). In the proposed rule, we provided an analysis of the proposed exclusion to allow the public to comment and provide additional information to be considered in our final exclusion analysis. We have considered all information provided during both comment periods in finalizing this exclusion.

Comments Related to Criteria Used To Identify Critical Habitat

(8) *Comment:* We received a comment that critical habitat should at a minimum include all known remaining occurrences of the species, including those with a low number of individuals (less than two) or low reproductive activity.

Our Response: The Act defines critical habitat as the specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection, and specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species. We believe that our proposed and final designations accurately describe all specific areas meeting the definition of critical habitat for *Berberis nevinii.*

As discussed in the Criteria Used to Identify Critical Habitat section of the proposed rule and this final rule, we delineated proposed critical habitat for *Berberis nevinii* using the following criteria: (1) Areas occupied by naturally occurring individuals at the time of listing and areas that are currently occupied by naturally occurring individuals; (2) occupied areas within the historical range of the species; (3) areas containing one or more of the primary constituent elements (PCEs) for this 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. Application of these criteria captures the physical and biological features that are essential to the conservation of this species, identified as the species' PCEs laid out in the appropriate quantity and spatial arrangement. Thus, not all areas supporting the identified PCEs will meet the definition of critical habitat.

We recognize that our designation of critical habitat for *Berberis nevinii* does not encompass all known occurrences of this species as noted by the commenter. As discussed in the proposed rule, for sites where no information is 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. We also gave consideration to the ecological uniqueness of sites. Sites meeting these criteria were included in the proposed designation.

We did not include sites with only one individual or sites with only two individuals of the same size/age class because this condition may reflect a lack of successful reproduction and therefore the long-term viability of these occurrences is questionable. As discussed in the proposed critical habitat rule, many *Berberis nevinii* occurrences consist of very few individuals, and sometimes consist of only one or two large (presumably old) shrubs that have persisted on a site for many decades without evidence of reproducing. Because of the lack of evidence of reproduction for these small occurrences, and the low reproductive output of mature plants and limited numbers of surviving juvenile plants in general, we do not consider sites with only one plant or two plants of the same size/age class to represent an occurrence that exhibits a measurable degree of reproductive success that is likely to contribute to the recovery of the species.

As explained in the Primary Constituent Elements section of this final rule, a self-incompatible pollination system has been suggested (White 2001, p. 36). Additionally, *Berberis nevinii* does not appear to reproduce by vegetative means (Mistretta and Brown 1989, p. 5; Boyd 2006), as is the case with some other members of the genus *Berberis*. Therefore, pollen transfers from plants in different occurrences are likely necessary for reproduction to occur in sites supporting only one plant or two plants of the same size/age class. The habitat requirements and home ranges of potential pollinator species relative to native *Berberis* occurrences have not been determined; however, the lack of evidence of reproduction in these small *B. nevinii* occurrences suggests that pollination may not be occurring or another biological constraint is impacting the occurrences. The fact that reproduction has not been in evidence at these sites in several decades, if at all, suggests that they may not be viable occurrences over the long term. Whether or not these occurrences may contribute to recovery of the species is unknown at this time. We will continue to explore the potential conservation value of these small occurrences, and consider these occurrences in future recovery actions as appropriate.

Additionally, we only considered areas occupied by naturally occurring individuals because we do not know the role that other occurrences (i.e., plants of cultivated origin or outplanted individuals originating from another part of the species' range that have subsequently naturalized to a new site) will play in the conservation of the species. Only about half of the known *Berberis nevinii* individuals found in the field are thought to be naturally occurring (CNDDB 2007; 63 FR 54958), with the vast majority of these in the vicinity of Vail Lake and Oak Mountain. As discussed in the proposed rule, *B. nevinii* is available in the nursery trade and has been planted at numerous sites throughout the species' range (Boyd 1987, p. 2; Boyd and Banks 1995, unpaginated; Reiser 2001, unpaginated). We recognize that 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 in *B. nevinii*. At least one naturalized occurrence (San Francisquito Canyon) may contain an individual 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.

Although we are not designating all known occurrences of *Berberis nevinii*, we believe that our criteria, and therefore the designation, are adequate to ensure the conservation of this species throughout its extant range based on the best available information at this time.

(9) *Comment:* One commenter stated that the proposed designation is flawed because it does not include unoccupied habitat for recovery, and that without including some suitable, but unoccupied, habitat (areas with one or more of the PCEs) in the critical habitat designation to allow *Berberis nevinii* to expand its range and promote recovery of the species, the Service will not be able to meet the Act's recovery goals and mandate.

Our Response: We have identified areas within the geographical range of the species that were occupied at the time of listing, contain the physical and biological features essential to the conservation of the species, and may require special management considerations or protection. As described in the Background section, potential habitat within this species' range has been extensively botanically explored or surveyed (Boyd 1987, p. 3). Surveys throughout the SBNF and the CNF have not identified any new occurrences of this species. All recent discoveries of *Berberis nevinii* have been limited to individual plants or small stands (Boyd 1987, p. 3; Boyd and Banks 1995, unpaginated; Soza and Boyd 2000, p. 4) and additional survey efforts are unlikely to identify new large occurrences of this species. The long-term viability of single plant occurrences or small stands where there is no evidence of reproduction for many decades is questionable, and we do not believe that these areas will significantly contribute to the long-term recovery of this species. Furthermore, we do not have specific data concerning the habitat requirements or reproductive biology of this species to accurately predict any unoccupied areas where reintroduction would likely be successful. We designate critical habitat in areas outside the geographical area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)). Accordingly, when the best scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographical area occupied by the species. Therefore, consistent with the Act and its implementing regulations, we are not designating any lands outside the area currently occupied by the species. We recognize that the designation of critical habitat may not include all of the habitat that may eventually be determined to be necessary for the recovery of the species and critical habitat designations do not signal that habitat outside the designation is unimportant or may not contribute to recovery.

Comments Related to Federal Lands

(10) Comment: The CNF commented that there is one population of *Berberis nevinii* containing six individuals on approximately 7 ac (2.8 ha) of land on the CNF. They further stated that the proposed critical habitat area mapped by the Service on the CNF (Subunit 1B) was 17 ac (6.8 ha), but according to CNF survey maps, these six individuals were

outside the critical habitat map for Subunit 1B as described and mapped in the February 6, 2007, proposed rule (72 FR 5552, pp. 5577, 5579).

Our Response: We appreciate the correction and have since received updated locality data from the CNF for the *Berberis nevinii* occurrence on CNF lands. We verified that Subunit 1B as described and mapped in the February 6, 2007, proposed rule (72 FR 5552, pp. 5577, 5579) was inaccurate, and revised the boundaries of this subunit based on the new occurrence information provided by CNF. A revised description of Subunit 1B was published on October 17, 2007, concurrently with the notice of availability for the DEA (72 FR 58793). Based on follow-up communication with a CNF botanist (Young 2007) and a June 6, 2006, site visit by Service biologists (Wallace 2006a), we believe that there are only five individuals, not six, at this site. To the best of our knowledge, the final rule correctly describes the *B. nevinii* occurrence on the CNF.

(11) *Comment:* The CNF provided the following changes or clarifications to information in the proposed rule: Cajon Canyon is within the SBNF, not the ANF; projects surveys after 1988 and 1989 were conducted in the SBNF for potential habitat and have also yielded negative results; potential habitat in the SBNF exists near the Crafton Hills area and on the west side of the San Jacinto Mountains in the vicinity of Bautista Canyon, although surveys have failed to locate any plants in these locations to date.

Our Response: We appreciate the clarification on the location of Cajon Canyon and the information on survey efforts and potential habitat on the SBNF. We have revised the text of this final rule to include this new information (see Background section above).

(12) *Comment:* The CNF commented that current laws, regulations, and policies, as well as the current land management plan direction on the CNF, are adequate to provide for the conservation of the *Berberis nevinii* occurrence and its habitat on the CNF. They further stated that they recently revised their Land Management Plan (LMP) to incorporate management direction that provides sufficient protection and management for *B. nevinii* and its habitat, and that the section 7 consultation on the revised LMP resulted in the issuance of a non-jeopardy biological opinion by the Service. Additionally, the Species Management Guide for *B. nevinii* (Mistretta and Brown 1989) developed for the ANF was formally adopted by the CNF in 1992 to direct management of this species on the CNF. They further commented that there has been no change in the status and survival potential of this occurrence since its discovery in 1993; the area's fire history is within the range of natural variation; and no development or fuel treatments are planned for this area of the CNF that would affect the species or its habitat. Furthermore, the CNF also commented that the designation of critical habitat on CNF lands would not provide any additional benefit to the conservation of the species or its habitat since all site-specific projects proposed by the CNF are subject to section 7(a)(2) consultation with the Service and that the designation would unnecessarily add to their analysis burden by requiring the CNF to make a determination of effect regarding critical habitat when consulting under section 7 of the Act.

Our Response: We have determined that National Forest lands contain physical and biological features essential to the conservation of *Berberis nevinii*, and meet the definition of critical habitat (see Criteria Used to Identify Critical Habitat section below). We acknowledge that the revised LMP will benefit *B. nevinii* and its habitat. The LMP contains general provisions for species conservation and suggests specific management and conservation actions that will benefit this species and the physical and biological features essential to its conservation. Implementation of the LMP should address known threats to this species on National Forest lands. As stated above, we appreciate and commend the efforts of the United States Forest Service (USFS) to conserve federally listed species on their lands.

The Secretary may exclude an area from critical habitat under section 4(b)(2) of the Act after taking into consideration the economic impact, the impact on national security, and any other relevant impact if he determines that the benefits of such exclusion outweigh the benefits of designating such area as critical habitat, unless he determines that the exclusion would result in the extinction of the species concerned. We have considered the request from the CNF that we exclude their lands because it would unnecessarily add work in the future to determine the effect regarding critical habitat for actions on their lands and the fact that they had already completed consultation under section 7(a)(2) of the Act on their revised LMP. Recognizing that the CNF already analyzes the impacts of its proposed activities on both this species and the habitat, we are unable to conclude that the benefits of exclusion would outweigh the benefits of inclusion in this particular instance.

Under the Joint Counterpart Endangered Species Act Section 7 Consultation Regulations published in the **Federal Register** on December 8, 2003 (68 FR 68254), projects under the National Fire Plan that the USFS determines are ''not likely to adversely affect'' any listed species or designated critical habitat do not require any additional consultation with the Service. Projects within the scope of the National Fire Plan include projects such as prescribed fire, mechanical fuels treatments (thinning and removal of fuels to prescribed objectives), emergency stabilization, burned area rehabilitation, road maintenance and operation activities, ecosystem restoration, and culvert replacement actions. Therefore, projects such as restoration, revegetation, and removal of nonnative species conducted in support of the National Fire Plan that are not likely to adversely affect federally-listed species should not add to the USFS' workload or cost burden by requiring them to conduct a separate analysis and make a determination of effect on critical habitat when consulting under section 7 of the Act.

Also, as part of our section 7 consultation with the USFS on the CNF's LMP, the USFS has already consulted on various activities carried out on National Forest lands including: roads and trail management; recreation management; special use permit administration; administrative infrastructure; fire and fuels management; livestock grazing and range management; minerals management; and law enforcement. In our 2005 biological opinion on the LMP, we determined that implementation of the plan was not likely to jeopardize the continued existence of *B. nevinii*. Since critical habitat has not been previously proposed or designated for this species, it is anticipated that the consultation with the USFS regarding their current LMP will be reinitiated. However, because the USFS has already consulted with us on potential impacts to this species related to the activities outlined in the LMP, the USFS can supplement its analysis for those activities already analyzed in the LMP with the additional analysis required for critical habitat areas. We do not believe that this additional analysis would place an undue burden on the USFS in this instance.

In conclusion, we are designating National Forest lands that meet the definition of critical habitat for *B. nevinii* because we are unable to

conclude, based on the general assertions provided by the agency here, that the benefits of excluding these National Forest lands outweigh the benefits of their inclusion. We will, of course, continue to consider on a case-by-case basis in future critical habitat rules whether to exclude particular Federal lands from such designation when we determine that the benefits of such exclusion outweigh the benefits of their inclusion.

Comments Related to the Draft Economic Analysis (DEA)

We did not receive any comments related to the DEA.

Comments From State Agencies

We did not receive any comments from State agencies on this rule.

Summary of Changes from Proposed Rule

In preparing the final critical habitat designation for *Berberis nevinii*, we reviewed and considered comments from the peer reviewer and the public on the proposed designation of critical habitat published on February 6, 2007 (72 FR 5552). In light of comments received on the proposed rule and information gathered for the DEA, we reevaluated the proposed critical habitat boundaries and published revisions to proposed critical habitat subunits 1B, 1D, and 1E concurrently with the notice of availability for the DEA (72 FR 58793; October 17, 2007). We did not receive any comments related to the DEA. This final rule differs from the proposed designation of critical habitat published on February 6, 2007 (72 FR 5552), as follows:

(1) In the proposed rule, we based the critical habitat boundary descriptions on Universal Transverse Mercator (UTM) gridlines set every 328 ft (100 m). These square grids were overlaid on occurrence polygons determined to be essential to the conservation of the species. Areas where the occurrence polygon intersected with a grid cell were retained. Although we used Geographic Information System (GIS) soil and vegetation data in an effort to ensure that the habitat within the grid cells containing the occurrence polygons had one or more of the PCEs, as well as aerial photography to remove areas that did not contain any of the PCEs, the use of UTM gridlines effectively created an artificial buffer around the resulting areas we determined to be essential to the conservation of the species. Therefore, in this final designation, we have refined the critical habitat boundaries by screen digitizing habitat polygons using ArcMap, a computer GIS program. Use of this methodology produced more precise boundaries for areas that we determined contained the physical and biological features essential to the conservation of *Berberis nevinii*. Areas outside of these boundaries were removed (see the Criteria Used to Identify Critical Habitat section for a detailed discussion). This method of delineation for critical habitat reduced the total area of habitat from approximately 361 ac (146 ha) to 173 ac (70 ha). Total area in this final critical habitat rule is less than what was estimated in the notice of availability for the DEA (72 FR 58793; October 17, 2007) because the proposed critical habitat boundaries for subunits 1B, 1D, and 1E in the DEA were also produced using 100 m grids (see item (3) below). Therefore, the DEA and final economic analysis (FEA) likely overestimate the potential economic costs of this critical habitat designation because this reduction in area is not reflected in either the DEA or FEA.

(2) We revised the location and boundaries of critical habitat Subunit 1B (Agua Tibia Mountain Foothills) on the CNF to reflect updated location information provided by the National Forest. Revised Subunit 1B is in a new location and encompasses approximately 1 ac (<1 ha) of Federal land managed by the CNF, rather than a total of 22 ac (9 ha)–17 ac (7 ha) of United States Forest Service (USFS) land and 5 ac (2 ha) of private land—as originally proposed. Accordingly, we have revised the subunit to reflect this new information (please refer to the Proposed Critical Habitat Designation section of this final rule).

(3) We reevaluated areas previously determined to contain the physical and biological features essential to conservation of *Berberis nevinii* in subunits bordering Vail Lake. We removed areas that do not contain these essential features due to lake-level fluctuations and recurrent, episodic inundation that has lasted for relatively long periods of time. These revisions (as described in the October 17, 2007, notice of availability (72 FR 58793)), along with removing the 328 ft (100 m) grids as described in item (1) above that further refined these two subunits, reduced the area meeting the definition of critical habitat within proposed Subunit 1D (North of Vail Lake) from 22 ac (9 ha) to 5 ac (2 ha) and the area meeting the definition of critical habitat within proposed Subunit 1E (South of Vail Lake/Peninsula) from 251 ac (102 ha) to 112 ac (45 ha). We are excluding both subunits from this final designation under section 4(b)(2) of the Act (see the Relationship of Critical Habitat to Habitat Conservation Plans (HCPs)—Exclusion Under Section 4(b)(2) of the Act section below for a detailed discussion).

(4) We made technical corrections and clarifications to some of the information found in the following sections of the proposed rule: Background, Primary Constituent Elements, Special Management Considerations or Protection, Proposed Critical Habitat Designation, and Exclusions Under Section 4(b)(2) of the Act for *Berberis nevinii*. These changes include new information or clarifications on the distribution of *B. nevinii*; reproduction strategy and life history; threats to the species and its habitat, particularly as they relate to transportation projects and land development; updated descriptions of the critical habitat units as described above; and a more comprehensive description of the relationship of critical habitat to the approved Western Riverside County MSHCP and the exclusion of private lands covered by this plan.

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

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(c) 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 the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided under 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, transplantation, and in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies

carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) of the Act requires consultation on Federal actions that may affect 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 the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by private landowners. Where a landowner requests federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time of listing must contain the physical or biological features that are essential to the conservation of the species, and be included only if those features may require special management considerations or protection. 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 PCEs laid out in the appropriate quantity and spatial arrangement for the conservation of the species). Under the Act, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed as critical habitat only when we determine that those areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our 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 we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may 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.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not promote the recovery of the species.

Areas that are important to the conservation of the species, but are outside the critical habitat designations, will continue to be subject to conservation actions that we and other Federal agencies implement under section 7(a)(1) of the Act. Areas that support populations are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency 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 (HCPs), or other species conservation planning efforts if information available at the time of these planning efforts calls for a different outcome.

Primary Constituent Elements (PCEs)

In accordance with section 3(5)(A)(i) of the Act and the regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features essential to the conservation of the species that may require special management considerations or protection. We consider the physical or biological features to be the PCEs laid out in the appropriate quantity and spatial arrangement for the conservation of the species. The PCEs include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, and rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

We derive the PCEs required for *Berberis nevinii* from its biological needs as described below and in the proposed critical habitat designation published in the **Federal Register** on February 6, 2007 (72 FR 5552, pp. 5558–5561). Additional information can also be found in the final listing rule published in the **Federal Register** on October 13, 1998 (63 FR 54956).

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, California, with the largest native occurrence (as defined by CNDDB) consisting of several stands and totaling about 134 individuals to the south of Vail Lake in Riverside County (Boyd 1987; CNDDB 2007). 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 54956), but most native occurrences are between 1,400 and 1,700 ft (427 to 518 m) in elevation (Boyd 1987, p. 2; CNDDB 2007). 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; CNDDB 2007). *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 (CNDDB 2007).

Based on 1987 field surveys, native *Berberis nevinii* occurring on slopes in Scott Canyon and south of Vail Lake were found in areas with slopes of 19 to 34 degrees (Boyd 1987, pp. 7, 45, 62, 65, 68). Other *B. nevinii* plants occurring on slopes in the Vail Lake and Oak Mountain area generally occupy slopes of less than 34 degrees, based on Service GIS data (2006). Introduced (i.e., nonnative) occurrences are known to grow on steeper slopes (e.g., 40 to 50 degrees) in San Francisquito Canyon (Boyd 1987, p. 7). *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; CNDDB 2007).

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, unpaginated), and two plants at the Big Oak Mountain summit occur on heavy adobe or gabbro type soils with high water-holding capacity formed from metavolcanic geology (Mesozoic basic intrusive rock) (Soza 2003, unpaginated). The CNF 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 Natural Resource Conservation Service 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 and 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 badlands 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. Based on the revised location information received during the public comment period, the *B. nevinii* site on the CNF south of Vail Lake is now mapped as rough broken land and Vasalia gravelly sand loam, with 5 to 9 percent slopes (Service GIS data 2007).

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* (scale-broom) and *Prunus ilicifolia* (holly-leaved cherry), which 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, unpaginated). Information received by a peer reviewer of the proposed critical habitat rule appears to support this association with mesic microhabitats, as it was noted that recruitment of *B. nevinii* is typically into relatively mesic chaparral sites (White 2001, p. 36).

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; CNDDB 2007). Native *B. nevinii* in Lopez Canyon, Scott Canyon, and San Timoteo Canyon, as well as many of those found in the Vail Lake and 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 *Quercus agrifolia* (coast live oak) 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, 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, CNDDB 2007).

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* (California buckwheat), *Artemisia californica* (California sagebrush), *Adenostoma fasciculatum* (chamise), *Rhus ovata*

(sugar bush), *R. trilobata* (skunkbrush), *R. integrifolia* (lemonadeberry), *Salvia mellifera* (black sage), *Sambucus mexicana* (elderberry), *Prunus ilicifolia* (hollyleaf cherry), *Rhamnus crocea* (spiny redberry), and *Quercus berberidifolia* (scrub oak) (Boyd 1987, p. 2; CNDDB 2007). Several native occurrences are associated with coastal oak woodland or riparian/alluvial scrub vegetation, such as *Quercus agrifolia, Populus fremontii* (Fremont cottonwood), *Salix laevigata* (red willow), *Platanus racemosa* (western sycamore), *Baccharis glutinosa* (mule-fat), or *Lepidospartum squamatum* (CNDDB 2007). Boyd (1987, p. 2) has noted that certain desert floral elements such as *Encelia farinosa* (brittlebush), *Chrysothamnus nauseosus* (rubber rabbitbrush), *Artemisia tridentata* (sagebrush), *Chilopsis linearis* (desert willow), *Yucca schidigera* (Mojave yucca), *Opuntia parryi* (snake cholla), and *Atriplex canescens* (fourwing saltbush) 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 mixing with cismontane chaparral shrubs 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). One native occurrence is on relatively flat clay lenses in an open grassland area with chaparral nearby. Associated plant species include *Chenopodium californicum* (pigweed), *Avena fatua* (wild oat), *Harpagonella palmeri* (Palmer's grappling hook), *Plantago erecta* (California plantain), *Convolvulus simulans* (bindweed), *Galium porrigens* (climbing bedstraw), and *Delphinium* sp. (Larkspur) (Wallace 2006b, p. 1).

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; Mistretta and Brown 1989, p. 10). This suggests the need for some relatively long fire-free period to allow for canopy growth and the creation of conditions conducive to germination, establishment, and recruitment of *B. nevinii* into chaparral. This idea was also proposed by White (2001, p. 36) and reiterated in his review of our proposal (White 2007, p. 1). Boyd et al. (1987, p. 77) noted that mature cultivated individuals were located in areas exposed to full sunlight, and Reiser (2001, unpaginated) noted that mature *B. nevinii* shrubs frequently tower above associated subshrubs. Based on field observations, 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 and 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. 1,206).

We have little information about pollinators, seed dispersal mechanisms, or the reproductive biology of this species. *Berberis nevinii* has loose clusters of bisexual yellow flowers that open between March and 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; Neihaus 1977, p. 1; Morris 2006). Species-specific information on pollinators for *B. nevinii* is lacking. Native bees in the following genera have been collected on species of *Berberis* native to North America: *Andrena, Osmia, Emphoropsis, Synhalonia, Melissodes,* and *Ceratina* (Krombein et al. 1979, vol. 2, pp. 1796, 1797, 1835, 2032, 2129, 2152, 2168, 2182). These are generalist taxa; however, their habitat requirements and home ranges relative to the native *Berberis* taxa have not been determined. According to the U.S. Department of Agriculture (2006), native *Berberis* species ''provide significant forage for native bees.'' According to Mussen (2002), California's native *Berberis* species are ''visited (and probably pollinated) by honey bees'' (*Apis mellifera*).

The genus *Berberis* contains species that are both self-compatible and self-incompatible (Anderson et al. 2001, p. 227), and while we do not know if *B. nevinii* is self-incompatible, we can draw some conclusions based on observed levels of reproduction, or the lack thereof, at known occurrences. As noted by the peer reviewer for the proposed critical habitat rule, several occurrences consist of only a single plant that has existed for years or decades without reproducing (Mistretta and Brown 1989), suggesting a self-incompatible pollination system (White 2001, p. 36). If this is the case, recovery of this species may require pollen transfers among the occurrences with demonstrated low reproductive output.

Berberis nevinii does not appear to reproduce by vegetative means to any great extent if at all (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 of slender elongate rhizomes, as is the case with some other members of the genus *Berberis*. According to White (2007, p. 1), the now-extirpated *B. nevinii* occurrence in San Timoteo Canyon, previously reported to reproduce vegetatively, was more likely resprouting from a large basal burl (refer to previous discussion of this terminology under the Species Description and Reproduction section above). 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 or adapted to these types of disturbances (Keeley 1991, p. 84; Tyler 1996, p. 2,182). 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). Mature plants of obligate seeder species are typically killed by fire, and seeds are the only means of 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). Plants of obligate sprouter species, on the other hand, are rarely killed by fire, but rather resprout from roots, lignotubers (burls), 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 (facultative sprouters), and fire-caused mortality is variable, likely due to characteristics of the individual fire (Kelly and Parker 1990, p. 114).

Based on additional information received through peer review of the February 6, 2007, proposed critical habitat rule (72 FR 5552), *Berberis nevinii* appears to be an obligate sprouter as defined above, and its life history matches Keeley's (1991)

description of the ''fire resister'' or ''nonrefractory seed'' syndrome (i.e., seeds germinate without fire-associated cues) (White 2007, p. 1). As stated in the proposed rule, *B. nevinii* resprouts following fire (Soza and Fraga 2003, p. 2; Sanders 2006, unpaginated; Mistretta and Brown 1989, p. 5). According to Soza and Boyd (2003, p. 2), Soza (2006, unpaginated), and the USFS (2005, p. 237), post-fire surveys on ANF and CNF reported *B. nevinii* regeneration by resprouting and recruitment from seeds. However, White (2007, p. 1), did not consider it likely that these seedlings would survive exposure during early post-fire years and would die before reaching reproductive maturity.

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 fire frequency has increased in the lower coastal valley and foothill zone, 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. 1,831; Keeley and Fotheringham 2001, p. 1,545; 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). 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 coastal sage scrub clearly shows an increasing trend in area burned over this time period (Wells et al. 2004, pp. 148, 151).

Berberis nevinii's specific response to altered fire regimes (e.g., changes to fire frequency, timing, or intensity) is unknown (63 FR 54961). However, overly frequent fire on the landscape could potentially kill young *B. nevinii* before they reach their reproductive potential and may adversely affect mature *B. nevinii* (Boyd 1991, pp. 7, 9) by causing repeated resprouting that depletes stored resources faster than they can accumulate during fire-free periods (White 2007, p. 1). 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. 1,831). This type conversion has been observed in areas surrounding urban centers (Keeley 2006, p. 382). As noted above, the presence of a seed bank is inconsistent with the ''non-refractory seed'' (fire resistor) syndrome considered to be represented in *B. nevinii* (White 2007, p. 1); thus, overly frequent fires are not likely to adversely affect the soil seed bank for this species, as suggested in the proposed rule to designate critical habitat (72 FR 5560).

Life history characteristics and population demographics of *Berberis nevinii* are largely unknown and unstudied. *Berberis nevinii* shrubs are long-lived (>50 years) (Mistretta and Brown 1989, p. 5) with low reproductive rates 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 (meaning that its present distribution is a remnant of a formerly wider distribution) (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 the 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, sexual or vegetative reproduction appears to be uncommon in many *B. nevinii* occurrences. However, because the species is long-lived, intermittent seed production over the lifespan of a shrub may be more important than annual seed production for perpetuating the species.

Primary Constituent Elements for Berberis Nevinii

Based on our current knowledge of the life history, biology, and ecology of *Berberis nevinii* and the habitat requirements for sustaining the essential life history functions of the species, we have determined that *B. nevinii* requires the PCEs described below:

(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 feet (275 and 915 meters) in elevation that provide the appropriate cover for growth and reproduction.

This final designation is defined for the conservation of the physical and biological features essential to the conservation of the species, which support the life history functions of the species, through the identification of the appropriate quantity and spatial arrangement of areas containing the PCEs. Some units contain all of these PCEs and support multiple life processes, while some units contain only a portion of these PCEs, those necessary to support the species' particular use of that habitat. Because not all life history functions require all the PCEs, not all critical habitat units will contain all the PCEs.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the areas within the geographical area occupied by the species at the time of listing contain the physical or biological features essential to the conservation of the species, and whether these features may require special management considerations or protection. As stated in the final listing rule (63 FR 54956, October 13, 1998), threats to the species and its physical and biological features 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 the introduction of invasive, nonnative plants that may compete with *Berberis nevinii* or contribute to combustible fuel loads (63 FR 54961). These threats can directly or indirectly result in the loss, modification, degradation, or fragmentation of *B. nevinii* habitat, thereby eliminating or reducing potential habitat for seed production and germination, seedling

establishment, plant growth and maturation, and population growth. Individually or combined, these threats may require special management considerations or protection of the physical and biological features 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 in the San Fernando Valley of Los Angeles County (63 FR 54961). Urban development is currently the primary threat to *B. nevinii* habitat and occurrences in the vicinity of Vail Lake and Oak Mountain in Riverside County. 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 within or near *B. nevinii* habitat may increase the frequency of fire on the landscape due to increased combustible fuel loads that may result from the incursion and spread of annual nonnative grasses and an increased potential for fire ignition.

In the February 6, 2007, proposed rule (72 FR 5552), we focused primarily on potential indirect impacts of urbanization on *Berberis nevinii* habitat and occurrences in the vicinity of Vail Lake and Oak Mountain (72 FR 5565–5567). Urban development is not expected to directly impact the known occurrences of *B. nevinii* on Federal land in the Vail Lake and Oak Mountain area, although indirect impacts associated with increased urbanization may occur. On the other hand, *B. nevinii* habitat on private land in this area may be subject to some degree of residential development, as described below in the critical habitat subunit descriptions (see the Critical Habitat Designation section of this final rule). However, these private lands are located within the Criteria Area of the Western Riverside County MSHCP and are targeted, in whole or in part, for acquisition and inclusion in the MSHCP Conservation Area as Additional Reserve Lands. Specifically, the conservation objectives of the MSHCP include conservation and management of at least 8,000 ac (3,238 ha) of suitable habitat, including all known locations of *B. nevinii* in the Vail Lake area (see the Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act section below for a detailed discussion of the MSHCP).

Recreational activities may also impact the physical and biological features essential to the 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 (PCE 3), the introduction of nonnative plants (PCE 3), soil disturbance or compaction (PCE 2), and increased erosion and changes to hydrological (drainage and water infiltration) patterns that 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 to the conservation of the species. The creation of fuel breaks, 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 dispersing seeds and creating (disturbance) conditions that increase the competitive edge of nonnative species over native species, thereby altering the composition of the vegetation community (PCE 3). As pointed out in the proposed critical habitat rule (72 FR 5552), vegetation community composition and structure could be altered by fire management activities such as prescribed fires that are too frequent or that occur at times of the year atypical of the natural fire regime, or by fire suppression that allows overgrowth of high canopy cover, limiting or eliminating plant species that require full or partial sun from the plant community (72 FR 5563). *Berberis nevinii's* life history characteristics indicate that it likely recruits into chaparral during fire-free periods and may require long intervals between fires for recruitment and population increases; thus, overly frequent fire is a substantial and immediate threat to this species (White 2007, p. 1).

While highway projects were identified in the final listing rule (63 FR 54956, October 13, 1998) and proposed critical habitat rule (72 FR 5552; February 6, 2007) as a threat to *Berberis nevinii*, we do not anticipate that this activity will affect designated critical habitat in the foreseeable future. Specifically, the proposed critical habitat rule identified the proximity of Highway 79 as a potential threat to the *B. nevinii* occurrence and habitat on the CNF (Subunit 1B) in part due to proposed highway widening and realignment activities (72 FR 5565). However, we no longer anticipate that these activities will affect Subunit 1B because: (1) There are currently no plans to widen the portion of State Route 79 closest to Subunit 1B, and (2) the revised subunit is now more than 525 ft (160 m) south of the highway, which is far enough away that impacts to the subunit from construction or widening activities are unlikely.

Based on information provided for the economic analysis, nonnative *Arundo donax (Arundo)* and other invasive grasses are present in Subunit 1B, and the CNF anticipates an eradication effort based on the weed management strategy in the USFS' Revised Land Management Plan for the Four Southern California National Forests (USFS 2005). Additional information obtained on water storage at Vail Lake indicates that lake level fluctuations could affect proposed subunits bordering Vail Lake (specifically, proposed subunits 1D and 1E). While we revised proposed critical habitat boundaries for these subunits based on the currently permitted storage capacity of Vail Lake (see the Criteria Used to Identify Critical Habitat section in this final rule), fluctuating water levels that surpass permitted storage levels and lake storage capacity could still affect *Berberis nevinii* in subunits that border Vail Lake. However, the occurrences that are located closest to Vail Lake have not been inundated or affected by rising water levels and fluctuations in the recent past (Boyd 2007, p. 1), and we do not anticipate that any *B. nevinii* individuals in this area will be affected.

Criteria Used To Identify Critical Habitat

Berberis nevinii 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 and Oak Mountain area in western Riverside County has the highest concentration of native *B. nevinii*, representing several size (age) classes. Plants occur in numerous stands scattered throughout the area, with the largest number of plants located at the south edge of Vail Lake and on the peninsula protruding into the lake. The long-term conservation of *B. nevinii* will depend upon the protection of these core native occurrences and the maintenance of ecological functions within these sites.

We delineated critical habitat for *Berberis nevinii* using the following criteria: (1) Areas occupied by naturally occurring individuals of the species at the time of listing and areas that are currently occupied by naturally occurring individuals; (2) occupied areas within the historical range of the species; (3) areas containing one or more of the PCEs for 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 or 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 considered the ecological uniqueness of sites.

We did not include sites with only one individual or sites with two individuals of the same size/age class because this condition may reflect a lack of successful reproduction and therefore the long-term viability of these occurrences is questionable. As discussed in the proposed critical habitat rule, many *Berberis nevinii* occurrences consist of very few individuals, and sometimes consist of only one or two large (presumably old) shrubs that have persisted on a site for many decades without evidence of reproducing. Because of the lack of evidence of reproduction for these small occurrences, and the low reproductive output of mature plants and limited numbers of surviving juvenile plants in general, we do not consider sites with only one plant or two plants of the same size/age class to represent an occurrence that exhibits a measurable degree of reproductive success that is likely to contribute to the recovery of the species.

As explained in the Primary Constituent Elements section of this final rule, a self-incompatible pollination system has been suggested (White 2001, p. 36). Additionally, *Berberis nevinii* does not appear to reproduce by vegetative means (Mistretta and Brown 1989, p. 5; Boyd 2006), as is the case with some other members of the genus *Berberis.* Therefore, pollen transfers from plants in different occurrences are likely necessary for reproduction to occur in sites supporting only one plant or two plants of the same size/age class. The habitat requirements and home ranges of potential pollinator species relative to native *Berberis* occurrences have not been determined; however, the lack of evidence of reproduction in these small *B. nevinii* occurrences suggests that pollination may not be occurring or another biological constraint is impacting the occurrences. The fact that reproduction has not been in evidence at these sites in several decades, if at all, suggests that they may not be viable occurrences over the long term. Whether or not these occurrences may contribute to recovery of the species is unknown at this time. We will continue to explore the potential conservation value of these small occurrences, and consider these occurrences in future recovery actions as appropriate.

Whether naturalized occurrences will play a role in conservation of the species is also 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 occurrence supporting naturalized plants (San Francisquito Canyon, Los Angeles County) may contain an individual or descendents of an individual that originated from a nearby extirpated occurrence (i.e., the San Fernando Valley, Los Angeles County). Thus, we will continue to explore the potential conservation value of introduced occurrences, and consider these occurrences in future recovery actions as appropriate.

We are aware of 39 records for *Berberis nevinii* rangewide documented by the CNDDB (2007). However, we do not have adequate information to determine the status of six of these occurrences, as described in the Criteria Used to Identify Critical Habitat sections of the proposed rule (72 FR 5552; February 6, 2007, p. 5562), and no additional information regarding these particular occurrences was provided to us during the public comment period. We considered 19 of the CNDDB records for *B. nevinii* to be extant, native occurrences, and all of these were known at the time of listing, although each was not specifically described in the final listing rule (63 FR 54956, October 13, 1998). The majority of the extant, native occurrences are in Riverside County in the vicinity of Vail Lake and Oak Mountain, described in the final listing rule as one of the primary geographical areas occupied by the species. Only six of the CNDDB *B. nevinii* occurrences, all in Riverside County in the vicinity of Vail Lake and Oak Mountain, met our criteria for designating critical habitat. Five of the six occurrences consist of more than two individuals, and evidence of reproduction (multiple size/age classes, seedlings, and/or fruit with seed) is known for three of the occurrences (CNDDB element occurrences 24, 31, and 38). We do not know if reproduction has occurred at the other three sites (CNDDB 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.

As discussed in the Background section of the proposed rule (72 FR 5552; February 6, 2007), the Western Riverside County MSHCP database contains 32 records of extant *Berberis nevinii* occurrences from the vicinity of Vail Lake and Oak Mountain alone, as well as one record from the Soboba Badlands (72 FR 5555). However, many of the MSHCP records overlap and some appear to duplicate CNDDB records. In contrast to the CNDDB records, the MSHCP records largely do not contain accompanying data, such as number of plants, origin (native versus introduced), and habitat associations, making it impossible to accurately quantify the number of distinct occurrences or plants in this area (Service 2004, pp. 330–331) or determine the specific location of many of these occurrences. Therefore, we did not rely on the MSHCP occurrence records for determining critical habitat, but rather we sought additional information to clarify these records during the public comment period. We did not receive any additional information in this regard.

We evaluated whether geographically peripheral (e.g., Los Angeles and San Bernardino Counties) native occurrences would fit into our criteria for identifying critical habitat. Despite the biological conservation arguments raised by Lesica and Allendorf (1995; pp. 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 (CNDDB 2007 element occurrence 43) and Scott Canyon (CNDDB 2007 element occurrence 5) occurrences both consist of single large (old) individuals with no signs of past or current reproduction by seed. The San Timoteo Canyon occurrence (CNDDB 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, unpaginated).

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 designated 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 pollen and seed dispersal within and between stands of *Berberis nevinii.* Available data indicates that the genus *Berberis* is likely pollinated by generalist bee taxa. 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.*

We delineated critical habitat unit boundaries in the following manner:

(1) We identified all areas occupied by the species at the time of listing or currently occupied by *Berberis nevinii* using location data in the CNDDB (2007);

(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 the physical and biological features essential to the conservation of the species using the criteria described above; and

(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 from field surveys to narrow and refine the location of *B. nevinii* occurrence polygons. Finally, using aerial photography, we removed areas that did not contain any of the PCEs for the species (e.g., aquatic habitat in Vail Lake).

As described in the Summary of Changes from Proposed Rule section above, in the proposed rule we overlaid 100 m (328 ft) square UTM grids over all essential habitat to delineate the proposed critical habitat boundaries and produce UTM coordinates. In this final rule we delineated critical habitat unit boundaries by screen-digitizing the habitat polygons that we determined contain the physical and biological features essential to the conservation of *Berberis nevinii.* The delineation of critical habitat boundaries through digitizing habitat polygons versus applying 328 ft (100 m) square grids over the areas we determined to be essential to the species reduced the total area from approximately 361 ac (146 ha), which was an overestimate of the area of essential habitat, to 173 ac (70 ha), which is the actual area we determined to be essential to the conservation of the species at the time of the proposed rule.

When delineating proposed critical habitat, we also tried to remove areas from proposed subunits near Vail Lake that were identified as being under water, and therefore did not contain the physical and biological features (72 FR 5562). We based subunit delineations in the proposed rule on USGS 1-meter resolution color-balanced, color infrared aerial photography acquired in May to June 2002 for the Vail Lake area, western Riverside County. For this final rule, we reevaluated proposed critical habitat subunits bordering Vail Lake based on updated aerial photographs and Vail Lake volume data provided by Rancho California Water District (RCWD) during the development of the economic analysis. We removed areas along the shoreline from subunits 1D (North of Vail Lake) and 1E (South of Vail Lake/Peninsula) that do not contain the physical and biological features required by *Berberis nevinii* and are not occupied by the species due to lake-level fluctuations and recurrent, episodic inundation, sometimes for relatively long periods of time based on criteria discussed below. We published these revisions to proposed critical habitat and reopened the comment period in conjunction with the notice of availability for the DEA, published in the **Federal Register** on October 17, 2007 (72 FR 58793).

As discussed in the October 17, 2007 (72 FR 58793) notice of availability, water levels at Vail Lake can fluctuate greatly, depending on the amount of local runoff reaching the lake, both within any given year and annually, frequently exceeding the 2002 water levels for relatively long periods of time. The RCWD, the entity that owns, operates, and manages Vail Dam and Vail Lake, has a surface water storage permit in the lake for up to 40,000 acre-feet (49,339 cubic-meters) from November 1 to April 30, annually. Thus, we revised proposed critical habitat boundaries for subunits bordering Vail Lake based on lake levels at RCWD's permitted storage capacity. This process, coupled with the removal of the 100 m (328 ft) square grids, resulted in the removal of approximately 17 ac (7 ha) from proposed Subunit 1D and approximately 139 ac (56 ha) from proposed Subunit 1E, leaving approximately 5 ac (2 ha) and approximately 112 ac (45 ha) in proposed subunits 1D and 1E, respectively.

Water volume in Vail Lake has been known to exceed 40,000 acre-feet (49,339 cubic-meters), even filling and surpassing lake storage capacity (50,000 acre-feet (61,674 cubic-meters)) with water flowing over the spillway. The creation of Vail Lake in 1948 may have resulted in the loss of some *Berberis nevinii* individuals; however, the occurrences that are now located closest to Vail Lake have not been inundated or affected by rising water levels and fluctuations in the recent past (Boyd 2007). Thus, the revisions to proposed critical habitat subunits 1D and 1E are not likely to result in *B. nevinii* individuals in this area falling outside the revised subunit boundaries. These revisions will, on the other hand, more accurately represent *B. nevinii* habitat in subunits 1D and 1E.

We are designating 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 are the appropriate quantity and spatial arrangement of areas containing the PCEs to constitute the physical and biological features essential to the conservation of the species, which support the life history functions of the species.

When determining the critical habitat boundaries for this final rule, we made every effort to avoid including developed areas, such as lands covered

by buildings, pavement, and other structures, because such lands lack PCEs for *Berberis nevinii.* The scale of the maps we prepared under the parameters for publication within the *Code of Federal Regulations* may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the map of this critical habitat rule have been excluded by text in this final rule. Therefore, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification, unless the specific action may affect adjacent critical habitat.

Final Critical Habitat Designation

We are designating one unit with two subunits as critical habitat for *Berberis nevinii.* The critical habitat areas identified below constitute our current best assessment of areas that meet the definition of critical habitat for *B. nevinii.* Table 1 outlines the area determined to meet the definition of critical habitat, including the areas excluded from the final critical habitat designation, and the two areas designated as final critical habitat for *B. nevinii.* A brief discussion of each area designated as critical habitat is provided in the unit descriptions below. Additional detailed documentation concerning the essential nature of these areas is contained in our supporting record for this rulemaking.

TABLE 1.—AMOUNT OF LAND DETERMINED TO MEET THE DEFINITION OF CRITICAL HABITAT, AMOUNT OF LAND EXCLUDED FROM THE FINAL CRITICAL HABITAT DESIGNATION, AND AMOUNT OF LAND DESIGNATED CRITICAL HABITAT FOR *Berberis nevinii*

[Area is displayed in acres (ac) (hectares (ha)), rounded to the nearest whole number. Numbers may not sum due to rounding]

Critical habitat unit	Land ownership by type	Land meeting the definition of critical habitat	Land excluded from critical habitat	Critical habitat
Unit 1. Agua Tibia/Vail Lake:				
1A. Big Oak Mountain Summit	BLM	5 ac (2 ha)	0 ac (0 ha)	5 ac (2 ha)
1B. Agua Tibia Mountain Foothills	USFS	1 ac (1 ha)	0 ac (0 ha)	1 ac (1 ha)
1C. South Flank Big Oak Mountain	Private	39 ac (16 ha)	39 ac (16 ha)	0 ac (0 ha)
1D. North of Vail Lake	Private	5 ac (2 ha)	5 ac (2 ha)	0 ac (0 ha)
1E. South of Vail Lake/Peninsula	Private	112 ac (45 ha)	112 ac (45 ha)	0 ac (0 ha)
1F. Temecula Creek East	Private	11 ac (4 ha)	11 ac (4 ha)	0 ac (0 ha)
Total		173 ac (70 ha)	167 ac (67 ha)	6 ac (3 ha)

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed animal species incidental to otherwise lawful activities. An incidental take permit application must be supported by a habitat conservation plan (HCP) that identifies conservation measures that the permittee agrees to implement for the covered species to minimize and mitigate the impacts of the requested incidental take. Often HCPs also incorporate conservation measures to benefit listed plant species, although take of plant species is not prohibited under the Act. 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 where we determine that the benefits of exclusion outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act. Based on such a determination, we are excluding the private lands covered under the Western Riverside County MSHCP from the final designation of critical habitat for *Berberis nevinii* (see the Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

Below, we present a brief description of the areas included in the final designation and reasons why these areas meet the definition of critical habitat for *Berberis nevinii.*

Unit 1: Agua Tibia/Vail Lake

Unit 1 comprises approximately 6 ac (3 ha) and is divided into two subunits: Big Oak Mountain Summit (1A) and Agua Tibia Mountain Foothills (1B). The lands in Unit 1 were occupied at the time of listing, contain the physical and biological features essential to the conservation of *Berberis nevinii,* and 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 5 ac (2 ha) of Federal land managed by the BLM on Big Oak Mountain to the north of Vail Lake in southern Riverside County. Two *Berberis nevinii* individuals of different sizes (ages) occur in this subunit 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, unpaginated). 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, Convolvulus simulans, Galium porrigens*, and *Delphinium* sp.

We are designating 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 physical and biological features essential to the conservation of *B. nevinii.* Additionally, this site contains naturally occurring *B. nevinii* of different sizes (ages). 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 (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) surrounded by private land. The primary threats to *Berberis nevinii* habitat in this area are the indirect effects associated with urban and residential development on private lands adjacent to BLM lands, 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). However, special management considerations or protection for the physical and biological features may be needed 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 resulting from urban and residential development.

Subunit 1B: Agua Tibia Mountain Foothills

Subunit 1B consists of approximately 1 ac (<1 ha) of federally-owned land managed by the USFS on the CNF near the Agua Tibia Wilderness Area in southern Riverside County, California. 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* (CNDDB 2007). 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 rough broken land and Visalia gravelly sandy loam, with 5 to 9 percent slopes (PCE 2) (Service GIS data 2007).

We are designating this subunit as critical habitat because it contains the physical and biological 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 the CNF is not as well protected as the occurrence on the ANF (USFS 2005, p. 238). The primary threats to *B. nevinii* habitat in this area are human recreation (off-highway vehicle use, shooting); wildland fire, including an increased risk of fire ignition due to the proximity of State Highway 79 (USFS 2005, pp. 232, 237); fuels and fire management activities (USFS 2005, p. 237); and invasive, nonnative plants, including potential short-term adverse effects associated with control efforts (USFS 2005, p. 234). This occurrence on the CNF burned in 1996 and vigorously resprouted following the fire (USFS 2005, p. 237). According to the USFS, this location has shown signs of disturbance from road activities, with unauthorized use of off-highway vehicles occurring close to, but not within, the area occupied by the species (USFS 2005, p. 235). Nonetheless, the magnitude of impacts associated with roads and recreational activity in this area appears to be low (USFS 2005, p. 238). Also, the USFS does not anticipate substantial camping and hiking-related impacts to *B. nevinii* habitat, and intends to avoid or mitigate these impacts through implementation of Forest Plan standards (USFS 2005, p. 234).

The February 6, 2007, proposed rule (72 FR 5552) identified the proximity of Highway 79 as a potential threat to the *Berberis nevinii* occurrence and habitat on the CNF, in part due to proposed highway widening and realignment activities (72 FR 5565). However, we no longer anticipate that these activities will affect Subunit 1B as there currently are no plans for widening or realigning Highway 79 in the section of roadway closest to this subunit. The revised subunit is now more than 525 ft (160 m) south of the highway. As discussed in the Special Management Considerations or Protection section above, the presence of invasive, nonnative plants may impact the *B. nevinii* occurrence and habitat at this site. However, the CNF anticipates an eradication effort of the nonnative *Arundo donax* and other invasive grasses (USFS 2005) present in this subunit, which should minimize the impacts of this threat to the species and its habitat.

One of the greatest threats to occupied habitat on the CNF and the physical and biological features contained therein is from wildland fire and the management of fire and fuels (i.e., fire suppression and prevention activities). This subunit is within the Wildland-Urban Interface (WUI) Defense Zone (USFS 2005, p. 237; Service 2005, p. 127). Some plants 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 (Service 2005, p. 127). Special management considerations or protection of the physical and biological features 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.

Subunit 1C: South Flank Big Oak Mountain

We are excluding this subunit from the final designation of critical habitat under section 4(b)(2) of the Act (Table 1). See the Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act section below for a discussion of this exclusion.

Subunit 1D: North of Vail Lake

We are excluding this subunit from the final designation of critical habitat under section 4(b)(2) of the Act (Table 1). See the Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act section below for a discussion of this exclusion.

Subunit 1E: South of Vail Lake/ Peninsula

We are excluding this subunit from the final designation of critical habitat under section 4(b)(2) of the Act (Table 1). See the Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act section below for a discussion of this exclusion.

Subunit 1F: Temecula Creek East

We are excluding this subunit from the final designation of critical habitat under section 4(b)(2) of the Act (Table 1). See the Relationship of Critical Habitat to Habitat Conservation Plan Lands—Exclusions Under Section 4(b)(2) of the Act section below for a discussion of this exclusion.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely

modify designated critical habitat. Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our definition of ''destruction or adverse modification'' (50 CFR 402.02) (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)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional to serve its intended conservation role for the species.

Under section 7(a)(2) of the Act, 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, we document compliance with the requirements of section 7(a)(2) through our 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 jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define ''Reasonable and prudent alternatives'' 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,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect *Berberis nevinii* or its designated critical habitat will require section 7(a)(2) consultation under the Act. Activities on State, Tribal, local or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10(a)(1)(B) of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are examples of agency actions that may be subject to the section 7(a)(2) 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(a)(2) consultations.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical and biological features to an extent that appreciably reduces the conservation value of critical habitat for *Berberis nevinii*. Generally, the conservation role of *B. nevinii* critical habitat units is to support native occurrences of the species in the Vail Lake and Oak Mountain area, which in combination with occurrences on private land excluded from critical habitat designation under section 4(b)(2) of the Act, comprise the core viable natural population(s) of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for *Berberis nevinii* include, but are not limited to (please see Special Management Considerations or Protection section for a more detailed discussion on the impacts of these actions to the listed species):

(1) Activities that would directly or indirectly impact *Berberis nevinii* habitat and its physical and biological features. Such activities could include, but are not limited to: Residential or commercial development; fire prevention and suppression activities, such as the creation of fuel breaks and brush clearing or thinning; recreation management activities, including managing authorized recreation and restricting unauthorized recreation through placement of recreational trailheads, signs, barriers, maps, and/or facilities; off-road vehicle use; heavy recreational use; road development, maintenance, or improvement projects, such as road grading, widening, or realignment; flood control projects, such as vegetation stripping; and water storage projects that increase the period that habitat is inundated. These activities could change the physical and biological features of the habitat by: Affecting the topography of the site; physically removing or damaging soils and associated vegetation; altering the natural hydrology of the area; and by introducing and facilitating the spread of invasive, nonnative plant species. Additionally, actions to control or eradicate invasive, nonnative plants may cause temporary direct or indirect adverse impacts to *B. nevinii* habitat, although the ultimate outcome may be beneficial by removing species that compete with *B. nevinii* and contribute to high combustible fuel loads.

(2) Activities that would alter fire frequency in areas occupied by *Berberis nevinii*. 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. nevinii* 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 recreation management projects and road maintenance, improvement, or construction projects. These activities could reduce the ability of *Berberis nevinii* to grow and reproduce because nonnative plant species may crowd out or otherwise compete with *B. nevinii*. 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.

We consider all of the lands designated as critical habitat for *Berberis nevinii* to contain the physical and biological features essential to the conservation of the species. The two subunits designated as critical habitat are within the geographic range of the species, were occupied at the time of listing, and are currently occupied by *B. nevinii*. Federal agencies already consult with us on activities in areas occupied by *B. nevinii* that may affect the species to ensure that their actions do not jeopardize the continued existence of *B. nevinii*.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate or revise critical habitat 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 legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In the following sections, we address a number of general issues that are relevant to the exclusions we have considered.

Benefits of Designating Critical Habitat

The process of designating critical habitat as described in the Act requires that the Service identify those lands on which are found the physical or biological features essential to the conservation of the species that may require special management considerations or protection, and those areas outside the geographical area occupied by the species at the time of listing that are essential to the conservation of the species. In identifying those lands, the Service must consider the recovery needs of the species, such that, on the basis of the best scientific and commercial data available at the time of designation, the habitat that is identified, if managed, could provide for the survival and recovery of the species.

The identification of those areas that are essential for the conservation of the species and can, if managed, provide for the recovery of a species is beneficial. The process of proposing and finalizing a critical habitat rule provides the Service with the opportunity to determine the physical and biological features essential to the conservation of the species within the geographical area occupied by the species at the time of listing, as well as to determine other areas essential for the conservation of the species. The designation process includes peer review and public comment on the identified physical and biological features and essential areas. This process is valuable to land owners and managers in developing conservation management plans for identified areas, as well as any other occupied habitat or suitable habitat that may not have been included in the Service's determination of essential habitat.

The consultation provisions under section 7(a) of the Act constitute the regulatory benefits of critical habitat. As discussed above, Federal agencies must consult with us on discretionary actions that may affect critical habitat and must avoid destroying or adversely modifying critical habitat. Federal agencies must also consult with us on discretionary actions that may affect a listed species and refrain from undertaking actions that are likely to jeopardize the continued existence of such species. The analysis of effects to critical habitat is a separate and different analysis from that of the effects to the species. Therefore, the difference in outcomes of these two analyses represents the regulatory benefit of critical habitat. For some species, and in some locations, the outcome of these analyses will be similar, because effects on habitat will often result in effects on the species. However, the regulatory standard is different: The jeopardy analysis looks at the action's impact on survival and recovery of the species, while the adverse modification analysis looks at the action's effects on the designated habitat's contribution to the species' conservation. This will, in many instances, lead to different results and different regulatory requirements. Thus, critical habitat designations may provide greater regulatory benefits to the recovery of a species than would listing alone.

There are two limitations to the regulatory effect of critical habitat. First, a section 7(a)(2) consultation is required only where there is a Federal nexus (an action authorized, funded, or carried out by any Federal agency)—if there is no Federal nexus, the critical habitat designation of private lands itself does not restrict any actions that destroy or adversely modify critical habitat. Second, the designation only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure that the conservation role and function of those areas that contain the physical and biological features essential to the conservation of the species or of unoccupied areas that are essential for the conservation of the species are not appreciably reduced. Critical habitat designation alone, however, does not require property owners to undertake affirmative actions to promote the recovery of the species.

Once an agency determines that consultation under section 7(a)(2) of the Act is necessary, the process may conclude informally when we concur in writing that the proposed Federal action is not likely to adversely affect critical habitat. However, if we determine through informal consultation that adverse impacts are likely to occur, then we would initiate formal consultation, which would conclude when we issue a biological opinion on whether the proposed Federal action is likely to result in destruction or adverse modification of critical habitat.

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 the physical and biological features essential to the conservation of the species, but it would not suggest the implementation of any reasonable and prudent alternative. We suggest reasonable and prudent alternatives to the proposed Federal action only when our biological opinion results in an adverse modification conclusion.

As stated above, the designation of critical habitat does not require that any management or recovery actions take place on the lands included in the designation. Even in cases where consultation has been initiated under

section 7(a)(2) of the Act, the end result of consultation is to avoid jeopardy to the species and/or adverse modification of its critical habitat, but not necessarily to manage critical habitat or institute recovery actions on critical habitat. Conversely, voluntary conservation efforts implemented through management plans may institute proactive actions over the lands they encompass and are often put in place to remove or reduce known threats to a species or its habitat; therefore implementing recovery actions. We believe that in many instances the benefit to a species and/or its habitat realized through the designation of critical habitat is low when compared to the conservation benefit that can be achieved through conservation efforts or management plans. The conservation achieved through implementing HCPs or other habitat management plans can be greater than what we achieve through multiple site-by-site, project-by-project, section 7(a)(2) consultations involving consideration of critical habitat. Management plans may commit resources to implement long-term management and protection to particular habitat for at least one and possibly additional listed or sensitive species. Section 7(a)(2) consultations commit Federal agencies to preventing adverse modification of critical habitat caused by the particular project only, and not to providing conservation or long-term benefits to areas not affected by the proposed project. Thus, implementation of any HCP or management plan that considers enhancement or recovery as the management standard may often provide as much or more benefit than a consultation for critical habitat designation.

Another benefit of including lands in critical habitat is that designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the affected species. In general, critical habitat designation always has educational benefits; however, in some cases they may be redundant with other educational effects. For example, HCPs have significant public input and may largely duplicate the educational benefits of a critical habitat designation. Including lands in critical habitat also would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances.

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, p. 720). Stein et al. (1995, p. 400) 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 are essential to our understanding the status of species on non-Federal lands, and necessary for us to implement recovery actions such as reintroducing listed species and restoring and protecting habitat.

Many non-Federal landowners derive satisfaction from contributing to endangered species recovery. We promote these private-sector efforts through the Department of the Interior's Cooperative Conservation philosophy. Conservation agreements with non-Federal landowners (HCPs, safe harbor agreements, other conservation agreements, easements, and State and local 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 the view that we can achieve greater species conservation on non-Federal land through such partnerships than we can through regulatory methods (61 FR 63854; December 2, 1996).

Many private landowners, however, are wary of the possible consequences of attracting endangered species to their property. Mounting evidence suggests 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. This perception results 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).

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 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). We believe that the judicious exclusion of specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a superior level of conservation.

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(a)(2) of the Act, can sometimes be counterproductive to its intended purpose on non-Federal lands. Thus, the benefits of excluding areas that are covered by effective partnerships or other conservation commitments can often be high.

Benefits of Excluding Lands With HCPs

The benefits of excluding lands with approved HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by critical habitat. Many HCPs take years to develop, and upon completion, are consistent with 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 conservation efforts and partnerships designed to proactively protect species to ensure that listing under the Act will not be necessary. Our experience in implementing the Act has found that designation of critical habitat within the boundaries of management plans that provide conservation measures for a species is a disincentive to many entities which are either currently developing such plans, or contemplating doing so in the future, because one of the incentives for undertaking conservation is greater ease of permitting where listed species will be 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 species' benefits 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 an additional Federal regulatory burden sufficient to discourage continued participation in developing plans targeting listed species' conservation.

A related benefit of excluding lands covered by approved HCPs from critical habitat designation is the unhindered, continued ability it gives us 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. We have found that potential participants are not inclined to participate in such management plans when we designate critical habitat within the area that would be covered by such a management plan, thus having 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 excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

We also note that permit issuance in association with HCP applications require consultation under section 7(a)(2) of the Act, which would include the review the effects of all HCP-covered activities that might adversely impact the species under a jeopardy standard, including possibly significant habitat modification (see definition of ''harm'' at 50 CFR 17.3), even without the critical habitat designation. In addition, all other Federal actions that may affect the listed species would still require consultation under section 7(a)(2) of the Act, and we would review these actions for possibly significant habitat modification in accordance with the definition of harm referenced above.

The information provided in the previous section applies to all the following discussions of benefits of inclusion or exclusion of critical habitat.

After considering the following areas under section 4(b)(2) of the Act, we are excluding approximately 167 ac (67 ha) of non-Federal lands from the *Berberis nevinii* critical habitat designation in subunits 1C, 1D, 1E, 1F that are within the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP) area. A detailed analysis of our exclusion of these lands under section 4(b)(2) of the Act is provided below.

Areas Considered for Exclusion Under Section 4(b)(2) of the Act

At the request of the USFS, we evaluated the appropriateness of excluding Forest Service lands from the final designation of critical habitat for *Berberis nevinii* under section 4(b)(2) of the Act based on management provided for federally listed species, including *B. nevinii,* under the USFS Land Management Plan and the Species Management Guide for *B. nevinii.* As discussed in more detail in our response to Comment 12 in the Public Comments section above, we have concluded that the exclusion of Forest Service lands in this instance does not outweigh the benefits of their designation. Therefore, as previously discussed, we are designating approximately 1 ac of Forest Service lands in subunit 1B as critical habitat for *B. nevinii.*

Exclusions Under Section 4(b)(2) of the Act

When performing the required analysis under section 4(b)(2) of the Act, the existence of a management plan (HCPs as well as other types) that considers enhancement or recovery of listed species as its management standard is relevant to our weighing of the benefits of inclusion of a particular area in the critical habitat designation. The following factors are considered when we evaluate the management and protection provided by such plans:

(1) Whether the plan is complete and provides for the conservation and protection of the physical and biological features essential to the conservation of the species;

(2) Whether there is a reasonable expectation that the conservation management strategies and actions will be implemented for the foreseeable future, based on past practices, written guidance, or regulations; and

(3) Whether the plan provides conservation strategies and measures consistent with currently accepted principles of conservation biology.

As discussed in detail below, we believe that the Western Riverside County MSHCP provides for the conservation of *Berberis nevinii* and its physical and biological features. We have determined that the benefits of excluding essential habitat for *B. nevinii* covered by this plan, based on our partnership with private land owners and local, County, and State jurisdictions, whose commitment to benefiting the species is evident by the management mandated by the MSHCP, outweighs the benefit of including these lands in a critical habitat designation. Furthermore we have determined that exclusion of these lands will not result in the extinction of *B. nevinii.*

Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP)

We are excluding from the final critical habitat designation for *Berberis nevinii* all non-Federal lands (approximately 167 ac (67 ha)) covered by the Western Riverside County MSHCP under section 4(b)(2) of the Act. The non-Federal lands that we are excluding include: Approximately 39 ac (16 ha) of private lands on the south flank of Big Oak Mountain (Subunit 1C); approximately 5 ac (2 ha) of private lands directly north of Vail Lake (Subunit 1D); approximately 112 ac (45 ha) of private lands 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 11 ac (4 ha) of private lands north of Temecula Creek and southeast of Vail Lake (Subunit 1F).

The MSHCP is a large-scale, multi-jurisdictional HCP encompassing 1.26-million ac (510,000 ha) in Western Riverside County. The MSHCP addresses 146 listed and unlisted ''covered species,'' including *Berberis nevinii.* Participants in the Western Riverside County MSHCP include 14 cities in Western Riverside County; the County of Riverside, including the Riverside County Flood Control and Water Conservation Agency (County Flood Control), 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 Western Riverside County 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 an incidental take permit (TE–088609–0) under section 10(a)(1)(B) of the Act to 22 permittees under the MSHCP for a period of 75 years.

The Western Riverside County 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 designated by the MSHCP as Public-Quasi-Public (PQP) lands. These PQP lands include those under Federal ownership, primarily managed by the USFS and BLM, and also permittee-owned open-space areas (e.g., State Parks, County Flood Control, and County Park lands). In this final rule, we are designating as critical habitat Federally-owned PQP lands. Collectively, the Additional Reserve Lands and PQP lands form the overall MSHCP Conservation Area in which ''covered species,'' including *Berberis nevinii,* will be protected. The precise configuration of the 153,000 ac (61,916 ha) of Additional Reserve Lands is not mapped or precisely identified in the MSHCP, but rather is based on textual descriptions of a Conceptual Reserve Design within the bounds of a 310,000 ac (125,453 ha) ''Criteria Area'' that is interpreted as implementation of the MSHCP proceeds.

All private lands that we are excluding from the final critical habitat designation under section 4(b)(2) of the Act are within the MSHCP's Criteria Area and are targeted for inclusion within the MSHCP Conservation Area as potential Additional Reserve Lands. In addition to the lands we have determined to be essential to the conservation of the species, 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. As discussed in the Background section of the proposed rule (72 FR 5552; February 6, 2007), we were unable to accurately quantify the exact number of *B. nevinii* occurrences or plants within the MSHCP Plan Area (72 FR 5555). Nevertheless, all essential habitat within the MSHCP area are either within existing PQP lands or proposed Additional Reserve Lands. 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, which includes all areas and features that we have determined to be essential to the conservation of the species (Dudek 2002, p. 9–117, Table 9–2).

Furthermore, all private lands that we are excluding from final critical habitat designation are within the MSHCP's Survey Area and will receive conservation benefits under the Additional Survey Needs and Procedures policy. The MSHCP requires surveys for *Berberis 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 overall conservation objectives for the species have been met. Therefore, 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.

Numerous processes are incorporated into the MSHCP that allow for Service oversight of MSHCP implementation. These processes include: Annual reporting requirements; joint review of projects proposed within the Criteria Area; participation on the Reserve Management Oversight Committee; and a Reserve Assembly Accounting Process. The Reserve Assembly Accounting Process will be implemented to ensure that the conservation of lands occurs in rough proportionality to development, that lands are assembled in the configuration as generally described in the MSHCP, and that conservation goals and objectives are being achieved (Service 2004, pp. 19–26). The Service is also responsible for reviewing Determinations of Biologically Equivalent or Superior Preservation that are proposed under the Protection of Species Associated with Riparian/Riverine Areas and Vernal Pools policy and for reviewing minor amendment projects for consistency with the requirements of the MSHCP (Service 2004, pp. 19–26).

As stated in the final listing rule (63 FR 54956, October 13, 1998), threats to the species and its habitat 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, and the introduction of invasive, nonnative plants that may compete with *Berberis nevinii* or contribute to combustible fuel loads (63 FR 54961). As described above, the MSHCP provides enhancement of habitat by removing or reducing threats to this species and the physical and biological features essential to the conservation of the species. This MSHCP preserves habitat that supports identified core populations of this species and, therefore, provides for recovery of this species.

Benefits of Exclusion Outweigh the Benefits of Inclusion

As discussed in the Benefits of Designating Critical Habitat section and in the Service Response to Comment 6 above, we believe that the regulatory benefit of designating critical habitat on private lands covered by the Western Riverside County MSHCP would be low and may hinder the effective implementation of the plan. The Western Riverside County MSHCP addresses conservation issues from a coordinated, integrated perspective and will achieve better *Berberis nevinii* conservation than would be achieved through multiple site-by-site, project-by-project, section 7 consultations involving consideration of critical habitat. Furthermore, biological opinions for plants do not include an incidental take statement and, therefore, contain no mandatory reasonable and prudent measures issued to minimize the effect of any predicted loss of plants. Any measures taken to minimize effects to the plant species or its habitat are voluntary. The Western Riverside County MSHCP provides for the proactive monitoring and management of conserved lands (as previously described), reducing known threats to the *B. nevinii* and its habitat.

Conservation and management of *Berberis nevinii* habitat is essential to the survival and recovery of this species. Such conservation needs are typically not addressed through the application of the statutory prohibition on adverse modification or destruction of critical habitat. The Western Riverside County MSHCP provides as much or more conservation benefit to the species than a consultation for critical habitat designation conducted under the standards required by the Ninth Circuit in the *Gifford Pinchot* decision. Furthermore, educational benefits that may be derived from a critical habitat designation are low in

this case and largely redundant to the educational benefits achieved through the significant public, State, and local government input solicited and received during the development of the Western Riverside County MSHCP.

We have developed close partnerships with the 22 MSHCP permittees through the development of this regional HCP that incorporates appropriate protections and management of the physical and biological features essential to the conservation of this species. Those protections are consistent with the mandates under section 7 of the Act to avoid adverse modification or destruction of critical habitat and go beyond that prohibition by including active management and protection of essential habitat areas. By excluding these lands from designation, we are eliminating a largely redundant layer of regulatory review for a limited set of projects on non-Federal lands that are addressed by the MSHCP, and we are helping to preserve our ongoing partnerships with the permittees and encouraging new partnerships with other landowners and jurisdictions. Those partnerships, and the landscape level, multiple-species conservation planning efforts they promote, are critical for the conservation of *Berberis nevinii.* Designating critical habitat on non-Federal lands within the Western Riverside County MSHCP could have a detrimental effect to our partnerships with the 22 MSHCP permittees and could be a significant disincentive to the establishment of future partnerships and HCPs with other partners.

We have reviewed and evaluated the exclusion of 167 ac (67 ha) of non-Federal lands that meet the definition of critical habitat within the Western Riverside County MSHCP plan area from the designation of final critical habitat for *Berberis nevinii* and have determined that the benefits of excluding these lands in subunits 1C, 1D, 1E, and 1F outweigh the benefits of including them. As discussed above, the MSHCP will provide for significant preservation and management of the physical and biological features essential to *B. nevinii* and will help reach the recovery goals for this species.

Exclusion Will Not Result in Extinction of the Species

In keeping with our analysis and conclusion detailed in our biological opinion for the Western Riverside County MSHCP (Service 2004, p. 334), we do not believe that the exclusion of non-Federal lands that meet the definition of critical habitat within the Western Riverside County MSHCP plan area from the final designation of critical habitat for *Berberis nevinii* will result in the extinction of the species. The MSHCP provides protection and management, in perpetuity, of lands within subunits 1C, 1D, 1E, and 1F, including the physical and biological features essential to the conservation of *B. nevinii.* In addition, the jeopardy standard of section 7 of the Act and routine implementation of conservation measures through the section 7 process also provide assurances that the species will not go extinct.

Economic Analysis

Section 4(b)(2)of the Act requires us to designate critical habitat on the basis of the best scientific information available and to consider economic and other relevant impacts of designating a particular area as critical habitat. Section 4(b)(2) of the Act allows the Secretary to exclude areas from critical habitat for economic reasons if the Secretary determines that the benefits of such exclusion exceed the benefits of designating the area as critical habitat. However, this exclusion cannot occur if it will result in the extinction of the species concerned.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The draft analysis (dated September 4, 2007) was made available for public review between October 17, 2007 and November 16, 2007 (72 FR 58793). We did not receive any public comments related to the draft economic analysis. A final analysis of the potential economic effects of the designation was developed taking into consideration any relevant new information.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for *Berberis nevinii.* This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

The economic analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, section 7 consultations under the jeopardy standard, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies.

Potential costs associated with invasive, nonnative plant species management, recreation management, fire management, and section 7 consultations comprised all of the quantified impacts in the areas we are designating as critical habitat. The Federal government is expected to bear the entire cost of the anticipated upper-bound future impacts, with the following anticipated split among agencies: BLM, 61 percent; USFS, 35 percent; Service, 4 percent. Similarly, we anticipate that Subunit 1A (Big Oak Mountain Summit), which is managed by BLM, will account for the majority (62 percent) of the total upper-bound future conservation impacts.

Potential costs associated with changes to the management of Vail Lake comprised the majority of the total quantified upper-bound future impacts in areas we are excluding from the designation of critical habitat under section 4(b)(2) of the Act. This cost would have been borne entirely by Rancho California Water District (RCWD), the entity that manages Vail Lake, and is based on the scenario that RCWD would not be able to implement the preferred alternative (Hybrid 1 Alternative) of their Regional Integrated Resources Plan, which calls for additional water storage in Vail Lake so as to cost-effectively meet the future municipal and agricultural demands of customers. Other impacts in areas excluded from the final designation of critical habitat were based on the costs of acquisition, management, biological monitoring, and administration of land to be acquired under the Western Riverside County MSHCP, or impacts associated with development opportunities on private land within the Plan Area for the MSHCP.

We estimated potential economic effects of actions related to the conservation of *Berberis nevinii* under sections 4, 7, and 10 of the Act and those attributable to designating critical habitat to be approximately $169,000 to $172,000 in undiscounted dollars over the next 20 years in areas we are designating as final critical habitat (subunits 1A and 1B). Discounted future costs were estimated to be

approximately $136,000 to $139,000 ($10,000 annualized) at a 3 percent discount rate or approximately $107,000 to $110,000 ($11,000 annualized) at a 7 percent discount rate for activities in subunits 1A and 1B. We estimated potential economic effects to be approximately $1.7 to $433.5 million in undiscounted dollars over the next 20 years (or 40 years for impacts related to management of Vail Lake) in areas we are excluding from final critical habitat under section 4(b)(2) of the Act based on the Western Riverside County MSHCP (Subunits 1C through 1F). Discounted future costs were estimated at approximately $1.2 to $232.5 million at a 3 percent discount rate ($82,000 to $10.1 million annualized) or approximately $0.9 to $118.1 million at a 7 percent discount rate ($81,000 to $8.9 million annualized) for activities in subunits 1C, 1D, 1E, and 1F. The latter impacts would only occur if the areas we proposed for exclusion were instead designated as critical habitat for *B. nevinii.* Note that these cost estimates were based on revisions to the proposed designation of critical habitat subunits 1B, 1D, and 1E as described in the notice of availability for the DEA published on October 17, 2007 (72 FR 58793).

The Service also completed a final economic analysis (FEA) of the designation of critical habitat for *Berberis nevinii* that updates the DEA by removing impacts that were not considered probable or likely to occur and by adding an estimate of the costs associated solely with the designations of critical habitat for *B. nevinii* (incremental impacts). The FEA estimates that the potential economic effects of actions relating to the conservation of *B. nevinii,* including costs associated with sections 4, 7, and 10 of the Act, and including those attributable to the designation of critical habitat, will be $1.80 million (undiscounted) over the next 20 years. The present value of these impacts, applying a 3 percent discount rate, is $1.34 million; or $0.95 million, using a discount rate of 7 percent. This is a reduction from the impacts estimated in the DEA of about $0.15 million (undiscounted) over the next 20 years. The FEA also estimates total costs attributable solely to the designation of critical habitat for *B. nevinii* (incremental costs) to be $3,593 (present value at a three percent discount rate). When critical habitat for this species is designated, it is anticipated that the consultation with the USFS regarding their current Land Management Plan will be reinitiated, resulting in administrative impacts to the USFS. After consideration of the impacts under section 4(b)(2) of the Act, we have not excluded any areas from the final critical habitat designations based on the identified economic impacts.

The final economic analysis is available at *http://www.regulations.gov* and *http://www.fws.gov/carlsbad* or upon request from the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866 (E.O. 12866), we evaluate four parameters in determining whether a rule is significant. If any one of the following four parameters are met, the Office of Management and Budget (OMB) will designate that rule as significant under E.O. 12866:

(a) The rule would have an annual economic effect of $100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government;

(b) The rule would create inconsistencies with other Federal agencies' actions;

(c) The rule would materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients; or

(d) The rule would raise novel legal or policy issues. If OMB requests to informally review a rule designating critical habitat for a species, we consider that rule to raise novel legal and policy issues. Because no other Federal agencies designate critical habitat, the designation of critical habitat will not create inconsistencies with other agencies' actions. We use the economic analysis of the critical habitat designation to evaluate the potential effects related to the other parameters of E.O. 12866 and to make a determination as to whether the regulation may be significant under parameter (a) or (c) listed above.

Based on the economic analysis of the critical habitat designation, we have determined that the designation of critical habitat for *Berberis nevinii* will not result in an annual effect on the economy of $100 million or more or affect the economy in a material way. Based on previous critical habitat designations and the economic analysis, we believe this rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. OMB has not requested to informally review this rule, and thus this action does not raise novel legal or policy issues. In accordance with the provisions of E.O. 12866, this rule is not considered significant.

Executive Order 12866 directs Federal agencies issuing regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A–4, September 17, 2003). Under Circular A–4, once an agency determines that the Federal regulatory action is appropriate, the agency must consider alternative regulatory approaches. Because the determination of critical habitat is a statutory requirement under the Act, we must evaluate alternative regulatory approaches, where feasible, when issuing 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 species. We believe that the evaluation of the inclusion or exclusion of particular areas, or a combination of both, constitutes our regulatory alternative analysis for designations.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must 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. SBREFA amended 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. In this final rule, we are certifying that the critical habitat designation for *Berberis nevinii* will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration (SBA), small entities

include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (e.g., housing development, grazing, oil and gas production, timber harvesting). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect *Berberis nevinii* (see Section 7 Consultation section). Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see Application of the ''Adverse Modification'' Standard section).

The FEA examined the potential for *Berberis nevinii* conservation efforts to affect small entities. This analysis was based on the estimated impacts associated with the listing of *B. nevinii* and proposed critical habitat designation and evaluated the potential for economic impacts related to transportation projects; land development; management of Vail Lake; recreation; fire management; and invasive, nonnative plant species management. The FEA also estimated the costs associated solely with the designation of critical habitat for *B. nevinii* (incremental impacts). Overall, the FEA estimates that the potential economic effects of actions relating to the conservation of *B. nevinii*, including costs associated with sections 4, 7, and 10 of the Act, and including those attributable to the designation of critical habitat, will be $1.80 million (undiscounted) over the next 20 years. The present value of these impacts, applying a 3 percent discount rate, is $1.34 million; or $0.95 million, using a discount rate of 7 percent. This is a reduction from the impacts estimated in the DEA of about $0.15 million (undiscounted) over the next 20 years. The FEA also estimates total costs attributable solely to the designation of critical habitat for *B. nevinii* (incremental costs) to be $3,593 (present value at a three percent discount rate). Impacts to small entities are not anticipated because the final designation of critical habitat for *B. nevinii* includes only Federal lands, and costs associated with modifications to activities will be borne entirely by the Federal government (USFS or BLM) as we do not anticipate any applicants would be involved in consultations regarding impacts to the designated critical habitat (please refer to section Appendix B of the FEA for a full discussion of potential economic impacts to small entities). Transportation projects that are reasonably foreseeable within the 20-year analysis period are not anticipated to impact areas within designated critical habitat and were not considered.

In summary, we have considered whether this designation would result in a significant economic effect on a substantial number of small entities. The entire designated critical habitat is owned and managed by the Federal government, which is not considered a small business entity. Therefore, based on the above reasoning and currently available information, we certify that this rule will not have a significant economic impact on a substantial number of small entities. A regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 801 et seq.)

Under SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in the economic analysis, we believe that this rule will not have an annual effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination (see **ADDRESSES** for information on obtaining a copy of the final economic analysis).

Executive Order 13211—Energy Supply, Distribution, or Use

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. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared without the regulatory action under consideration. The final economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with B. nevinii conservation activities within the final critical habitat designation are not expected. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal

mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, 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 [T]ribal 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 [T]ribal 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 onto State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. Furthermore, all lands designated as critical habitat in this rule are managed by BLM and USFS, which are not considered small entities or small governments. The designation of critical habitat imposes no obligations on State or local governments. As such, a Small Government Agency Plan is not required.

Takings

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating approximately 6 ac (3 ha) of lands in Riverside County, California, as critical habitat for *Berberis nevinii* in a takings implications assessment. The takings implications assessment concludes that this final designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism

In accordance with E.O. 13132 (Federalism), this final rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this final critical habitat designation with appropriate State resource agencies in California. We received one comment from a local agency during the public comment period for the proposed critical habitat rule. This commenter supported the proposed exclusion of private lands within the boundaries of the Western Riverside County MSHCP plan area from the designation of final critical habitat, but was concerned that this area could still be included in the final designation if the Secretary determined that the benefits of including these lands outweigh the benefits of excluding them. We have determined that the benefits of excluding these private lands covered by the Western Riverside County MSHCP outweigh the benefits of designating critical habitat in these areas, and that this exclusion will not result in the extinction of *Berberis nevinii*; therefore, we have excluded all private lands from this final designation (please refer to the Public Comments section of this final rule for a detailed discussion of this comment and our response).

The entire designated critical habitat is owned and managed by the Federal government and, therefore, is unlikely to have any incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical and biological features essential to the conservation of the species are more clearly defined, and the PCEs necessary to support the life processes of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the physical and biological features essential to the conservation of the species within the designated areas to assist the public in understanding the habitat needs of *Berberis nevinii*.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). 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 jurisdiction of the Circuit Court of the United States for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 et seq.) in connection with designating critical habitat under the Act. 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 by the Circuit Court of the United States for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (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), E.O. 13175, and the Department of the 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. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that there are no Tribal lands that meet the definition of critical habitat for *Berberis nevinii*. Therefore, we have not designated critical habitat for *B. nevinii* on Tribal lands.

References Cited

A complete list of all references cited in this rulemaking is available on the Internet at *http://www.regulations.gov and http://www.fws.gov/carlsbad/*.

Author(s)

The primary authors of this rulemaking are staff of 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.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.12(h), revise the entry for ''*Berberis nevinii*'' under ''FLOWERING PLANTS'' in the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historical range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*		*
Berberis nevinii	Nevin's barberry	U.S.A. (CA)	Berberidaceae	E	648	17.96(a).	
*	*	*	*	*	*		*

■ 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 (Nevin's barberry)'' 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 map below.

(2) The primary constituent elements of critical habitat for *Berberis nevinii* are the habitat components that provide:

(i) 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;

(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 feet (275 and 915 meters) in elevation that provide the appropriate cover for growth and reproduction.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map. Data layers defining map units were created on a base of USGS 1:24,000 maps and critical habitat units were then mapped using a 100-meter grid to establish Universal Transverse Mercator (UTM) North American Datum 1927 (NAD 27) coordinates which, when connected, provided the boundaries of the unit. All acreage calculations were performed using GIS.

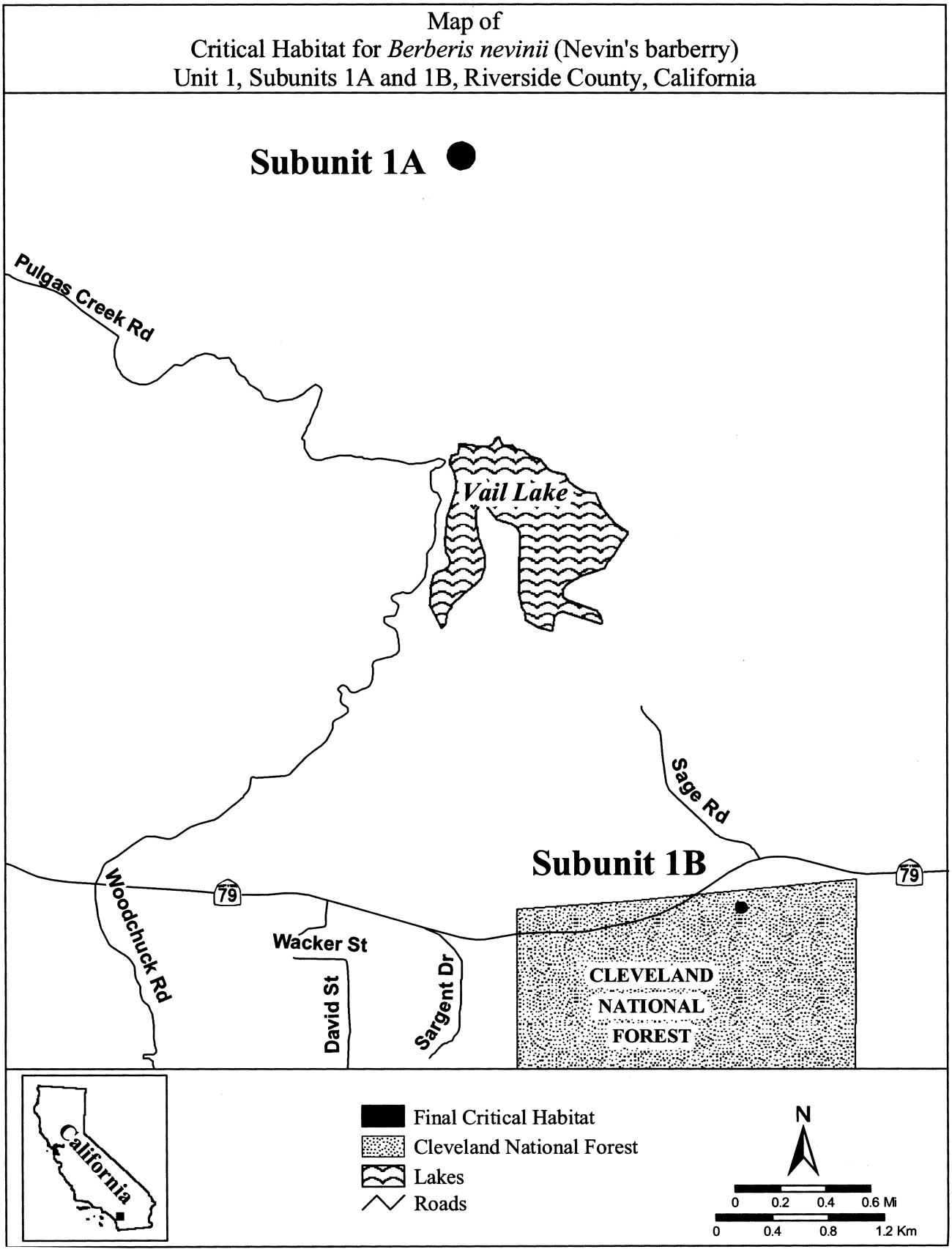
(5) Unit 1: Agua Tibia/Vail Lake Unit, Riverside County, California.

(i) Subunit 1A: Big Oak Mountain Summit. From USGS 1:24,000 quadrangle Sage, lands bounded by the following UTM NAD27 coordinates (E, N): 502153, 3708505; 502157, 3708510; 502167, 3708519; 502179, 3708526; 502192, 3708532; 502205, 3708534; 502219, 3708535; 502233, 3708533; 502246, 3708528; 502258, 3708522; 502269, 3708513; 502278, 3708503; 502286, 3708491; 502291, 3708478; 502294, 3708465; 502294, 3708451; 502292, 3708437; 502288, 3708424; 502281, 3708412; 502272, 3708401; 502262, 3708392; 502250, 3708384; 502237, 3708379; 502224, 3708376; 502210, 3708376; 502196, 3708378; 502183, 3708382; 502171, 3708389;

502160, 3708398; 502151, 3708408; 502143, 3708420; 502138, 3708432; 502135, 3708446; 502135, 3708460; 502137, 3708474; 502141, 3708487; 502148, 3708499; 502153, 3708505; thence returning to 502153, 3708505.

(ii) Subunit 1B: Agua Tibia Mountain Foothills. From USGS 1:24,000 quadrangle Vail Lake, lands bounded by the following UTM NAD27 coordinates (E, N): 504200, 3702900; 504300, 3702900; 504300, 3702800; 504200, 3702800; thence returning to 504200, 3702900.

(iii) Note: Map of Unit 1 follows:


Map of
Critical Habitat for *Berberis nevinii* (Nevin's barberry)
Unit 1, Subunits 1A and 1B, Riverside County, California
Subunit 1A
Pulgas Creek Rd
Vail Lake
Sage Rd
Subunit 1B
79
Woodchuck Rd
Wacker St
David St
Sargent Dr
CLEVELAND
NATIONAL
FOREST
California
Final Critical Habitat
Cleveland National Forest
Lakes
Roads
N
0 0.2 0.4 0.6 Mi
0 0.4 0.8 1.2 Km

BILLING CODE 4310–55–C

* * * * *

Dated: January 31, 2008.

Lyle Laverty,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 08–523 Filed 1–12–08; 8:45 am]

BILLING CODE 4310–55–P

Federal Register

Wednesday,
February 13, 2008

Part III

Department of Transportation

Federal Railroad Administration

49 CFR Parts 217 and 218

Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 217 and 218

[Docket No. FRA–2006–25267]

RIN 2130–AB76

Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices: Handling Equipment, Switches and Fixed Derails

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Final rule.

SUMMARY: Human factors are the leading cause of train accidents, accounting for 38 percent of the total in 2005. Human factors also contribute to employee injuries. This final rule establishes greater accountability on the part of railroad management for administration of railroad programs of operational tests and inspections, and greater accountability on the part of railroad supervisors and employees for compliance with those railroad operating rules that are responsible for approximately half of the train accidents related to human factors. Additionally, this final rule will supplant Emergency Order 24, which requires special handling, instruction and testing of railroad operating rules pertaining to hand-operated main track switches in non-signaled territory. Finally, an appendix has been added to 49 CFR part 218 to provide guidance for remote control locomotive operations that utilize technology in aiding point protection.

DATES: This regulation is effective April 14, 2008.

FOR FURTHER INFORMATION CONTACT: Douglas H. Taylor, Staff Director, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue, SE., RRS–11, Mail Stop 25, Washington, DC 20590 (telephone 202–493–6255); or Alan H. Nagler, Senior Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., RCC–11, Mail Stop 10, Washington, DC 20590 (telephone 202–493–6038).

SUPPLEMENTARY INFORMATION:

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I. Background and Authority

The Federal Railroad Safety Act of 1970, as codified at 49 U.S.C. 20103, provides that, ''[t]he Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.'' The Secretary's responsibility under this provision and the balance of the railroad safety laws have been delegated to the Federal Railroad Administrator. 49 CFR 1.49(m). In the field of operating rules and practices, FRA has traditionally pursued a very conservative course of regulation, relying upon the industry to implement suitable railroad operating rules and mandating in the broadest of ways that employees be ''instructed'' in their requirements and that railroads create and administer programs of operational tests and inspections to verify rules compliance. This approach was based on several factors, including a recognition of the strong interest the railroads have in avoiding costly accidents and personal injuries, the limited resources available to FRA to directly enforce railroad operating rules, and the apparent success of management and employees in accomplishing most work in a safe manner.

Over the years, however, it became necessary to ''Federalize'' certain requirements, either to remedy shortcomings in the railroads' rules or to emphasize the importance of compliance and to provide FRA a more direct means of promoting compliance. These actions, which in most cases were preceded or followed by statutory mandates, included adoption of rules governing—

1. Blue Signal Protection for employees working on, under or between railroad rolling equipment (49 CFR part 218, subpart B);

2. Railroad Communications (49 CFR part 220);

3. Prohibition of Tampering with Safety Devices (49 CFR part 218, subpart D); and

4. Control of Alcohol and Drug Use in Railroad Operations (49 CFR part 219).

In addition, FRA has adopted requirements for Qualification and Certification of Locomotive Engineers (49 CFR Part 240) that directly prohibit contravention of certain specified operating rules and practices.

FRA believes these programs of regulation contribute positively to railroad safety, in part because they contribute significantly to good discipline among affected employees.

FRA is not specifically required by statute to issue a regulation on the subjects covered by this final rule. However, FRA believes that establishing greater accountability for implementation of sound operating rules is necessary for safety. FRA initiated and finalized this rulemaking because it has recognized that human factor train accidents comprise the largest single category of train accident causes and because existing regulations have proven inadequate to achieve a significant further reduction in their numbers or severity. Moreover, the current situation in the railroad industry, which is characterized by strong market demand, extensive hiring of new employees, and rapid attrition of older employees now becoming eligible for retirement, demands a more substantial framework of regulations to help ensure that operational necessity will not overwhelm systems of safeguards relied upon to maintain good discipline.

The theme of this final rule is accountability. It embodies both a broad strategy intended to promote better administration of railroad programs and a highly targeted strategy designed to improve compliance with railroad operating rules addressing three critical areas. Within this framework, FRA has

taken responsibility to set out certain requirements heretofore left to private action. FRA will be monitoring compliance with those requirements through appropriate inspections and audits, and when necessary will be assessing appropriate civil penalties to assure compliance. Railroad management will be held accountable for putting in place appropriate rules, instructions, and programs of operational tests. Railroad supervisors will be held accountable for doing their part to administer operational tests and establish appropriate expectations with respect to rules compliance. Railroad employees will be held accountable for complying with specified operating rules, and will have a right of challenge should they be instructed to take actions that, in good faith, they believe would violate those rules. It is intended that this framework of accountability promote good discipline, prevent train accidents, and reduce serious injuries to railroad employees. In this supplementary information section, FRA provides a detailed explanation of the growing number of accidents, the severity of some of those accidents, the agency's prior actions, and a discussion of major subjects addressed in the proposed rule or raised by the comments to that proposal.

II. Proceedings to Date

A. Increase in Human Factor Caused Accidents and Noncompliance

FRA has grown steadily more concerned over the past few years as the frequency of human factor caused accidents has increased. When these accidents are reported, the reporting railroad is required to cite the causes of the accident. In the case of a human factor caused accident, an employee or employees are typically associated with a failure to abide by one or more railroad operating rules. Over the past few years, FRA inspectors have simultaneously observed a substantial increase in noncompliance with those railroad operating rules that are frequently cited as the primary or secondary causes to these types of accidents.

Accidents caused by mishandling of equipment, switches and derails rose from 370 to 640 per year from the years 1997 to 2004—an increase of 42 percent. The greatest causes of these accidents as identified by the railroads were (1) switch improperly lined and (2) absence of employee on, at or ahead of a shoving movement. These two issues alone account for over 60 percent of all accidents caused annually by employees mishandling of equipment, switches and derails.

A grouping of four other causes saw steady increases from 133 per year in 1997 to 213 per year in 2004—a cumulative increase of 37 percent; these causes are (1) failure to control a shoving movement, (2) switch previously run through, (3) cars left in the foul and (4) failure to apply or remove a derail. Two additional causes of accidents, (1) switch not latched or locked and (2) car(s) shoved out and left out of clear, were the cited cause of only 10 accidents in 1997 and 40 accidents in 2004.

While the accident data shows significant increases in these areas, the data collected by FRA during inspections suggests that the number of accidents could easily increase at an even greater rate. FRA inspection data shows that noncompliance related to mishandling of equipment, switches and derails rose from 319 to 2,954 per year from the years 2000 to 2004—a nine-fold increase. The most common areas of human factor noncompliance were (1) employee failed to observe switch points for obstruction before throwing switch; (2) employee failed to ensure all switches involved with a movement were properly lined; (3) employee failed to ensure switches were latched or locked; (4) employee failed to ensure switches were properly lined before movement began; and (5) employee left equipment fouling adjacent track.

Several other related issues of noncompliance also saw substantial increases, although the overall number of incidents found by FRA was lower than the top five. These additional areas of noncompliance are: (1) Employee left derail improperly lined (on or off); (2) absence of employee on, at, or ahead of shoving movement; (3) employee failed to ensure train or engine was stopped in the clear; (4) employee failed to ensure switches were properly lined after being used; (5) employee failed to reapply hasp before making move over switch (if equipped); (6) employee failed to relock the switch after use; and (7) one or more employees failed to position themselves so that they could constantly look in the direction of movement.

Some noncompliance data applies particularly to human factor mistakes FRA noted during inspections of operations involving remotely controlled locomotives. FRA assigned noncompliance codes to identify the following problems specifically associated with these remote control operations: (1) Employee operated equipment while out of operator's range of vision; (2) employee failed to provide point protection, locomotive leading; and (3) employee failed to provide point protection, car leading. In 2004, the first year that FRA collected data under those codes, FRA inspectors recorded 29 instances of noncompliance with the railroad's operating rules underlying the three codes. In 2005, the number of instances of noncompliance with those same codes recorded by FRA inspectors increased to 92. These types of noncompliance are continuing with some frequency as in 2006, FRA noted 43 instances of noncompliance with those cause codes and in the first half of 2007, FRA has noted 23 instances.

B. Accident at Graniteville, SC and Safety Advisory 2005–01

Although the increasing number of human factor caused accidents impacted the railroad industry and its employees, a catastrophic accident that occurred at Graniteville, South Carolina on January 6, 2005, catapulted the issue into the national spotlight. As the National Transportation Safety Board (NTSB) described in its report NTSB/RAR–05/04, PB2005–916304 (Nov. 29, 2005), that accident occurred when Norfolk Southern Railway Company (NS) freight train 192, while traveling in non-signaled territory at about 47 miles per hour (mph), encountered an improperly lined switch that diverted the train from the main track onto an industry track, where it struck an unoccupied, parked train (NS train P22). The collision derailed both locomotives and 16 of the 42 freight cars of train 192, as well as the locomotive and 1 of the 2 cars of train P22. Among the derailed cars from train 192 were three tank cars containing chlorine, one of which was breached, releasing chlorine gas. The train engineer and eight other people died as a result of chlorine gas inhalation. About 554 people complaining of respiratory difficulties were taken to local hospitals. Of these, 75 were admitted for treatment. Because of the chlorine release, about 5,400 people within a 1-mile radius of the derailment site were evacuated for 9 to 13 days. The property damage, including damages to the rolling stock and track, exceeded $6.9 million. In 2006, NS recorded expenses of $41 million related to this incident. This burden includes property damage and other economic losses, personal injury and individual property damage. (It should be noted that this figure does not include losses for which NS was insured, nor other costs that are associated with the accident such as liability incurred, increased shipping rates, higher insurance rates and other societal costs, i.e., expenses for non-

railroad businesses, and expenses incurred related to claims from this accident.) NTSB determined that the probable cause of the collision was the failure of the crew of NS train P22 to return a main track switch to the normal position after the crew completed work at an industry.

The crew's failure violated railroad operating rules but did not violate any Federal requirement. NS Operating Rule 104, in effect at the time, placed primary responsibility with the employee handling the switch and other crewmembers were secondarily responsible if they were in place to observe the switch's position. NTSB/RAR–05/04 at 8. In addition, NTSB concluded that NS rules required a job briefing which ''would likely have included a discussion of the switches and specifically who was responsible for ensuring that they were properly positioned [and that] [h]ad such a briefing taken place, the relining of the switch might not have been overlooked.'' *Id.* at 44. FRA concurs that the lack of intra-crew communication regarding the switch's position was particularly significant at the time the crew was preparing to leave the site. *Id.* at 8–9.

Four days after the Graniteville accident (and coincidentally, two days after a similar accident at Bieber, California with serious, but not catastrophic consequences), FRA responded by issuing Safety Advisory 2005–01, ''Position of Switches in Non-Signaled Territory.'' 70 FR 2455 (Jan. 10, 2005). The issuance of a safety advisory is an opportunity for the agency to inform the industry and the general public regarding a safety issue, to articulate agency policy, and to make recommendations. FRA explained in the safety advisory that ''[a] review of FRA's accident/incident data shows that, overall, the safety of rail transportation continues to improve. However, FRA has particular concern that recent accidents on Class I railroads in non-signaled territory were caused, or apparently caused, by the failure of railroad employees to return manual (hand-operated) main track switches to their normal position, i.e., usually lined for the main track, after use. As a result, rather than continuing their intended movement on the main track, trains approaching these switches in a facing-point direction were unexpectedly diverted from the main track onto the diverging route, and consequently derailed.''

Safety Advisory 2005–1 strongly urged all railroads to immediately adopt and comply with five recommendations that were intended to strengthen, clarify and re-emphasize railroad operating rules so as to ensure that all main track switches are returned to their normal position after use. The recommendations emphasized communication both with the dispatcher and other crewmembers. FRA recommended that crewmembers complete and sign a railroad-created Switch Position Awareness Form (SPAF). Proper completion of a SPAF was expected to trigger specific communication relevant to critical elements of the tasks to be performed. Additional training and railroad oversight were also recommended.

C. Emergency Order No. 24

Safety Advisory 2005–1 did not have the long-term effect that FRA hoped it would. The Safety Advisory was intended to allow the industry itself a chance to clamp down on the frequency and severity of one subset of human factor accidents, i.e., those accidents involving hand-operated main track switches in non-signaled territory. FRA credits the Safety Advisory with contributing to a nearly six-month respite from this type of accident, from January 12 through July 6, 2005, but following this respite there was a sharp increase in serious accidents.

Three serious accidents over a 28-day period from August 19 to September 15, 2005, were the catalyst for FRA issuing an emergency order: Emergency Order No. 24 (EO 24); Docket No. FRA–2005–22796, 70 FR 61496 (Oct. 24, 2005). The three accidents cited in EO 24 resulted in fatal injuries to one railroad employee, non-fatal injuries to eight railroad employees, an evacuation of civilians, and railroad property damage of approximately two million dollars. Furthermore, each of these accidents could have been far worse, as each had the potential for additional deaths, injuries, property damage or environmental damage. Two of the accidents could have involved catastrophic releases of hazardous materials as these materials were present in at least one of the train consists that collided.

FRA is authorized to issue emergency orders where an unsafe condition or practice ''causes an emergency situation involving a hazard of death or personal injury.'' 49 U.S.C. 20104. These orders may immediately impose ''restrictions and prohibitions * * * that may be necessary to abate the situation.'' *Id.*

EO 24 was necessary because despite the Safety Advisory, there was insufficient compliance with railroad operating rules related to the operation of hand-operated main track switches in non-signaled territory. FRA considered issuing another Safety Advisory, but that might at best only provide another temporary respite. The issuance of EO 24 was ''intended to accomplish what the Safety Advisory could not: implement safety practices that will abate the emergency until FRA can complete rulemaking.'' 70 FR at 61498. FRA further concluded that ''reliance solely on employee compliance with railroad operating rules related to the operation of hand-operated main track switches in non-signaled territory, without a Federal enforcement mechanism, is inadequate to protect the public safety.'' 70 FR at 61499.

EO 24 is built on the foundation of FRA's regulations, at 49 CFR part 217, which require each railroad to instruct its employees on the meaning and application of its code of operating rules, and to periodically test its employees to determine their level of compliance. With regard to hand-operated switches in non-signaled territory, EO 24 requires that each railroad (1) instruct its employees, (2) allow only qualified employees to operate and verify switches, (3) require employees to confirm switch positions with the dispatcher prior to releasing the limits of a main track authority, (4) develop a Switch Position Awareness Form for employees to complete when operating switches, (5) require employees to conduct job briefings at important intervals, (6) require intra-crew communication of switch positions after a switch is operated, (7) enhance its program of operational tests and inspections under 49 CFR part 217, and (8) distribute copies of EO 24, and retain proof of distribution, to all employees affected. Minor clarifying amendments were made to EO 24 in a second notice, but the overarching requirements remained unchanged from the first notice. 70 FR 71183 (Nov. 25, 2005).

D. Secretary of Transportation's Action Plan for Addressing Critical Railroad Safety Issues

Prior to the Graniteville accident, FRA had developed and implemented procedures to focus agency resources on critical railroad safety issues. Such procedures were appropriate even though the industry's overall safety record had improved over the last decade and most safety trends were moving in the right direction. FRA recognizes that significant train accidents continue to occur, and the train accident rate has not shown substantive improvement in recent years. Several months after the Graniteville accident, the Secretary of Transportation announced a National

Rail Safety Action Plan to address this need. FRA acknowledged in the plan that ''recent train accidents have highlighted specific issues that need prompt government and industry attention.'' Action Plan at 1 (published on FRA's Web site at *http://www.fra.dot.gov/*).

In the plan, FRA introduced its basic principles to address critical railroad safety issues. One basic principle is that FRA's safety program is increasingly guided by careful analysis of accident, inspection, and other safety data. Another basic principle is that FRA attempts to direct both its regulatory and compliance efforts toward those areas involving the highest safety risks. The plan is intended to be proactive in that it will target the most frequent, highest risk causes of accidents.

FRA identified ''reducing human factor accidents'' as one of the major areas in which the agency planned initiatives. In fact, the plan discusses this issue first because it constitutes the largest category of train accidents, accounting for 38 percent of all train accidents over the first five years of this decade, and human factor accidents were growing in number at the time the action plan was implemented. Furthermore, FRA's plan takes aim at reducing human factor accidents because in recent years most of the serious events involving train collisions or derailments resulting in release of hazardous materials, or harm to rail passengers, have been caused by human factors or track problems.

FRA's analysis of train accident data has revealed that a small number of particular kinds of human errors are accounting for an inordinate number of human factor accidents. For example, the eight human factor causes involving mishandling equipment, switches and derails that FRA is addressing in this final rule accounted for nearly 48 percent of all human factor accidents in 2004; these eight causes, which resulted in accidents causing over $113 million in damages to railroad property from 2001–2005, can be grouped into three basic areas of railroad operations: (1) Operating switches and derails; (2) leaving equipment out to foul; and (3) the failure to protect shoving or pushing movements. Thus, this rulemaking is meant to address nearly half of all human factor caused accidents on all classes of track.

Of the 118 human factor causes that are tracked, the leading cause was improperly lined switches, which alone accounted for more than 16 percent of human factor accidents in 2004. The next two leading causes were shoving cars without a person on the front of the movement to monitor conditions ahead, i.e., lack of point protection, and shoving cars with point protection but still resulting in a failure to control the movement; these two shoving related causes together accounted for 17.6 percent of human factor accidents in 2004. The remaining five causes addressed in this final rule account for nearly 14 percent of the total number of accident causes; these causes involve leaving cars in a position that fouls an adjacent track, operating over a switch previously run through, a failure to apply or remove a derail, a failure to latch or lock a switch, and a failure to determine before shoving that the track is clear ahead of the movement. The two catch-all general causes that might be cited when a railroad believes one or more related causes may apply or is unsure of the exact cause are: (1) Other general switching rules; and (2) other train operation/human factors.

The human factor causes that are the central focus of this final rule are of a type that involve noncompliance with established railroad operating rules related to fundamental railroad operations. In each case, compliance can be objectively and conclusively determined. For example, it can be definitively determined whether switches are properly lined, locked, latched or had been previously run through. It can be determined whether a shoving movement was made without point protection or without the signals or instructions necessary to control the movement. Similarly, it can be determined whether a car is left fouling a track such that it is causing an unsafe operating condition, or whether the track is clear ahead for a shoving movement. Finally, it can also be determined with certainty whether there has been a failure to apply or remove a derail.

The top human factor causes that FRA is choosing not to address with this final rule are already regulated, to some extent, or would be significantly more difficult to regulate. For example, several human factor causes relate to the failure to apply a sufficient number of hand brakes; that issue is already covered by regulation at 49 CFR 232.103(n). Speeding issues, including restricted speed, are regulated to discourage clearly excessive speeding by imposing revocation periods or civil penalties for locomotive engineer violators. 49 CFR 240.117(e)(2) and 240.305(a)(2). Establishing a clear rule for regulating a train handling issue, such as a locomotive engineer's improper use of an independent brake or air brakes to prevent excess buff or slack action, can pose difficulties as train handling is an area where locomotive engineers exercise discretion. 58 FR 18982, 18992 (Apr. 9, 1993) (describing in section-by-section analysis why FRA amended the qualification and certification of locomotive engineer's rule to require revocation only when there is a failure to conduct certain brake tests as opposed to the more general, original requirement to revoke for ''failure to adhere to procedures for the safe use of train or engine brakes.'' 56 FR 28228, 28259 (June 19, 1991)). Likewise, the operating conditions related to improper coupling are too numerous to easily address through regulation, and determination of responsibility related to train handling and train make-up involves often complex technical issues that are still subject to study. *See Safe Placement of Train Cars, Report to the Senate Committee on Science, Commerce and Transportation and the House Committee on Transportation and Infrastructure* (June 2005), published at *http://www.fra.dot.gov.*

Developing close call data. As part of its mission to improve railroad safety, FRA is sponsoring the Confidential Close Call Reporting System Demonstration Project to demonstrate the effectiveness of a confidential close call reporting system for the railroad industry. ''Close calls'' in this context are unsafe events that do not result in a reportable accident but very well could have. In other industries such as aviation, implementation of close call reporting systems that shield the reporting employee from discipline (and the employer from punitive sanctions levied by the regulator) have contributed to major reductions in accidents. In March of 2005, FRA completed an overarching memorandum of understanding with railroad labor organizations and railroad management to develop pilot programs to document close calls. Participating railroads will be expected to develop corrective actions to address the problems that may be revealed. The aggregate data may prove useful in FRA's decision-making concerning regulatory and other options to promote a reduction in human factor-caused accidents. However, the project has not yet produced sufficient data to consider in this final rule.

E. Railroad Safety Advisory Committee (RSAC) Overview

In March 1996, FRA established RSAC, which provides a forum for developing consensus recommendations to FRA's Administrator on rulemakings and other safety program issues. The Committee includes representation from

all of the agency's major customer groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of member groups follows:

American Association of Private Railroad Car Owners (AAPRCO);
American Association of State Highway & Transportation Officials (AASHTO);
American Public Transportation Association (APTA);
American Short Line and Regional Railroad Association (ASLRRA);
American Train Dispatchers Association (ATDA);
Association of American Railroads (AAR);
Association of Railway Museums (ARM);
Association of State Rail Safety Managers (ASRSM);
Brotherhood of Locomotive Engineers and Trainmen (BLET);
Brotherhood of Maintenance of Way Employes Division (BMWED);
Brotherhood of Railroad Signalmen (BRS);
Federal Transit Administration (FTA)*;
High Speed Ground Transportation Association (HSGTA);
International Association of Machinists and Aerospace Workers;
International Brotherhood of Electrical Workers (IBEW);
Labor Council for Latin American Advancement (LCLAA)*;
League of Railway Industry Women*;
National Association of Railroad Passengers (NARP);
National Association of Railway Business Women*;
National Conference of Firemen & Oilers;
National Railroad Construction and Maintenance Association;
National Railroad Passenger Corporation (Amtrak);
National Transportation Safety Board (NTSB)*;
Railway Supply Institute (RSI);
Safe Travel America (STA);
Secretaria de Comunicaciones y Transporte*;
Sheet Metal Workers International Association (SMWIA);
Tourist Railway Association Inc.;
Transport Canada*;
Transport Workers Union of America (TWU);
Transportation Communications International Union/BRC (TCIU/BRC); and
United Transportation Union (UTU).

Effective May 2006, the following additional members have been added to the Committee:

Transportation Security Administration*;
American Chemistry Council;
American Petroleum Institute;
Chlorine Institute;
Fertilizer Institute; and
Institute of Makers of Explosives.
*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If the task is accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The task force then provides that information to the working group for consideration. If a working group comes to unanimous consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation, and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA moves ahead to resolve the issue through traditional rulemaking proceedings.

F. Establishment of the Railroad Operating Rules Working Group and Development of the NPRM

On April 14, 2005, FRA held a Human Factors Workshop which convened members of RSAC for the purpose of developing a task statement to be presented at the next RSAC meeting. FRA explained that current regulations do not address compliance with the relevant operating rules that cause the preponderance of human factor accidents. The agency expressed a desire to standardize and adopt these rules as Federal requirements with greater accountability being the goal. It was also raised that training and qualification programs should be included as part of the task because employee compliance is certainly directly related to how well employees are instructed and tested. FRA suggested that one area of consideration was to improve its regulations (49 CFR part 217) which require each railroad to instruct its employees on the meaning and application of its code of operating rules, and to periodically test its employees to determine their level of compliance. Many participants expressed a preference for non-regulatory action.

On May 18, 2005, the RSAC accepted a task statement and agreed to establish the Railroad Operating Rules Working Group whose overall purpose was to recommend to the full committee how to reduce the number of human factor caused train accidents/incidents and related employee injuries. The working group held eight two-day conferences, one per month from July 2005 through February 2006. The vast majority of the time at these meetings involved review of an FRA document suggesting language that could form the basis of proposed regulatory text.

The draft proposed rule text that FRA developed for the working group was the agency's first attempt to address several broad concerns. One, FRA set out to propose regulations that addressed those human factors that are the leading cause of train accidents. This involved analyzing the accident/incident data, identifying the relevant causes, identifying the relevant operating rules and procedures, and synthesizing those railroad rules and procedures in clear and enforceable language. Two, FRA's issuance of EO 24 was intended to address the emergency created by the mishandling of hand-operated main track switches in non-signaled territory that caused several tragic accidents; however, EO 24 was never intended to be a permanent arrangement, and the initiation of an informal rulemaking was necessary to provide the public and the regulated community an opportunity to provide comment on preferences for a final rule. Three, as the agency with oversight of railroad safety, FRA was aware of both the successes and failures of each railroad's program of operational tests and inspections required pursuant to 49 CFR 217.9. The draft proposed rule text was designed to close loopholes and impose specific reviews to focus testing and inspection programs on the

operating rules that have the greatest impact on safety.

FRA clearly benefitted from the participation of the working group in detailed review of railroad operating rules and practices. The working group's meetings provided a meaningful forum for interested participants to be able to offer insight into the strengths and weaknesses of FRA's suggested draft proposed rule text and related issues. Unfortunately, the RSAC participants were unable to reach a consensus for making formal recommendations prior to issuance of the proposed rule. The working group's consensus was limited to an agreement to reconvene to discuss the NPRM, and any comments received, after the NPRM comment period closed. Relying heavily on items that the working group achieved near consensus on and ideas suggested by FRA that received support from at least some members of the working group, FRA published an NPRM on October 12, 2006. 71 FR 60372.

G. Development of the Final Rule

As mentioned previously in this preamble, FRA's main purpose in issuing this rule is to reduce the number of accidents/incidents attributed to human factor causes and this regulation is narrowly tailored to accomplish that goal. The correlation between these accidents/incidents and the final rule have been established. This final rule is the product of FRA's decisions regarding the most effective way to regulate after review and consideration of input from both the comments filed in the docket and the RSAC. This final rule is also the product of FRA's experience with EO 24; FRA is adopting many of its requirements and revising others. Furthermore, this final rule requires revisions to each railroad's operational testing and inspection program to ensure that each railroad's officers are better qualified to conduct tests and inspections and each railroad is, in fact, focusing its program on the most serious safety concerns.

1. Summary of the Comments

The NPRM specified that written comments must be received by December 11, 2006, and that comments received after that date would be considered to the extent possible without incurring additional expense or delay. FRA received 12 comments by the deadline and two comments after the deadline. As an aid to further discussion at a meeting of the RSAC Operating Practices Working Group held in early February 2007, FRA prepared two comment summaries which have been added to the docket. These documents contained the same information but one document arranged the comments by commenter and the other by section commented on. The 14th comment received, i.e., the comment of Mr. Walter C. Rockey filed on February 5, 2007, was received too late to include in these summary documents, although the comment was reviewed and considered. Thus, FRA considered all 14 comments filed with the docket.

The 14 commenters touched upon nearly every section of the NPRM, including some who made general comments that applied to the overall nature or approach of the NPRM. Some of the comments are addressed in the section of this preamble titled ''IV. General Comments/Major Issues.'' Most of the comments, however, were specific to a particular proposed section and thus it made greater sense to address the comment in the section of the preamble titled ''V. Section-by-Section Analysis.'' FRA believes that it has addressed each of the comments made by the 14 commenters, either directly or indirectly, and has consequently considered all known reasonable alternatives to the NPRM.

2. RSAC's Working Group Reviewed the Comments

The Railroad Operating Rules Working Group held two multi-day meetings (February 8–9, 2007 and April 4–5, 2007) in an attempt to achieve consensus recommendations based on the proposed rule and the comments received. The RSAC participants were able to achieve limited consensus on a few items and those consensus items were agreed to by the full RSAC. In the areas where RSAC was able to achieve a consensus recommendation, FRA honored the principle of each recommendation and generally sought to carry forward the elements of the discussion draft that had benefited from thoughtful comment by RSAC participants. The final rule's text, however, might be slightly different in light of regulatory drafting requirements. FRA developed a greater appreciation for the nuances of each of the railroad operating rules and practices discussed; and, armed with that additional insight, FRA has sought to put forth a reasonable final rule that reflects real world railroading.

FRA has noted in the section-by-section analysis where we have adopted an RSAC recommendation or deviated from it. FRA also refers to comments and suggestions made by members of the Working Group, full RSAC, or other commenters so as to show the origin of certain issues and the nature of discussions concerning those issues. FRA believes these references serve to illuminate factors it has weighed in making its regulatory decisions, as well as the logic behind those decisions. The reader should keep in mind, of course, that only the full RSAC makes recommendations to FRA, and it is the consensus recommendation of the full RSAC on which FRA is acting. However, FRA is in no way bound to follow the recommendation, and the agency exercises its independent judgment on whether the recommendations achieve the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements.

3. Consideration of Underlying Principles in Emergency Order 24

EO 24 illuminated the problems associated with mishandling of hand-operated main track switches in non-signaled territory. While there may be more than one cause that contributes to noncompliance with the operating rules, accidents could be prevented by strict employee compliance with those rules. Accidents involving this type of switch often occur when the employee operating the switch loses focus on the task at hand. In an effort to refocus the attention of employees who operate switches, EO 24's seven sections can be boiled down to three major components: (1) Instruction, (2) communication, and (3) verification through testing. FRA's final rule incorporates these three major components but with a broader application.

Instruction. It is fundamental that an employee cannot be expected to properly abide by operating rules without proper instruction, especially when those operating rules have been amended. To that end, EO 24 provides an outline for essential initial instruction and periodic instruction. Likewise, FRA is requiring enhanced instruction, training, and examination, i.e., qualification, for employees on the relevant operating rules, pertaining to handling equipment, switches and fixed derails.

Communication. FRA agrees with the general principle that mistakes can be prevented or corrected by proper communication. Communication prevents noncompliance and accidents because it generally is how people working together know what each other is doing. For example, EO 24 stressed the importance of communication by requiring job briefings at certain crucial intervals: Before work is begun; each time a work plan is changed; and at completion of the work. Such regular

job briefings ensure that employees working together understand the task they are intending to perform and exactly what role is expected of them and their colleagues. Through proper job briefings, employees can prevent some mishaps and contain others from worsening a bad situation. For these reasons, FRA proposes a job briefing component to this rulemaking.

In the background section of EO 24, FRA described a recurrent scenario of noncompliance where a train crew's mistake in leaving a main track switch lined for movement to an auxiliary track was the last act or omission that resulted in an accident; and yet these types of accidents are preventable through reliable communication of the actual switch position. This scenario ''occurs when a train crew has exclusive authority to occupy a specific track segment until they release it for other movements and [yet] that train crew goes off duty without lining and locking a hand-operated main track switch in its normal position.'' 70 FR at 61497. It is unfortunate that FRA has to clarify that the communication be reliable and accurately reflect the switch position, but some accident investigations have revealed employees whose actions implied more of an interest in quitting work for the day than taking the safe route to verify a switch's position and whether it was properly locked. FRA's final rule retains EO 24's emphasis on intra-crew communication or intra-roadway worker group communication. *See* 70 FR at 61499–50 and § 218.105.

Perhaps the most controversial aspect of EO 24 is the requirement that employees operating hand-operated main track switches in non-signaled territory complete a Switch Position Awareness Form (SPAF). The SPAF requirement is controversial because it creates a paperwork burden for employees and railroads. Switches may be lined and locked properly, but a violation of EO 24 may occur for merely failing to fill out a single component on the form. Critics of the form may not appreciate that FRA's intention for requiring a SPAF is to create a contemporaneous communication that reminds the employee of the importance of properly lining and locking such main track switches.

In the case of a train crew, the contemporaneous communication created by the SPAF is twofold: (1) The SPAF itself is a written communication that reminds the employee operating the switch to keep track of the switch's position and (2) another crewmember, typically the locomotive engineer, serves as a secondary reminder to the employee operating the switch because that other crewmember is also required to request information as to the switch's alignment. As FRA clarified in EO 24's second notice, it is immaterial how crewmembers communicate, e.g., whether in-person, by radio, by hand signals, or other effective means, as long as the communication takes place. 70 FR 71186 and 71188. By requiring both the SPAF and the intra-crew communication, FRA is requiring some redundancy, i.e., two communication reminders to properly line and lock such switches in the case of a train.

For purposes of EO 24, the paperwork burden and the redundancy in communication created by the introduction of the SPAF was acceptable. The very sharp increase in collisions, deaths and injuries resulting from improperly lined main track switches required FRA to take decisive action. Prior to EO 24, many railroads had already adopted the use of a SPAF voluntarily as a best practice suggested in Safety Advisory 2005–1. However, the inclusion of a SPAF in EO 24 does not bind the agency to forever require it; and the final rulemaking promulgates an alternative approach that does not include it. Of course, as this subpart prescribes minimum standards and each railroad may prescribe additional or more stringent requirements, each railroad has the choice to decide whether to continue using a SPAF after the effective date of this rule.

FRA decided not to require a SPAF in this final rule because the comprehensive communication requirements contained in §§ 218.103 and 218.105, create a direct enforcement mechanism that makes enforcement through a SPAF redundant. For example, the final rule includes a requirement that all crewmembers verbally confirm the position of a hand-operated main track switch that was operated by any crewmember of that train before it leaves the location of the switch. *See* § 218.105(c)(1). Likewise, the final rule requires that upon the expiration of exclusive track occupancy authority for roadway workers, roadway workers who operate hand-operated main track switches report the position of any such switches operated to the roadway worker in charge. *See* § 218.103(c)(2).

NTSB also ''does not believe that * * * the use of forms [such as a SPAF] is sufficient to prevent recurrences of accidents such as the one at Graniteville.'' NTSB/RAR–05/04 at 45. In support of this position, NTSB cites to the example of railroads that require train crews to record signal indications as they are encountered en route in order to lessen the chance that a block or other fixed signal will be missed or misinterpreted by a crew. Meanwhile, NTSB states that it ''has investigated a number of accidents in which such forms, although required and used, did not prevent crews from missing signals and causing accidents.'' *Id.*

Although NTSB does not support the use of a SPAF, it did express agreement with the emergency order in two respects. That is, NTSB supported EO 24's requirements directing that job briefings be held at the completion of work and that a train crewmember who repositions a hand-operated main track switch in non-signaled territory communicate with the engineer regarding the switch position. In support of this position, NTSB explains that ''a comprehensive safety briefing was not held before the work at Graniteville [and] [h]ad such a briefing been held before and, more importantly, after the work (as required by the FRA emergency order), the accident might have been avoided.'' *Id.* at 46. As stated previously, FRA is retaining these two aspects from the emergency order in its rule.

The EO 24 requirements for employees releasing the limits of a main track authority in non-signaled territory to communicate with the train dispatcher have, for the most part, carried over to this final rule and been strengthened. The final rule retains the requirement in EO 24 that an employee releasing the limits of a main track authority in non-signaled territory communicate with the train dispatcher that all hand-operated main track switches operated have been restored to their normal position, unless the train dispatcher directs otherwise, but only to the extent that the switches are at the location where the limits are being released. 70 FR at 61499 and § 218.105(d). With the elimination of the requirement for a SPAF, it would be difficult for an employee to recall the condition of any particular hand-operated main track switch operated and there would likely be a reaction for an employee to believe he or she left all such switches in proper position—without much opportunity to double-check the condition of those faraway switches at that time. As mentioned previously, accidents often occur where the limits are being released and that is why the final rule has placed emphasis on addressing the problem prior to departing the train's location. The switches located at the point of release of the limits should be readily accessible for any employee who is unsure of the condition the switch was last left in. The final rule also adds the requirement that the employee report

that the switch has been locked; locking of the main track switch should prevent easy access to unauthorized users.

Hand-in-hand with the EO 24 requirement that the employee contact the dispatcher to release main track authority in non-signaled territory is the corresponding requirement in EO 24 for train dispatchers; that is, EO 24 requires that the train dispatcher must also confirm the switch positions with the employee releasing the limits before clearing the limits of the authority and confirm that the SPAF was initialed as required. The final rule also requires the train dispatcher to verify the switch position information with the employee and the requirement for the dispatcher to confirm that the switch is locked in the intended position by repeating to the employee releasing the limits the report of the switch position and asking whether that is correct. The final rule also strengthens the current requirement in EO 24 by requiring that the employee then confirm this information with the train dispatcher.

Verification through testing. The third major component of EO 24's requirements involves the verification of compliance through testing. FRA's regulations, at 49 CFR Part 217, require each railroad to instruct its employees on the meaning and application of its code of operating rules, and to periodically test its employees to determine their level of compliance. Compliance with railroad operating rules is critical, especially when technology does not provide a fail safe option.

4. Recognition of the Need To Improve Railroad Programs of Operational Tests and Inspections

Most railroads have excellent written programs of operational tests and inspections, but FRA has identified weaknesses in the oversight and implementation of nearly all of these programs. For example, some railroad testing officers lack the competency to perform operational tests and inspections. Likewise, some railroads do not perform operational tests that address the root cause of human factor accidents, while others view the requirement as a numbers-generating exercise, and consequently conduct relatively few meaningful tests. That is, while it may be important that employees come to work with the proper equipment (and FRA considers that a basic requirement which, of course, must be satisfied), FRA's concern is that not enough verification testing is occurring on the operating rules most likely to cause accidents, including but not limited to rules addressing handling of switches.

In EO 24, FRA's verification through testing and inspection requirements were narrowly focused on those operating rules involving the operation of hand-operated main track switches in non-signaled territory. The purpose of this narrow focus was to create a special obligation for only those types of rules violations that were causing the emergency situation. FRA still believes compliance with these types of rules should be verified. The final rule replaces EO 24's requirements and adds requirements for verification of testing on a broader number of operating rules directly related to the root cause of human factor accidents; that is, the final rule requires testing of all the rules related to part 218, subpart F, not just those rules related to hand-operated main track switches in non-signaled territory.

The final rule also amends §§ 217.4 and 217.9 to require competency of railroad testing officers. In FRA's view, it is unfathomable that railroad testing officers would be allowed to conduct tests and inspections without proper instruction, on-the-job training, and some kind of written examination or observation to determine that the person is qualified to do the testing; however, Federal regulations currently do not require that railroad testing officers be qualified in such a manner. Railroads should already be shouldering this burden without Federal requirements so we do not view this as a substantial burden; instead, we view the qualification of railroad testing officers as a necessary expense of operating a railroad.

Furthermore, railroad officers that test for noncompliance are typically the same officers who are in charge of operations. In that regard, a railroad officer, who is knowledgeable of Federal requirements and the government's enforcement authority over individual officers, should be discouraged from ordering an employee to violate any operating rule inconsistent with proposed part 218, subpart F. In other words, if all railroad testing officers on a particular railroad are properly qualified, it will be more difficult for railroad officers to accept inconsistency in the application of operating rules.

FRA is amending § 217.9 to require railroads to focus programs of operational tests and inspections ''on those operating rules that cause or are likely to cause the most accidents or incidents.'' *See* § 217.9(c)(1). Except for the smallest freight railroads, FRA is requiring that each railroad conduct one or more reviews of operational tests and inspections that should help guide each railroad in the implementation of its program. The quarterly and six-month reviews for freight railroads, as well as the reviews for passenger railroads, in § 217.9(e) would formalize a best practice from some of the largest and safest railroads nationwide. These reviews are intended to ensure that each railroad is conducting tests and inspections directed at the causes of human factor train accidents and employee casualties. Each program will be specifically required to include appropriate tests and inspections addressing the rules dealing with handling of switches, leaving equipment in the clear, and protecting the point of the shove. Structured tests or observations permit railroads to find employees that need additional training or who may benefit from a reminder that it is not acceptable to take shortcuts that violate the operating rules.

Furthermore, the final rule's requirements to amend the program of operational tests and inspections, by emphasizing its purpose to focus on operating rules violations that cause accidents, should cut down on the disparity between the few instances of noncompliance found by many railroads with the many instances of noncompliance found through FRA inspections on the same railroads (*see* discussion in ''*Increase In Human Factor Caused Accidents and Noncompliance*''). While railroads have universally done an acceptable job of taking corrective action following an accident, railroads have not done as well in consistently testing for the variety of operating rules, at a variety of locations, and at different times of the day, in order to meet FRA's expectations for an effective testing and inspection program. Accidents and incidents of noncompliance should be prevented by the formalization of the process of verification through testing and FRA's ability to inspect each railroad's program of operational tests and inspections, as well as its records.

Finally, FRA emphasizes that it is retaining an enforcement mechanism, as it did in EO 24, because prior reliance on the railroad to ensure employee compliance with railroad operating rules without a Federal enforcement mechanism has repeatedly proven to be inadequate to protect the public and employee safety. Under current regulations, FRA has been able to effectively intervene in railroad operating rules compliance issues (apart from those already codified as obligations under existing regulations) only indirectly, through use of substantial resources, and in the case of

exceptionally pervasive noncompliance. The system of accountability provided for in this final rule will, by contrast, encourage railroad management to prevent a lessening of oversight or decline in compliance by reviewing safety performance in detail, assisting individual employees to acquire habits of work that are consistent with safety by permitting them to challenge directions that could cause them to cut corners, and permitting individual FRA inspectors to more persuasively seek corrective action early in the process of deteriorating rules compliance.

III. Remote Control Operations

A. Background

Remote control devices have been used to operate locomotives at various locations in the United States for many years, primarily within certain industrial sites. Railroads in Canada have made extensive use of remote control locomotives for more than a decade. FRA began investigating remote control operations in 1994 and held its first public hearing on the subject in February 1995 to gather information and examine the safety issues relating to this new technology. On July 19, 2000, FRA held a technical conference in which all interested parties, including rail unions, remote control systems suppliers, and railroad industry representatives, shared their views and described their experiences with remote control operations. This meeting was extremely beneficial to FRA in developing its subsequent Safety Advisory.

On February 14, 2001, the FRA published recommended guidelines for conducting remote control locomotive operations. *See* 66 FR 10340, Notice of Safety Advisory 2001–01, Docket No. FRA–2000–7325. By issuing these recommendations, FRA sought to identify a set of ''best practices'' to guide the rail industry when implementing this technology. As this is an emerging technology, FRA believes this approach serves the railroad industry by providing flexibility to both manufacturers designing the equipment and to railroads in their different operations, while reinforcing the importance of complying with all existing railroad safety regulations. All of the major railroads have adopted these recommendations, with only slight modifications to suit their individual requirements.

Regarding the enforcement of Federal regulations as they apply to remote control locomotive operations, the Safety Advisory explains that: ''although compliance with this Safety Advisory is voluntary, nothing in this Safety Advisory is meant to relieve a railroad from compliance with all existing railroad safety regulations [and] [t]herefore, when procedures required by regulation are cited in this Safety Advisory, compliance is mandatory.'' *Id.* at 10343. For example, the Safety Advisory clearly states that ''each person operating an RCL [remote control locomotive] must be certified and qualified in accordance with 49 CFR Part 240 [FRA's locomotive engineer rule] if conventional operation of a locomotive under the same circumstances would require certification under that regulation.'' *Id.* at 10344.

In November 2001, all six major railroads submitted to FRA their training programs for remote control operators as required by Part 240. Since that initial filing, several railroads have made changes to their remote control training programs at FRA's request. FRA is closely monitoring this training and making additional suggestions for improvement on individual railroads as they become necessary. These training programs currently require a minimum of two weeks classroom and hands-on training for railroad workers who were previously qualified on the railroad's operating and safety rules. Federal regulations require that locomotive engineers be trained and certified to perform the most demanding type of service they will be called upon to perform. Thus, a remote control operator who will only be called upon to perform switching duties using a remote control locomotive would not need to be trained to operate a locomotive on main track from the control stand of the cab. Major railroads are currently reviewing their remote control operator training plans in light of discussions with labor representatives and FRA regarding the requirements of these positions.

In addition to the required training, the regulations require railroads to conduct skills performance testing of remote control operators that is comparable to the testing required of any other locomotive engineer performing the same type of work. Federal regulations also hold remote control operators responsible for compliance with the same types of railroad operating rules and practices that other locomotive engineers are required to comply with in order to retain certification. *See* 49 CFR 240.117. Any alleged noncompliance triggers an investigation and review process. If a violation is found, the remote control operator will be prohibited from operating a locomotive on any railroad in the United States for a minimum of 15 days to a maximum of three years. The length of the prohibition (or revocation of the certificate) depends on whether the person was found to have committed other violations within the previous three years and whether the railroad, using its discretion, determined that the person had completed any necessary remedial training.

Furthermore, FRA addressed the current Federal locomotive inspection requirements and the application of those requirements to remote control locomotive technology. For example, the Safety Advisory states that the remote control locomotive ''system *must* be included as part of the calendar day inspection required by 49 CFR 229.21, since this equipment becomes an appurtenance to the locomotive.'' 66 FR at 10344 (emphasis added). Another example of a mandatory requirement mentioned in the Safety Advisory is that the remote control locomotive ''system components that interface with the mechanical devices of the locomotive, e.g., air pressure monitoring devices, pressure switches, speed sensors, etc., should be inspected and calibrated as often as necessary, *but not less than* the locomotive's periodic (92-day) inspection.'' *Id.* (emphasis added); *see* 49 CFR 229.23. Thus, the Safety Advisory reiterated that existing Federal regulations require inspection of the remote control locomotive equipment.

Although some aspects of this proposed rule pertains to main track operations where remote control locomotive operations rarely occur, most of the problems this proposal is intended to address are found equally in conventional and remote control locomotive yard switching operations. As FRA reported to Congress earlier this year, ''RCL [i.e., remote control locomotive] and conventional train accident rates were virtually identical for those major railroads that made extensive use of both types of operations.'' ''Final Report—Safety of Remote Control Locomotive Operations'' (''Final Report'') (March 2006) (published on FRA's Web site at *http://www.fra.dot.gov/*). The current remote control locomotive technology is best used for yard switching operations and is primarily used for that purpose. *See* Final Report at 15–17.

The final rule would continue FRA's policy of implementing minimum requirements for safe remote control locomotive operations within the confines of railroad operating rules having broad applicability. As previously explained, FRA has found existing rules adequate to accommodate safe remote control locomotive

operations without the need to draft a rule narrowly focused on remote control locomotive operations. *See* Docket No. FRA–2000–8422 (found at *http://dms.dot.gov/*) (denying a request for initiation of a rulemaking to solely address remote control locomotive issues). That said, after identifying certain characteristics of remote control locomotive shoving or pushing operations, FRA is implementing one requirement that pertains to remote control locomotive operations; that requirement addresses the problem of lack of situational awareness. *See* § 218.99(c). FRA also recognizes the relatively new use of permanently installed cameras in yards or at grade crossings which permit an employee to provide point protection without being physically present on, at, or ahead of the movement. Although it is possible for this technology to be used in conventional operations, e.g., by a yardmaster for a train crew, we believe it is more often used for remote control locomotive operations. *See* § 218.99(b)(2). The following background on these two issues should illuminate them further.

B. Situational Awareness

In FRA's recent report to Congress, the agency identified the potential for a reduction in a remote control operator's situational awareness as one of four human factor issues that warrant close attention as remote control locomotive technology continues to evolve. *See* Final Report at 24–26. A locomotive engineer, including a remote control operator, who is located in the cab of a controlling locomotive has a greater situational awareness than a remote control operator located on the ground. A remote control operator located on the ground may also be more easily distracted by conflicting movements or other physical dangers caused by continuously moving about the yard than a person located in a locomotive cab. The nature of remote control locomotive operations can also cause the remote control operator to be distracted by concentrating on switching operations, e.g., constantly referring to the switch list, coupling and uncoupling cars, and, pitching and catching. Also, a remote control operator on the ground may forget, or may not know, the locomotive orientation (i.e., the particular direction the remote control locomotive is heading) due to his or her location away from the remote control locomotive, and thus may inadvertently initiate a movement in the wrong direction. Similarly, a defective or misaligned switch could cause a movement to be diverted onto a connecting track unintentionally and go unnoticed if the remote control crewmembers are not observing the direction of movement. Apparently, the latter is what happened on December 7, 2003, on the Union Pacific Railroad in San Antonio, Texas, when a remote control locomotive operator, while switching, was struck and killed by his locomotive at the west end of UP's East yard. The employee had reversed one end of a crossover switch and was walking toward the other end of the crossover switch to line it when he was struck from behind by the remote control locomotive. The employee had started the remote control locomotive moving as he was walking toward the other end of the crossover. *See* Final Report at 90. This move was initiated after the employee pushed a button to realign a power-assisted switch, but likely did not wait at the switch machine to confirm visually that the points had moved to the correct position. NTSB/RAB–06/02 at 9. In addition to lack of adequate railroad oversight of the misaligned power-assisted switch, NTSB concluded that the probable cause of this accident was the employee's ''inattentiveness to the location of the locomotives and the switch position.'' NTSB/RAB–06/02 at 11. Certainly, this inattentiveness is another way to describe a lack of situational awareness.

As many railroads were not eager to invest in remote control technology until after FRA issued its Safety Advisory 2001–01, there is limited data and few studies completed detailing the safety implications of remote control operations; however, among the few studies that have been completed, situational awareness has arisen as a recurring theme. For example, in a study funded by FRA, an independently conducted root cause analysis of six remote control locomotive-involved accidents/incidents that occurred in 2006, found that the loss of situational awareness was a major factor in five of the accidents/incidents analyzed. Human Factors Root Cause Analysis of Accidents/Incidents Involving Remote Control Locomotive Operations (May 2006) (DOT/FRA/ORD–06/05) (published on FRA's Web site at *http://www.fra.dot.gov/downloads/Research/ord0605.pdf*). Further analysis suggests that remote control locomotive technology facilitated this loss of awareness in four of these five accidents/incidents by enabling remote control operators to control their cuts of cars away (i.e., remotely) from the point of movement. Additionally, four probable contributing factors were related to one or more remote control operator's control of a movement from a physical location away from the remote control locomotive and/or cut of cars. Consequently, the independent contractor who performed the root cause analysis identified the loss of remote control operator situational awareness as one of only four critical safety issues identified. *See* Final Report at 85–90.

FRA also sponsored the same independent contractor to undertake a study based on focus group sessions with remote control operators. These sessions provided a forum to gather information about operator experiences with remote control locomotive operations, to identify safety issues, lessons learned, and best practices from those who are most familiar with remote control locomotive operations and equipment. Focus groups also provided a means to solicit suggestions on how to improve remote control locomotive operations. One of the themes identified was that situational awareness can be lost when the remote control operator is not in the immediate vicinity of the remote control locomotive. Among the recommended practices from the focus groups were the suggestions to standardize operating practices and to require remote control operators to protect the point at all times. *See* Final Report at 79–85.

The Brotherhood of Locomotive Engineers and Trainmen (BLET) sponsored a study by Dr. Frederick C. Gamst, a private consultant specializing in railroading, and Mr. George A. Gavalla, a private consultant and former FRA Associate Administrator for Safety. ''Hazard Survey of Remote Control Locomotive Operations on the General System of Railroads in the United States'' (''BLET Study'') (The BLET Study is available in the docket for this NPRM). The BLET Study is based on anecdotal information supplied by railroad workers and officers who voluntarily self-reported their thoughts and experiences concerning their interactions with remote control operations. All of the self-reporting was done in writing and mainly via the Internet in its various forms of communication (i.e., e-mails, bulletin-boards, weblog, etc.). The study catalogues the myriad experiences, complaints, and ideas that were recorded by Dr. Gamst over three years beginning in January 2002. The anecdotal information collected by Dr. Gamst reflects the same general themes identified in the focus group study sponsored by FRA and described in the preceding paragraph. As in FRA's sponsored focus group study, the information Dr. Gamst collected is not

statistically sampled to be representative of all remote control operators in the U.S. or Canada. While the main drawback to these types of studies is that the researchers do not attempt to validate any statements made by employees, as participation is often premised on the condition that employees remain anonymous, the collection of individual opinions and perceptions taken as a whole are useful in identifying problems associated with remote control operations. Like the FRA's sponsored studies, the BLET's sponsored study also identified perceived problems associated with a remote control crew not observing the direction of movement. Specifically, the BLET study raised the issue as the reason why a remote control operator might keep shoving or pulling after a movement derailed or collided with an obstruction. *Id.* at 60–62.

C. Technology Aided Point Protection

The proposed rule contained a preamble discussion regarding how cameras and other technologies are increasingly being installed as an alternative to having an employee directly observing the leading end of a shoving or pushing movement. The technology permits indirect observation and is in use, mainly in yards, to provide point protection during remote control operations or when it would be more efficient during some conventional operations. In the proposed rule, FRA explained that it is possible to set up these cameras and monitors so that they provide at least an equivalent level of safety to that of an employee protecting the point. Of course, not every operation may be set up properly, working properly, or provide an equivalent level of safety. In order to facilitate the use of such technology, the final rule would only permit such an operation to substitute for an employee's direct visual determination where the technology provides an equivalent level of protection to that of a direct visual determination. *See* § 218.99(b)(3)(i).

Even with this clarification, the proposed rule raised the concern regarding whether previously published guidance should be incorporated in the final rule. The BRS commented that there are too many questions regarding the safe use of remote cameras and that regulation is necessary to provide that cameras cannot be used when they are not working as intended for any reason. FRA believes the final rule addresses BRS's concern as the technology cannot possibly afford an equivalent level of protection if it is not working properly. Furthermore, FRA has decided to incorporate the guidance as an appendix to part 218. Appendix D includes further explanation and mandatory requirements for exercising the option to provide point protection with the aid of technology as permitted in § 218.99(b)(3)(i).

The issue of reliance on non-crewmembers to carry out some remote control locomotive operator crew functions was raised in the focus group study sponsored by FRA and summarized in the Final Report. The remote control operators that made up the focus groups had indicated that there were occasions in which a non-crewmember, generally a yardmaster, would provide point protection, line switches, or check the status of a derail for a remote control crew. When this was allowed, several potential problems could result. First, there is great potential for an error in communication or a misunderstanding between the non-crewmember and the crewmembers regarding the activity or status of equipment. Further, a yardmaster who is occupied with his or her other responsibilities might not give the task the attention it deserves, or could be distracted and give an incorrect answer to a question by a remote control crewmember (e.g., ''is the move lined?''). The result could be that the task does not get completed or there is an error in task execution. Further, the remote control crew might not have any alternative way of determining that there is a problem with the point protection provided by the non-crewmember until it is too late. *See* Final Report at 82. Similar issues were raised in the BLET Study. BLET Study at 44.

In response to these concerns, FRA has specified additional requirements for technology aided point protection to be used by remote control locomotive operations at highway-rail grade crossings, pedestrian crossings, and yard access crossings in Appendix D, II. One, before conducting such operations, diagnostic testing is required to determine the suitability of the crossing for permitting technology aided point protection. The Crossing Diagnostic Team shall include representatives from the railroad, FRA, as well as the relevant State and local governments. Two, Appendix D specifically requires such operations to be conducted only ''at crossings equipped with flashing lights, gates, and constant warning time train detection systems;'' thus, it is clear that such operations are not permitted where there are passive warning systems or only some but not all of those active warning systems listed. Three, the safety of such operations is enhanced by having the remote control operator view the monitor and thus that has also been added to the requirements. The fourth and fifth requirements for such operations are intended to ensure that the cameras are arranged so that the remote control locomotive operator can accurately judge the end of the movement's proximity to the crossing as well as the speed and driver behavior of any approaching motor vehicles. Six, the remote control locomotive operator is required to be able to determine that the flashing lights and gates are working as intended either by sufficient camera resolution or a remote health monitoring system. The seventh and final requirement for such operations is that the railroad notify FRA's Associate Administrator for Safety in writing when this type of protection has been installed and activated at a crossing.

IV. General Comments/Major Issues

A. Enforcement

FRA received a variety of comments that expressed concern about enforcement of the rule. At the RSAC working group meetings, the labor organizations expressed concern that the final rule might enable FRA to assess civil penalties against individual employees for noncompliance with what were formerly just railroad operating rules. FRA understands from the comments and RSAC discussions that the labor organizations would prefer that FRA implement a process for employees to report unsafe conditions, such as FRA's Confidential Close Call Reporting System Demonstration Project discussed in this preamble (II. D.), rather than penalizing employees. BMWED's comments may have captured the labor position best when it expressed that there are underlying root causes for why accidents occur and thus FRA should exercise maximum restraint in assessing civil penalties against individual employees. BMWED also requested that FRA limit enforcement to individual railroad employees who commit the most egregious, gross and willful violations, and that mistakes, human error, and poor judgment do not rise to the level of the most egregious, gross and willful violations.

FRA wishes to clarify some apparent misunderstandings. For instance, there was a general idea expressed by labor participants in the RSAC meetings that this final rule would be different than the other Federal rail safety regulations because this one specifically allows FRA to enforce the regulation against an individual employee. This is incorrect. Each of FRA's rail safety regulations permit enforcement against any person who violates a regulatory requirement or

causes the violation of any requirement. See e.g., § 217.5 and § 218.9. ''Person'' is broadly defined and includes any employee, regardless of whether the employer is a railroad or not, or whether the employee is a manager, supervisor or other official. In other words, this final rule is not unique to FRA's regulations in that it permits FRA to take enforcement action against individual persons for a failure to comply including the assessment of civil penalties if the violation is willful or the issuance of a warning letter for a willful or nonwillful violation or a notice of proposed disqualification for a willful or nonwillful violation that demonstrates the person's unfitness for safety-sensitive service.

In response to BMWED's concern that FRA limit enforcement to individual railroad employees who commit the most egregious, gross and willful violations, we note that this is very similar to FRA's existing enforcement policy which we would apply to enforcement of this final rule. In both parts 217 and 218, FRA already states that ''[p]enalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury.'' *Id.* FRA's well-established policy with regard to the assessment of civil penalties against individuals will apply here. *See* 49 CFR part 209, app. A.

Likewise, in the NPRM, FRA mentioned the concern that there may be instances where an employee realizes that he or she violated an operating rule but is afraid of the consequences of reporting the error—even when such reporting would have the potential to prevent an accident or injury to other workers or innocent bystanders. NTSB addressed this point in its report on the Graniteville accident when it stated that a ''significant civil penalty may have an unintended impact on safety under some circumstances. That is, an employee who, after leaving a work site, realizes that a switch has been left improperly lined may be made more reluctant than in the past to immediately report the error to train dispatchers. The threat of the severe fine may prompt the employee to attempt a remedy (such as returning later to reline the switch) before the mistake can become known. As happened in the September 2005 fatal collision in Shepherd, Texas, such action on the part of the employee could contribute to an accident that might otherwise have been avoidable.'' NTSB/RAR–05/04 at 46. FRA disagrees with NTSB that FRA's enforcement program would have a negative effect on an employee's decision to remedy a mistake. Given FRA's published enforcement policy, an employee who recognizes noncompliance and seeks to correct it has likely not acted willfully nor been grossly negligent. Instead, an individual civil penalty is warranted where an employee recognizes noncompliance and does not act to correct it. Thus, FRA's enforcement policy offers employees an incentive to self-report noncompliance as doing so would likely be considered a reason for FRA to exercise its enforcement discretion not to take enforcement action against the individual. (Self-reporting is not, however, a defense to a potential individual liability action, and self-reporting does not absolutely preclude FRA from taking enforcement action against an individual although FRA would consider self-reporting a strong reason for mitigation of the civil penalty, disqualification order, or other enforcement remedy.) . When each railroad instructs its employees on its operating rules, it should emphasize this incentive to self-report. In addition, we encourage each railroad to reconsider its own discipline policy so that it does not discourage self-reporting of inadvertent noncompliance.

B. Good Faith Challenge—Legal Issues

Both prior to and subsequent to the publication of the NPRM, AAR raised legal objections to FRA promulgating a rule with a good faith challenge requirement as found in § 218.97. AAR's objections essentially raised four main issues: (1) Whether FRA has the authority to issue a regulation requiring good faith challenge procedures; (2) whether FRA is preempted by statute from enforcing regulatory good faith challenge procedures; (3) whether any regulatory good faith challenge procedures would contradict legislative intent by subjecting railroads to multiple enforcement actions and penalties; and (4) whether FRA is preempted by statute from requiring and enforcing an anti-retaliatory provision as part of the good faith challenge requirements.

Some of AAR's concerns are premised on the legislative history and statutory construction of 49 U.S.C. 20109 (Section 20109), which offers rail employees protections from retaliation when engaged in specified safety-related conduct. Meanwhile, Section 20109 was amended between the deadline for comments to the NPRM and this final rule. Public Law 110–53, which became effective on August 3, 2007, substantially amended Section 20109 by increasing the number of situations in which an employee is statutorily protected from retaliation. For example, paragraph (a) of Section 20109 makes it unlawful to discriminate against employees when the discrimination is at all based on an ''employee's lawful, good faith act:'' (1) To aid nearly any type of investigation whether initiated by a governmental agency, Congress, or another person with supervisory authority over the employee or the authority to conduct such investigations; (2) ''to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to railroad safety or security;'' (3) to file a complaint, directly cause a railroad safety or security enforcement proceeding to be brought, or testify in such a proceeding; (4) ''to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;'' and (5) to accurately report hours on duty pursuant to the Hours of Service Laws. Rail employees looking to seek protection against alleged retaliation for refusing to violate or assist in the violation of one of the regulations in part 218, subpart F, would likely do so under Section 20109(a)(2).

Under Section 20109(b), the statute prohibits a railroad employer from retaliating against an employee for: (1) ''Reporting, in good faith, a hazardous safety or security condition;'' (2) refusing to work, under certain conditions, when a hazardous safety or security condition is confronted in the employee's duties; and (3) refusing to authorize the use of any safety-related equipment, track or structures, if those items are in a hazardous safety or security condition and certain other conditions are met. Unlike Section 20109(a)(2), a refusal under Section 20109(b) is not predicated on a refusal to violate or assist in the alleged violation of any Federal law, rule, or regulation relating to railroad safety or security. Another substantial change to Section 20109 is that the statute no longer states that disputes and grievances are to be handled under the Railway Labor Act (''RLA''), but instead permits relief under this section to be initiated by an employee filing a complaint with the Secretary of Labor. Considering the substantial changes to Section 20109, rail employees and railroads are encouraged to carefully review the statute in order to respectively retain the protections afforded and comply with the law.

In consideration of the statutory amendments to Section 20109, there is no longer a need for a regulatory anti-

retaliation provision. This determination is further discussed in this section under the title ''4. Anti-Retaliation Provision.'' We anticipate that the elimination of the regulatory anti-retaliation provision, as well as other changes to the good faith challenge procedures made in response to various comments should allay most concerns, both legal and non-legal, raised by AAR and other commenters. Furthermore, for the following reasons, FRA remains unconvinced that there are any legal impediments to promulgating a good faith challenge regulation.

1. FRA's Rulemaking Authority

One of AAR's legal issues is the assertion that FRA does not have rulemaking authority to issue a good faith challenge provision. We disagree. FRA has authority to regulate railroad safety under 49 U.S.C. 20103 (Section 20103). More specifically, the language of Section 20103(a) mandates that ''[t]he Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for *every* area of railroad safety'' (emphasis added). In addition, case law supports a broad interpretation of an agency's authorizing statute. For example, in *Whirlpool Corp.* v. *Marshall,* 445 U.S. 1 at 11, (1980), the Supreme Court concluded that OSHA ''clearly conform[ed] to the fundamental objective of the [Occupational Safety and Health] Act''—the purpose of which was ''to prevent occupational deaths and serious injuries''—when it promulgated a regulation limiting retaliation against employees that refuse to work because of a good faith belief that they would be subjected to real danger of death or injury. Similarly, in promulgating § 218.97, FRA is conforming to the objective of its authorizing statute (to improve railroad safety), by prescribing a regulation which gives employees the right to challenge what may be an unsafe work assignment. Accordingly, FRA is authorized to issue the rule's good faith challenge provision because it is intended to improve railroad safety.

AAR does not challenge FRA's authority to regulate railroad safety under Section 20103. Instead, AAR claims that Section 20109 precludes that authority as it relates to the good faith challenge procedures, specifically singling out the proposed anti-retaliation provision previously found at § 218.97(b)(2). Meanwhile, changes to the rule and the statute have rendered AAR's concerns moot. For instance, the final rule does not contain an anti-retaliation provision similar to the proposed provision and, thus, there cannot be a conflict between Congressional intent and that particular regulatory provision.

AAR also argues that by legislating to provide employees a right to refuse to work in certain circumstances under Section 20109, Congress intended to preclude FRA from issuing a rule providing employees the right to exercise a good faith challenge in similar circumstances. It is important to note that the good faith challenge in both the NPRM and this final rule is distinguished from the statutory refusal to work as the regulatory challenge does not permit an employee to refuse to comply with the challenged directive indefinitely, but instead only protects the employee from being required to do the challenged task while the appeal process afforded by the good faith challenge procedures is on-going. *See* proposed § 218.97(b)(3), redesignated as § 218.97(c)(5)(iv) and (d)(2). The issue thus becomes whether Congress intended to preempt this type of rulemaking by FRA.

In support of such an argument, AAR asserts that FRA does not have the authority to issue rules providing for the good faith challenge for the same reasons that FRA may not directly regulate hours of service. In particular, AAR cites *Atchison, Topeka and Santa Fe Ry.* v. *Pena,* 44 F.3d 437, 441–42 (7th Cir. 1994), *aff'd, Bhd. of Locomotive Engineers* v. *Atchison, Topeka and Santa Fe Ry,* 516 U.S. 152 (1996), in which the Seventh Circuit overturned FRA's interpretation of the Hours of Service Act, 45 U.S.C. 61–66 (''Hours of Service Act''). AAR stated that ''[s]ince Congress has established hours-of-service restrictions, FRA has no rulemaking authority to establish its own hours-of-service requirements.'' AAR's Comments at 3 (Dec. 11, 2006). By analogy, AAR argues that as Congress has established specific standards and a specific process for an employee to refuse work in Section 20109, FRA has no rulemaking authority to establish its own requirements for an employee to refuse work.

AAR's analogy to, and reliance on, *Atchison* is misplaced. FRA is neither interpreting Section 20109 nor issuing rules that implement Section 20109. In order to effectuate that point, the final rule specifically requires in § 218.97(b)(2) that a railroad or employer's good faith challenge written procedures ''shall indicate that the good faith challenge described in paragraph (b)(1) is not intended to abridge any rights or remedies available to the employee under a collective bargaining agreement, or any Federal law including, but not limited to, 29 U.S.C. 651 *et seq.,* 6 U.S.C. 1142, or 49 U.S.C. 20109.'' This requirement in the regulation is intended to clarify that FRA is not attempting to undermine the Congressional intent or language found in Section 20109. Instead, FRA is using the clear substantive rulemaking authority in railroad safety matters found in Section 20103.

2. FRA's Enforcement Authority

Another of AAR's legal issues is the assertion that FRA's proposed rule provides for resolution of disputes and grievances arising in situations already covered by Section 20109. AAR argues that enforcing the good faith challenge procedures proposed in the NPRM would contradict legislative intent to preclude any agency enforcement of this issue and that Section 20109 provides similar employee protections and requires disputes, claims and grievances arising under that section to be handled by the RLA. AAR further notes that a House of Representatives committee report in the legislative history for that statute demonstrates that Congress intended the RLA to ''be the exclusive means for enforcing this section'' and that it did ''not intend for FRA to be involved in this area.'' H.R. Rep. No. 1025, 96th Cong., 2d Sess., at 16 (1980). AAR thus argues that the enforcement of the regulatory good faith challenge procedures is preempted by Section 20109(c) and its legislative history. With the recent amendments to Section 20109, AAR's references to legislative history have lost relevancy. However, FRA disagrees with AAR's position under the former statute and the version effective August 3, 2007.

AAR confuses procedures for handling the initial exercise of a right with procedures for handling a claim of retaliation ''resulting from'' the initial exercise of a right. Under the former statute, Section 20109(c) provided procedures for handling a claim of retaliation as a consequence of the initial refusal to work. That section stated that ''a dispute, grievance, or claim arising under this section is subject to resolution under section 3 of the Railway Labor Act.'' This language refers to disputes, claims and grievances resulting from a claim of retaliation as a result of the employee's exercise of the right under former Section 20109. The legislative history of that statute corroborates this assertion. A House of Representatives Committee Report discussing the remedy under former Section 20109 refers to discrimination not involving discharge or suspension ''such as assignment to undesirable duties.'' Since a dispute over an assignment of undesirable duties refers to an act of retaliation rather than an

exercise of the initial right to refuse work, this report lends support to the proposition that the language ''dispute, grievance, or claim arising under this section'' in former Section 20109(c) refers to disputes resulting from the retaliation that occurred and not from the initial exercise of the right to refuse to work. The same position is applicable to Section 20109 as recently amended.

This rulemaking, on the other hand, only requires procedures for handling the ''initial'' exercise of the good faith challenge. These procedures include such actions as not requiring the challenging employee to complete the work until the good faith challenge is resolved and allowing the employee to document the challenge. The procedures provide employers and employees with a process for handling an employee's good faith challenge. Unlike Section 20109, the procedures do not provide employers and employees with a process for handling an employee's claim of retaliation resulting from his or her good faith challenge. Therefore, FRA's procedures for handling the good faith challenge do not contradict legislative intent as applied to this issue.

3. Multiple Enforcement Actions

AAR argues that the good faith challenge would contradict legislative intent by subjecting railroads to multiple enforcement actions and penalties in situations where both the statutory right to refuse work under Section 20109 and the regulatory right to a good faith challenge would apply. Assuming the employee chose to make a good faith challenge and then claimed that he was consequently retaliated against, AAR argues that the employer would not only be subject to a civil penalty by the FRA under the regulation but would also be subject to damages by the Department of Labor (''DOL'') for violating Section 20109. AAR argues that multiple penalties for the same occurrence contradict legislative intent.

The statutory and legislative histories of both the former and current versions of Section 20109 do not appear to support AAR's claim that multiple penalties are impermissible. While former 49 U.S.C. 20109(d), current 49 U.S.C. 20109(e), and H.R. Report No. 1025 state that employees may not seek protection under multiple provisions, they do not address the issue of preventing employers from facing multiple penalties. The statutory ''election of remedies'' provision is intended to protect an employer from having to pay the same types of damages to an employee multiple times just because there are multiple statutory provisions upon which an employee could file a complaint or a suit. The election of remedies provision is intended to prevent, for example, an employee from getting double the backpay, compensatory damages, and punitive damages the employee is entitled to by seeking protection under both the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c), and Section 20109. We believe AAR is misinterpreting the election of remedies provision by confusing FRA's enforcement of penalties against an alleged bad actor versus an employee seeking remedies for him or herself. Furthermore, a railroad routinely may face multiple demands for penalties or lawsuits in safety matters. Many times, when FRA enforces a regulation against a railroad for a set of facts, the railroad is privately sued based on the same set of facts. This situation is no different and legally acceptable.

4. Anti-Retaliation Provision

AAR made several arguments suggesting that FRA is prohibited by statute from including an anti-retaliation provision in the rule and, although FRA disagrees with AAR's legal conclusion, the proposed anti-retaliation provision found in § 218.97(b)(2) of the NPRM has not been retained in the final rule. FRA proposed an anti-retaliation provision that required each railroad's good faith written procedures to provide that an employee making a good faith challenge not be discharged or in any way discriminated against for making the challenge. In order for the good faith challenge to achieve its intended purpose, i.e., improve railroad safety, it is fundamental that an employee be protected from retaliation when holding an employer or supervisor accountable. In October 2006, when the NPRM was published, the Federal laws protecting rail employees from retaliation were more narrowly written than the recently amended statutory protections provided for in Section 20109; consequently, when the NPRM was published, FRA was concerned that there could be multiple scenarios where an employee could raise a good faith challenge and not otherwise be legally protected from employer retaliation.

Given the statutory amendments effective August 3, 2007, it is unlikely that a rail employee, whether working for a publicly-owned railroad, a privately-owned railroad, or a contractor or subcontractor of either type of railroad, would not be protected from retaliation under either Section 20109 or 6 U.S.C. 1142, which was also enacted in Public Law 110–53. These two statutes protect employees from retaliation for ''the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done * * * to refuse to violate or assist in the violation of any Federal law, rule, or regulation relating to'' either ''public transportation safety or security'' or ''railroad safety or security'' respectively. 6 U.S.C. 1142(a)(2) or 49 U.S.C. 20109(a)(2); *see also* 29 U.S.C. 660(c). These statutes require DOL to investigate complaints of anti-retaliatory action and provide an array of remedies to an employee for violation of the law including reinstatement, backpay with interest, compensatory damages, and punitive damages up to $250,000. 49 U.S.C 20109(d)(3) and 6 U.S.C 1142(d)(3). Consequently, the recently effective anti-retaliatory statutory protections afforded to rail employees would now protect an employee from retaliation under FRA's good faith challenge rule and it is thus unnecessary for this final rule to require that each railroad include a similar anti-retaliation provision in its good faith challenge procedures.

Any potential FRA enforcement of anti-retaliation under the good faith challenge regulation would likely only add a nominal deterrent effect given the substantial remedies employees may seek directly against a defendant under the employee protections statutes. FRA's enforcement authority is limited to civil penalty assessments up to $27,000 against employers and individuals (*see* 49 U.S.C. 21301), emergency orders, compliance orders and agreements, and FRA's other statutorily granted enforcement authority. FRA does not have the authority to collect damages or back pay on behalf of any employee, nor order a railroad to reverse itself on a claim of discharge, discrimination or other retaliation. In consideration of these employee protection alternatives, FRA has decided to remove the anti-retaliatory provision from this rule rather than try to duplicate an investigation into alleged anti-retaliatory acts or omissions that an employee will certainly want to pursue under a collective bargaining agreement, with DOL, or in another forum.

Given the changed playing field for Federal inquiries into alleged retaliation, FRA is now assured that claims of retaliation will be adequately investigated and remedied by another Federal agency. FRA has already held discussions with DOL on ways to integrate FRA's safety program with DOL's whistleblower protection program. For example, FRA's employees will be trained to recognize when an

employee has alleged retaliation so that FRA may inform employees of their basic rights and refer such employees to DOL. FRA anticipates taking other action to inform employees of the statutory protections, such as providing a link to DOL's Web site from FRA's Web site and reminding employee complainants of the statutory protection.

C. Preemptive Effect

The American Association for Justice (AAJ) commented that FRA had impermissibly broadened the scope of preemption under 49 U.S.C. 20106. AAJ objected to FRA's discussion in the preamble of the NPRM regarding 49 CFR 217.2 and 49 CFR 218.4. FRA's discussion of each of these sections was identical, providing that:

> This section informs the public of FRA's intention and views on the preemptive effect of the rule. The preemptive effect of this rule is broad, as its purpose is to create a uniform national standard. Section 20106 of Title 49 of the United States Code provides that all regulations prescribed by the Secretary related to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. Exceptions would be rare. In general, 49 U.S.C. 20106 will preempt any State law—whether statutory or common law—and any State regulation, rule, or order, that concerns the same subject matter as the regulations in this rule. 71 FR 60372 at 60382 and 60386.

AAJ specifically objected to FRA's assertion that the preemptive effect of the rule is broad, that exceptions would be rare, and that § 20106 preempts common law claims. In support of its position that these assertions amounted to an expansion of preemption, AAJ cited *In re Soo Line R. Co. Derailment of January 18, 2002*, 2006 WL 1153359, an unreported Minnesota state court decision. In that decision, the court found for various reasons that plaintiffs' claims were not preempted. Some were not preempted, according to the court, because although Federal regulations covered the subject matter of the claims, the conditions at the location at the time of the derailment constituted an essentially local safety hazard. Others were not preempted, the court said, because the Federal regulations covering the subject matter of the claims were violated. A third category of claims were found not to be preempted because the regulations alleged to cover the subject matter of the claims were deemed by the court not specific enough to do so, and a final group of claims were found not to be preempted because there was no regulation covering the subject matter. While FRA disagreed with AAJ's comments, AAJ's comments have been rendered moot by enactment of Pub. L. No.110–53, discussed below.

Normal State negligence standards apply where there is no Federal action covering the subject matter. In Pub. L. No.110–53, Congress recently clarified the availability of State law causes of action under section 20106 where there is Federal action covering the subject matter. As amended, 49 U.S.C. 20106 provides that issuance of these regulations preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local railroad safety or railroad security hazard; that is not incompatible with a law, regulation, or order of the United States Government; and that does not unreasonably burden interstate commerce. Section 20106 permits State tort actions arising from events or activities occurring on or after January 18, 2002, for the following: (a) A violation of the Federal standard of care established by regulation or order issued the Secretary of Transportation (with respect to railroad safety, such as these regulations) or the Secretary of Homeland Security (with respect to railroad security); (b) a party's violation of, or failure to comply with, its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries; and (c) a party's violation of a State standard that is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a law, regulation, or order of the United States Government, and does not unreasonably burden interstate commerce. Nothing in section 20106 creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

V. Section-by-Section Analysis

Part 217—[Amended]

Section 217.2 Preemptive Effect

This section informs the public of FRA's intention and views on the preemptive effect of the rule. The preemptive effect of this rule is broad, as its purpose is to create a uniform national standard. Section 20106 of Title 49 of the United States Code provides that all regulations prescribed by the Secretary related to railroad safety preempt any State law, regulation, or order covering the same subject matter, except an additional or more stringent provision necessary to eliminate or reduce an essentially local safety or security hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. Section 20106 permits State tort actions arising from events or activities occurring on or after January 18, 2002, for the following: (a) A violation of the Federal standard of care established by regulation or order issued by the Secretary of Transportation (with respect to railroad safety, such as these regulations) or the Secretary of Homeland Security (with respect to railroad security); (b) a party's violation of, or failure to comply with, its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries; and (c) a party's violation of a State standard that is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a law, regulation, or order of the United States Government, and does not unreasonably burden interstate commerce. Nothing in section 20106 creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action. The NPRM language has been amended to reflect the changes made to Section 20106.

Only one comment addressed this paragraph and that comment has been discussed in the preamble. *See* IV. General Comments/Major Issues, C. Preemptive Effect.

Section 217.4 Definitions

FRA has added a definition of *Associate Administrator for Safety* to this section that is consistent with other definitions of this term in this chapter. The purpose of including this definition is to identify an official who would have the authority to require amendments to programs of operational tests and inspections. FRA did not receive any comments related to this definition.

FRA has added a definition of *qualified* to this section. The need for this definition arose from the new requirements for railroad testing officers in § 217.9. As further explained in the analysis for that section, it is not acceptable for a railroad testing officer to be monitoring or instructing employees without being instructed, trained and examined, i.e., qualified, on the railroad's operating rules and the tests the officer is expected to perform; thus, FRA is requiring such qualification. A person cannot be considered qualified unless he or she has successfully completed all ''instruction, training, and examination''

programs required by both the railroad and this part.

The definition of ''qualified'' is modeled after the definition used in § 240.7 in this chapter and should have the same meaning despite some slight differences. The phrase ''training and testing'' has been replaced by ''instruction, training, and examination'' to more thoroughly reflect the educational aspects of the requirements for a qualified person. The definition does not contain the word ''appropriate'' prior to the educational aspects so as to emphasize that the educational aspects of qualifying a person are mandatory, not discretionary. A word choice was made to substitute the term ''successfully completed'' for the word ''passed.'' The definition added to part 217 is the same definition added to part 218, subpart F. The relevant comments FRA received pertained to the proposed requirements in § 217.9 and not the definition itself.

Section 217.9 Program of Operational Tests and Inspections; Recordkeeping

FRA is amending and adding paragraphs to this section. Although not every existing paragraph is being amended, FRA is reprinting the entire section to make it easier for readers to follow.

FRA's amendment to paragraph (a) would clarify that the requirement to conduct operational tests and inspections specifically include tests and inspections sufficient to verify compliance with the requirements of subpart F of part 218 of this chapter. The proposed and final rules identify certain operating rules with which noncompliance has led to an increase in human factor-caused accidents. Subpart F of part 218 requires that each railroad have in effect certain operating rules and that each railroad officer, supervisor and employee uphold and comply with those rules. As the operating rules identified in subpart F of part 218 are designed to address the most frequently caused human factor accidents, FRA's amendment to paragraph (a) requires that each railroad periodically conduct operational tests and inspections to determine the extent of compliance with its code of operating rules, timetables, and timetable special instructions, specifically including tests and inspections sufficient to verify compliance with the requirements of subpart F of part 218 of this chapter, in accordance with a written program as required by paragraph (c) of this section. The program's increased focus on human factor-caused accident prevention should direct awareness to the related operating rules and correlate with a decrease in such accidents.

Paragraph (b) is added to this section to establish new responsibilities for both railroads and those railroad officers who conduct operational tests and inspections, i.e., railroad testing officers. FRA inspections and investigations have revealed railroad testing officers who lack the fundamental knowledge to perform adequate tests and inspections. In order for these officers to be able to do a proper job, they must know the railroad's operating rules, how the tests they will conduct fit into the railroad's testing program, and how to conduct a proper test. AAR and APTA recommended amending paragraph (b)(1)(iii) because they believe this paragraph might be wrongly interpreted to require field training on every operational test an officer might be authorized to conduct. FRA does not agree that changing ''as necessary to achieve proficiency'' to ''when necessary to achieve proficiency'' changes the meaning, as AAR and APTA prefer. We also disagree with AAR's interpretation of the proposed, and now final, paragraph. It is unnecessary for every railroad testing officer to be qualified and receive field training on every conceivable operational test. Experience can substitute for field training, as long as the person is able to conduct an acceptable test. In addition, a railroad testing officer does not need to receive field training on an operational test that the officer will not be asked to conduct. Of course, if an officer who conducts an improperly executed test is found to lack relevant experience conducting such a test and any field training on how to conduct such a proper test, FRA would consider the event to be a violation of the requirement. That said, FRA recognizes that some tests and inspections are so simple that no particular experience or training should be necessary; a railroad will need to use discretion and make training decisions on a case-by-case basis if it chooses not to train its railroad testing officers on each operational test. Paragraph (b)(1)(iv) requires that railroad testing officers conduct operational tests in accordance with the railroad's program for such tests and inspections. A test that is incompetently executed should not count towards compliance with a railroad's program of operational tests and inspections. Finally, this paragraph requires written records documenting that each railroad testing officer was properly qualified and that such records be made available to FRA upon request.

FRA received several comments with regard to proposed paragraph (b). BRS and BLET expressed support for the concept of requiring railroad testing officers to be qualified on operating rules, the testing program and conducting operational tests. AAR requested a ''grandfather provision'' that would allow current testing officers to continue conducting tests for ninety days after the effective date of the rule before records would need to be kept that these testing officers were qualified in accordance with paragraph (b)(2). Similarly, APTA requested that each railroad have until December 21, 2008, to qualify its railroad testing officers on the operational testing program. In the NPRM, FRA expressed disagreement with the need for such a grandfather provision. However, based on the comments and further consideration of the qualification and recordkeeping requirements, FRA will not require compliance with this paragraph until July 1, 2008, although we encourage each railroad to attempt to comply earlier.

FRA does not consider the requirements of paragraph (b) to be onerous. Each railroad should already maintain an accessible record showing when each testing officer was last qualified on the railroad's operating rules in accordance with paragraph (b)(1)(i). It is contrary to logic that a railroad would allow a person to become a railroad testing officer without ensuring that the person is qualified on the operational testing program requirements and procedures relevant to tests and inspections the testing officer would be expected to conduct. We do not understand how a person could possibly do a testing officer's job if the person lacked sufficient knowledge of the railroad's testing program such that the person could not conduct an adequate test or inspection. With that understanding, FRA would not expect that a great degree of new training is necessary, nor that it would be burdensome to create a record. APTA recommended that FRA relax the record retention requirements for ''grandfathered'' or existing testing officers. In the alternative, we suggest that if a railroad has not previously kept a record of whether an officer is qualified on the operational testing program, that the railroad create a short survey which would allow an officer to acknowledge whether the officer considers himself/herself qualified on the various aspects of the program, as well as qualified (either through experience or prior instruction, training, and examination) on the various types of tests and inspections that the officer may be asked to conduct. Meanwhile,

FRA acknowledges that each railroad must qualify its railroad testing officers on any amended or added operating rules that seek to conform with part 218, subpart F of this chapter, and any corresponding changes to the railroad's operational testing program by July 1, 2008; however, as most of these new Federal requirements are already similar to existing operating rules on the vast majority of railroads, we do not anticipate that this additional training will be extensive. Except for adding this applicability date, the final version of paragraph (b) is the same as the version proposed.

FRA has moved paragraph (b) to (c) and added two new requirements found at (c)(1) and (c)(5). Regarding the two new requirements, FRA has implemented a scheme that requires each railroad to amend the existing program of operational tests and inspections with the purpose of requiring railroads to do a better job of focusing their tests and inspections on those types of operating rules that either cause the most human factor-caused accidents nationwide or are identified as problematic on the particular railroad's division or system. At a minimum, FRA expects railroads to test and inspect for those operating rules identified as problematic in the quarterly or six month reviews, i.e., those operating rules violations that have recently caused accidents or incidents on the division or system-wide. We also expect railroads to regularly spot-check for compliance with those operating rules that lead to accidents and incidents nationwide, even if the railroad has not specifically encountered any recent incidents. As mentioned in the **SUPPLEMENTARY INFORMATION** section under ''Development of the NPRM,'' the verification through testing process does not always work well because during some periods of disruption related to organizational or personnel changes, some railroads do not perform operational tests that address the root cause of human factor accidents. At worst, administration of the program may be reduced to a numbers-generating exercise, and, consequently, on portions of the railroad, officers may conduct relatively few meaningful tests. Clearly, FRA intends for the program of operational tests and inspections to be meaningful and the amendments are intended to forcefully move lagging railroads to produce more meaningful tests and inspections.

Paragraph (c)(1) contains the existing requirement that the program shall provide for operational testing and inspection under the various operating conditions on the railroad. It has also been amended, so that on or after July 1, 2008, each railroad shall be required to amend its program to ''particularly emphasize those operating rules that cause or are likely to cause the most accidents or incidents, such as those accidents or incidents identified in the quarterly reviews, six month reviews, and the annual summaries as required under paragraphs (e) and (f), as applicable.'' Thus, FRA expects that each railroad would conduct a significant number of tests and inspections directed at addressing localized problems with compliance, such as those identified on a division, problems identified on a system-wide basis, and leading causes of human factor-caused accidents nationwide, such as those identified through this final rule.

In order to gain some specificity in each railroad's program, paragraph (c)(1) also requires ''a minimum number of tests per year that cover the requirements of part 218, subpart F of this chapter.'' FRA is reluctant to state a percentage or specific number per number of employee work hours as each railroad may have particular operating rules it wishes to emphasize to a greater degree than the next; however, the objective in including this language is to encourage sufficient testing in these critical areas to verify good compliance by railroad operating employees and to help establish the expectation that there will be compliance with those rules. FRA would be critical of a program that placed the majority of its emphasis on enforcing operating rules that are not leading causes of accidents/incidents. The requirement for a specific minimum number of such tests per year follows from such a requirement imposed in EO 24, albeit EO 24 covered a smaller subset of the operating rules FRA is covering in part 218, subpart F. AAR requested that the rule allow a railroad to specify in its program ''a minimum percentage of tests per year'' that cover the requirements of part 218, subpart F of this chapter, as opposed to a just ''a minimum number of tests per year.'' AAR's comment was somewhat unclear in that it did not specify how the percentage might be calculated; we assume that AAR means a percentage of the total number of operational tests to be performed in a given year will cover part 218, subpart F requirements. FRA is not adopting AAR's suggestion as we do not understand why a railroad that can identify a minimum number of total operational tests per year would have trouble identifying a minimum number of tests that cover the requirements of part 218, subpart F. It may be that railroads would like the flexibility to change the minimum number of tests in periods less than a year, i.e., monthly, quarterly, or six-month intervals. FRA recognizes that, from time-to-time, a railroad may have a reduction in business, a reduction in the number of operating employees, a reduction in employee work hours, or another factor that reduces the need to conduct as many operational tests as it set forth in its operational testing program. When such factors occur, a railroad should simply amend its program and create a record explaining the reason for the reduction in the amount of minimum tests. In that way, when FRA audits the program, we can readily deduce why the railroad has reduced the minimum number of tests to be conducted, decide whether the reasons are valid, and notify the railroad if we disapprove of the action taken pursuant to paragraph (i).

Paragraph (c)(5) adds a new requirement that, on or after July 1, 2008, the program show the railroad's designation of an officer to manage the program at each level of responsibility (division or system, as applicable). The officer may be designated either by name or job title, as long as the designation clearly identifies a responsible person that FRA can contact when FRA audits the program. The officer shall also have oversight responsibility to ensure that the program is being implemented properly across each division and system-wide. FRA's expectation is that this officer will at least manage the program to ensure that the overall direction of the program is sound. This designated officer would be expected to take an active role in ensuring that divisions and the entire system are meeting program requirements and ordering changes when expectations are not met. To the degree that a system-level officer can identify a division, or a specific railroad testing officer, that is failing to appropriately direct efforts, the designated officer is expected to take corrective action. In order to ensure that the railroad's testing officers are properly directing their efforts to reduce accidents/incidents, the designated officer or officers will need to make adjustments to the implementation of the program based on any reviews that might be required in paragraph (e), as well as the annual summary produced in accordance with former paragraph (d), which has been redesignated as paragraph (f).

Additionally, former paragraph (b)(6) has been redesignated as paragraph (c)(7) without any changes from the

prior existing rule. Former paragraph (c) has been redesignated as paragraph (d) also without change.

Paragraph (e) adds requirements for periodic reviews for any railroad with at least 400,000 total employee work hours annually. FRA has decided to provide each Class I railroad (including the National Railroad Passenger Corporation) until July 1, 2008 to comply with this paragraph and, the remaining railroads to which this paragraph applies, shall comply with an applicability date of January 1, 2009. The NPRM only would have provided until the effective date of the rule to comply with this section and FRA decided to heed the concerns raised during the RSAC working group meetings that the effective date of the rule would not provide sufficient time for each railroad to implement the reviews required by this paragraph.

FRA has decided to exclude freight railroads that have less than 400,000 total employee work hours annually from conducting periodic reviews and analyses as provided in paragraph (e)(1) because only 135 smaller railroads that meet this criterion reported any human factor caused rail accidents, and of those 135 that reported such accidents, only 20 railroads reported five (5) or more human factor caused rail accidents during the years 2002 through 2005. During this four year period, these 135 smaller railroads experienced 334 human factor caused rail accidents amounting to 7 percent of all human factor caused rail accidents. It should also be considered that there are almost 600 smaller railroads that fit this criterion and yet only 135 reported any human factor caused rail accidents at all. On that basis, FRA is excepting the smallest railroads, based on the less than 400,000 employee work hours threshold, from the monthly and quarterly reviews. Of course, if FRA accumulates evidence to suggest that railroads with less than 400,000 employee work hours are experiencing a significant number of human factor caused accidents, FRA will consider whether to initiate a new rulemaking revising this final rule.

Similarly, Amtrak and the railroads providing commuter service in a metropolitan or suburban area also experience a relatively low number of human factor caused rail accidents compared to the freight railroads with greater than 400,000 employee work hours annually. During the years 2002–2004, Amtrak and the commuter railroads experienced a total of 270 accidents attributed to human factor causes. At a meeting held with members of APTA on April 27, 2006, (notes of this meeting are in the docket of this proceeding) APTA explained that many of its member railroads do not keep accident/incident data and/or operational testing data electronically and, thus, conducting periodic reviews greater than annually would create a substantial burden for those railroads that could not simply run a report from a computer. In addition, APTA members reminded FRA that a commuter railroad's budget is dependant on the generosity of local and state governments, which may not want to upgrade computers and software which would permit quicker and more efficient accident/incident reviews. Passenger railroads are generally more stable in their organizations and experience greater continuity with respect to staffing at the line officer level (where many problems often develop).

With regard to six month reviews, however, there is a definite benefit for Amtrak and the commuter railroads to conduct a thorough system level review to achieve some degree of accountability. Meaningful reviews should help drive proper implementation of the program of operational tests and inspections—thus driving down the number of accidents/incidents attributable to human factors. APTA explained in its comments that there are funding and development issues that will require a period of training on these new regulations and any new automated reporting system that is created in response to the rule; consequently, APTA requested 12 months to implement the first six-month review under paragraph (e)(2). FRA has decided to deny APTA's request to delay implementation of the six-month review for a year. FRA does not agree with APTA that the six-month review requires a ''new automated reporting system'' for any railroad that does not already have one up and running. The records and reviews required by this section could be maintained by old-fashioned written records, and the analysis required could be completed without the aid of a computer or with software readily available in stores now. That said, we agree that an automated system would likely provide for more efficiently completed analysis. FRA, however, has not required such automation. Finally, FRA has not excepted even the smallest commuter railroads from the requirement that reviews be conducted, because in FRA's experience no railroad is free from the risk that good discipline will erode over time, and the consequences of a passenger train accident can be very serious indeed. The benefits of the review are too important to postpone for a year.

For the major freight railroads, the quarterly review is to be developed and conducted at the division level unless no division headquarters, or its equivalent, exists. Most larger railroads have created division headquarters (*see* current definition in § 217.4 of this part) to manage portions of the railroad and, certainly, railroads that have divisions do so because it is more efficient. That is, it is easier for an officer at a division headquarters to know what safety issues are problematic in his or her division than an officer of a large railroad at the system level.

AAR asserted in its comments an overall objection to paragraph (e) as it deems the reviews and recordkeeping requirements of this section as ''micro-management''and ''command-and-control regulation at its worst.'' AAR maintains that monthly, quarterly, and six-month reviews are not typically conducted by freight railroads as FRA asserted in its proposed rule and that FRA is wrong to maintain that it is a best practice for freight railroads to adjust its program of tests and inspections based on one quarter's worth of data. Furthermore, AAR asserts that even if some railroads voluntarily conducted the same types of reviews without regulation, FRA is not justified to impose this ''regulatory straitjacket, with the formality and recordkeeping that are byproducts of regulatory requirements,'' on each railroad.

FRA appreciates the comments of AAR with regard to paragraph (e) and certainly has given AAR's counterpoint due consideration. The main focus of this rule is to reduce the number of human factor caused accidents, and FRA's experience has been that one way to do that is to impose these types of review requirements which force needed improvements on a railroad's operational testing and inspection program. Prior to the publication of this rule, when FRA has identified significant problems with such a program and there has also been a correlation of noncompliance with important safety laws, FRA has shown some restraint in enforcement while working with some railroads in trying to improve compliance. On a case-by-case basis, FRA has entered into a voluntary compliance agreement with a railroad so that it is clear what enforcement action FRA will take if the operational testing and monitoring changes requested by FRA are not completed by a specific deadline.

Although voluntary compliance agreements are typically effective in improving safety on a particular railroad

or division, FRA's experience has been that the problems that trigger the need for such agreements are fairly common in the industry. The regulatory approach in this rule is significantly more efficient than entering into tens or hundreds of individual agreements. The implementation of this rule will effectively require the implementation of best practices that should aid in the reduction of accidents/incidents before FRA is able to pinpoint any problem associated with a particular railroad's system of tests and inspections. Rather than changing one railroad, or one division on a large railroad, at a time, this rule will require all but the smallest freight railroads to place greater emphasis on human factor caused accidents in each operational test and inspection program.

AAR also commented that FRA should not require that a designated officer for each division shall be the sole officer who may perform the required monthly and quarterly reviews of tests and inspections, if a railroad has divisions. AAR suggests that the rule permit each railroad the flexibility to choose whether an officer at headquarters can perform the required reviews. FRA is rejecting AAR's comment as it applies to the quarterly review. In order to comply with the requirements for the quarterly review under paragraph (e)(1)(i), an officer would need to have a detailed knowledge of the operation. It is our experience that railroads that have divisions are too large for a person at the system headquarters to have the kind of mastery over each division to conduct the kind of in-depth analysis required of the quarterly review. Where FRA has audited strong programs, division officers are conducting periodic analysis of accidents/incidents at the division level and making appropriate adjustments at the division level as remedial action. We are surprised at AAR's comments because the divisions typically operate semi-autonomously from system headquarters, albeit with regular coordination on system-wide matters. As a practical matter, if a division headquarters exists, an officer at the division level will be in the best position to perform the types of reviews required by the quarterly review.

Meanwhile, FRA has responded to AAR's comment by deleting the requirement for a monthly review. Instead, the review to determine whether each railroad testing officer is conducting the minimum number of each type of test or inspection required by the railroad's program will only be required on a quarterly basis, as opposed to a monthly basis. What was formerly referred to as the monthly review, but is now part of the quarterly review, is not expected to be an onerous task. It is merely a quick written tally of the number of tests performed by each railroad testing officer, including the railroad operating rules tested for, and a determination made whether the tally shows adherence to the written program of operational tests and inspections. When this type of review reveals noncompliance with the program, the designated officer is required to make any necessary adjustments to the tests and inspections required of railroad officers for the subsequent period(s). The designated railroad officer in paragraph (c)(5) may or may not be the officer who performs this review, but this designated railroad officer would be required to ensure that the quarterly review is properly completed. As FRA would expect that this aspect of the quarterly review would be derived from data collected at the division level, FRA does not anticipate any problems for a division officer producing this information in a quarterly review.

FRA is mandating a comprehensive quarterly review for freight railroads under paragraph (e)(1)(i). In addition to the scorecard for each railroad testing officer (i.e., the formerly proposed monthly review), it shall include a ''review of the [railroad's] accident/incident data, the results of prior operational tests and inspections, and other pertinent safety data for that division or system to identify the relevant operating rules related to those accidents/incidents that occurred during the quarter.'' The focus of the quarterly review is to identify those operating rules which pose the greatest risk of being violated—which should then be targeted for regular tests and inspections. That is why FRA is requiring that based upon the results of the quarterly review, the designated officer shall make any necessary adjustments to the tests and inspections required of railroad officers for the subsequent period. The quarterly review must be in writing and include the data upon which any conclusions are based. In response to several comments, FRA has clarified that any review, record or other information required by this section to be in writing may be retained electronically pursuant to paragraph (g).

FRA expects that in order to conduct a meaningful quarterly review, each railroad will review accident/incident data, operational test data, and other pertinent data. For example, a railroad should identify the relevant facts for each category of data. The relevant facts are usually covered if a railroad can answer the questions signifying who, what, where, when, why, and how often. For accident/incident data, these questions would involve identifying all the employees involved in the accident/incident, a description of the accident/incident, the location where it occurred, the time it occurred, the root cause and any secondary causes, and whether the division or system has suffered this type of accident/incident often, sometimes or never. For operational test data, the issues include identifying the railroad testing officer(s) responsible for the particular location, whether the testing officers are testing for the operating rules responsible for any recent accidents/incidents, whether the testing officers conducted any tests where any recent accidents/incidents occurred, whether the testing officers are testing during the hours of highest incident rates, whether any railroad officers are briefing the employees as to the root or secondary causes and the fact that the railroad will be testing for compliance, and how often the officers are conducting any follow-up testing and job briefings.

FRA believes there are at least five other types of pertinent safety data that should be included in a proper quarterly review. One, if FRA has conducted any recent inspections, the railroad should check whether its officers' tests reflect FRA's findings. Two, if an employee is involved in an accident/incident, the employee's safety record may provide insight. Three, the railroad should determine if there is any correlation between the training or experience of the local railroad testing officers and the locations where accidents/incidents have occurred. Four, a railroad should similarly consider the extent to which employee experience plays a part in any given accident/incident. Fifth, a railroad's review should consider whether any operational conditions have recently changed that increased the likelihood of either noncompliance with the operating rules or accidents/incidents. Special attention to all these details in the quarterly or six month review, as applicable, should lead a railroad to meaningful application of its written program of operational tests and inspections with a greater potential for driving down the frequency and severity of accidents/incidents.

Although it would be best if quarterly reviews were completed immediately following the end of each quarter, FRA is requiring completion no later than 30 days after the quarter has ended. We did not receive any negative comments regarding the 30 day period. FRA originally considered requiring the quarterly review in half that time but railroads participating at a Railroad

Operating Rules Working Group meeting suggested that additional time would be needed for those railroads that do not maintain their safety data electronically. For those railroads that keep records electronically, FRA encourages quarterly reviews to take place contemporaneously with the conclusion of the quarter. Regardless of how long it takes to complete the quarterly review, each division or system should be prepared to redirect its railroad testing officers in order to appropriately react to any accidents/incidents of noncompliance during the previous quarter. Even where a division or system has had a particularly safe quarter, railroad testing officers should be instructed to adjust the way in which they are conducting their tests so that employees cannot easily anticipate the types of tests to be conducted, nor the dates and locations of such tests. Because freight railroads with divisions might find it difficult to do the system-wide six month review in only 30 days, especially since the quarterly reviews might not be completed until the 30th day, FRA has amended the proposed rule by allowing freight railroads 60 days after the review period has ended to complete the six month review. Passenger railroads with divisions are not quite as large or complex that completion of the six month review should take more than 30 days.

In paragraphs (e)(1)(ii) and (e)(2), six month reviews are only required for each Class I railroad, Amtrak, and each railroad providing commuter service in a metropolitan or suburban area. The basis for the requirement is that the identified freight railroads are so large that each would benefit from an officer, likely at the system headquarters, who is identifiable by name or job title, who will oversee whether each division, line or segment is complying with the program of operational tests and inspections. It is expected that such an officer would have the authority to intervene in division, line or segment operations to the extent that this officer could order changes to the way divisions are implementing the program. The purpose for such intervention would be to require certain types of operational tests or inspections based on observations made system-wide that may not be apparent to each designated division officer armed only with data from his or her own division.

In the case of Amtrak and the commuter railroads, paragraph (e)(2) requires reviews equivalent to those for the freight railroads in paragraph (e)(1), however all the reviews are to take place at least every six months. Of course, these are minimum requirements and passenger railroads are free to initiate more frequent reviews. For example, paragraphs (e)(2)(i) and (ii) describe reviews that are equivalent to the review required for freight railroads on a quarterly basis and certainly passenger railroads may perform that review on a quarterly basis as well; however, the passenger railroads are required to comply with those two requirements at least every six months. Paragraph (e)(2)(iii) describes a review that is to be completed at least once every six months and is the equivalent of the six month review required for freight railroads. As it is required that the passenger railroads conduct the same reviews as the freight railroad with the exception of the timing of those reviews, the prior section-by-section analysis description for each review is applicable here.

Because FRA needs to be assured that each railroad is complying with any required reviews, the regulation requires that the reviews be retained for one year after the end of the calendar year to which they relate and shall be made available to FRA upon request. FRA also encourages railroads to store these records electronically, pursuant to paragraph (g), as long as the information can be produced upon request.

Former paragraph (d), which is redesignated as paragraph (f), is being amended in two respects. One amendment is merely to change the term ''manhours'' to ''employee work hours'' as the latter is gender neutral. The second amendment would clarify that this requirement does not apply to ''a railroad with less than 400,000 total'' employee work hours *annually*, as the current rule accidentally fails to include the qualification of the time period.

In the NPRM, FRA questioned the necessity of retaining the annual summary requirement in paragraph (f) and FRA received several comments, including from AAR, APTA, and UTU, supporting the elimination of the annual summary on operational tests and inspections requirement. After further consideration, FRA realizes that the annual review requires different information than the other reviews and that eliminating it would have a serious detrimental effect on FRA's ability to audit a railroad's program. The annual summary requires all but the smallest railroads to create a written summary of the number, type, and result of each operational test and inspection, stated according to operating divisions where applicable, that was conducted as required by paragraphs (a) and (c) of this section. This written record may be kept in an electronic format pursuant to paragraph (g). Generally, railroads keep the data used to create this report in an electronic database which makes it relatively simple to generate the required annual summary.

Former paragraph (e) is redesignated paragraph (g) with one amendment. The former rule specified that the railroad maintain a ''desk-top'' computer upon which the railroad can retrieve data. As laptop and notebook computers have become more common, and their computing abilities now rival desk-top models, there is no reason to restrict railroads from using any computer to retrieve records for FRA under this section.

Proposed paragraph (h), which suggested a requirement specifying that railroads and individuals can be liable for falsifying or deliberately mutilating records required by this section, has been deleted as unnecessary for two reasons. One, if FRA has sufficient evidence to prove that a railroad or individual has falsified a program required under this section or a record kept for such a required program, then that railroad or individual could be cited by FRA for a willful violation of the underlying section. The penalty assessed would be greater than a typical civil penalty assessment. *See* 49 CFR 217.5 and app. A to Part 217. Thus, even with the deletion of this proposed paragraph, FRA retains the authority to assess civil penalties for falsification of the required records pertaining to this section. Two, the activity at issue is also prohibited by criminal law. *See*, e.g., 49 U.S.C. 21311. Consequently, FRA has decided to remove this paragraph from the final rule and would expect that the existing criminal law and this final rule will provide sufficient disincentives for railroads and individuals to complete the programs and records required under this part without falsifying, mutilating, or destroying such a record.

Proposed paragraph (i), which has been redesignated as paragraph (h) requires that FRA have some specific oversight mechanism for disapproving a railroad's program of operational tests and inspections. It also requires minimum procedures and structure for the review process. The paragraph requires that the Associate Administrator for Safety only disapprove programs required by this section for cause stated. As the disapproval decision is made for cause, it is significant for the railroad to understand exactly why FRA is disapproving the program; thus, notification of such disapproval will be made in writing and specify the basis for the disapproval decision. If the Associate Administrator for Safety disapproves the program, the railroad

has 35 days from the date of the written notification of such disapproval to either (1) amend its program and submit it to the Associate Administrator for Safety for approval, or (2) provide a written response in support of the program to the Associate Administrator for Safety. If the railroad chooses the second option to defend the allegedly defective program, the Associate Administrator for Safety will inform the railroad of FRA's final decision in writing. Although the rule is silent regarding whether a railroad may request an extension, FRA intends for the Associate Administrator for Safety, as the agency's decision-maker, to have the flexibility to decide procedural issues, such as having the ability to grant or deny requests for extensions of time, as the issues arise. The Associate Administrator for Safety renders a final decision in writing which will specify the terms and conditions under which the program will be considered approved or disapproved. If the decision denies the railroad's request in whole or in part, FRA intends for the railroad to amend its program and submit it to the Associate Administrator for Safety for approval within 35 days of the final decision as that is the period of time accorded for amending programs when a railroad chooses not to appeal the disapproval. Again, a railroad may request an extension of time to amend its program and submit it to the Associate Administrator for Safety for approval, and FRA intends for the Associate Administrator for Safety to have the flexibility to decide whether to grant or deny such procedural requests. Although enforcement action is always discretionary, FRA believes that enforcement action is warranted when a railroad fails to appropriately and timely amend its program; for this reason, FRA is requiring in paragraph (h)(2) that a failure to submit the program with the necessary revisions to the Associate Administrator for Safety will be considered a failure to implement a program under this part.

The approach in paragraph (h) recognizes that FRA will want to review such written programs during audits or investigations and that FRA should have the authority to request changes to the program if it does not meet the minimum requirements of this rule. Although FRA retains the authority to review in detail each railroad's program, FRA is not requiring that each railroad submit its program for prior review and approval. Rather, FRA intends to review the programs of the major railroads over a multi-year cycle to determine if they are effective. In BLET's written comment, it requested that FRA reconsider this approach and instead advocated that each railroad be required to submit its operational tests and inspections program for FRA's explicit approval. BLET's reason for requiring a submission and approval process is that employees need to be afforded no less than the highest degree of assurance that a railroad's compliance monitoring is appropriate if the employee can be held responsible for noncompliance. A similar comment was raised by UTU in the context that FRA should prohibit testing officers from performing operational tests that violate operating rules or endanger employees. While FRA appreciates these comments, we are not adopting them for the following reasons. Although FRA has found deficiencies with some railroads' programs from time-to-time, if a railroad has a program, it will typically contain all the requirements necessary to be deemed approved. Most problems with a program cannot be determined until an audit or investigation reveals inadequacies. Thus, a mandatory approval process is both a drain on the agency's resources and also unlikely to reveal many programmatic deficiencies. The best time to request a programmatic change is when an inadequacy is revealed. However, the NPRM did not provide for specific procedures for FRA to take place when an inadequacy was identified. The rule has been strengthened to provide for specific oversight authority vesting with the Associate Administrator for Safety. It is also helpful to remember that FRA is requiring railroad testing officers to conduct tests and inspections in accordance with a railroad's program, and that it is implicit that an improperly conducted test shall not be considered a valid test toward satisfying any requirement under the program.

In the proposed rule, FRA solicited comments as to whether the final rule should require each railroad to instruct its employees on operating rules at least once every three years. BLET submitted a comment supporting triennial qualification of employees on all Federalized operating rules. As BLET points out, adding this requirement would merely expand the proposal to require each railroad to qualify its employees on Part 218, subpart F in this chapter, and many employees are already covered as locomotive engineers are currently required to be qualified every three years pursuant to § 240.210(c) of this chapter. FRA would add that a triennial operating class is the typical standard requirement on most railroads today. However, FRA also recognizes that our definition of qualified might be deemed to lead to more extensive or rigorous instruction, training, and examination than is currently in practice. While that might be a positive development, FRA recognizes that there might be costs involved with assuring the additional qualifications are met, and FRA has not found a correlation between the lack of operating rules training in general and accidents/incidents. FRA's decision only requires such periodic instruction as it applies to those operating rules that would be required by part 218, subpart F because the rules set out in that subpart do have a direct correlation to a substantial number of accidents/incidents and other noncompliance detected by FRA. *See* § 218.95(a)(5). FRA will consider implementing another rulemaking if noncompliance with other operating rules are identified that are causing a significant number of accidents/incidents. Based on available information, the current requirement, that each railroad periodically instruct each employee on the meaning and application of the railroad's operating rules, appears to be sufficient. *See* § 217.11.

Section 217.11 Program of Instruction on Operating Rules; Recordkeeping; Electronic Recordkeeping

FRA did not propose any changes to this section in the NPRM; however, after the NPRM's publication we realized that it contained a cross-cite to § 217.9(e)(1) through (e)(5), which has been redesignated as § 217.9(g)(1) through (5). This citation change is the only amendment to this section.

Part 218—[Amended]

Section 218.4 Preemptive Effect

This section informs the public of FRA's intention and views on the preemptive effect of the rule. The preemptive effect of this rule is broad, as its purpose is to create a uniform national standard. Section 20106 of Title 49 of the United States Code provides that all regulations prescribed by the Secretary related to railroad safety preempt any State law, regulation, or order covering the same subject matter, except an additional or more stringent provision necessary to eliminate or reduce an essentially local safety or security hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. Section 20106 permits State tort actions arising from events or activities occurring on or after January 18, 2002, for the following: (a) A

violation of the Federal standard of care established by regulation or order issued the Secretary of Transportation (with respect to railroad safety, such as these regulations) or the Secretary of Homeland Security (with respect to railroad security); (b) a party's violation of, or failure to comply with, its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries; and (c) a party's violation of a State standard that is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a law, regulation, or order of the United States Government, and does not unreasonably burden interstate commerce. Nothing in section 20106 creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action. The NPRM language has been amended to reflect the changes made to Section 20106.

Only one comment addressed this paragraph and that comment has been discussed in the preamble. *See* IV. General Comments/Major Issues, C. Preemptive Effect.

Section 218.5 Definitions

FRA is amending the definition of *flagman's signals* in order to eliminate a reference to ''torpedoes.'' Torpedoes are antiquated signaling devices which have fallen into disuse in the industry. Likewise, we are amending § 218.37, which refers to this definition and the placing of torpedoes when providing flag protection.

FRA is also amending the definition of *locomotive* to explain that this particular definition of *locomotive* does not apply to subpart F. The definition of *locomotive* in this section is a more mechanically-minded definition than the definition contained in 49 CFR 218.93. This definition continues to apply to the requirements in part 218, with the exception of subpart F.

Section 218.37 Flag Protection

FRA is eliminating references to ''torpedoes'' as these are antiquated signaling devices which have fallen into disuse in the industry. The former rule required each railroad to have in effect an operating rule which complies with this section, and thus contains references to the use of torpedoes, even though the railroad could meet other flagging requirements without ever needing to carry or use torpedoes. In the former section, there are two paragraphs that reference torpedoes. Former paragraph (a)(1)(iii) states, in part, that ''[w]hen a train stops on main track, flag protection against following trains on the same track must be provided as follows: A crew member with flagman's signals must immediately go back at least the distance prescribed by timetable or other instructions for the territory, *place at least two torpedoes on the rail at least 100 feet apart* and display one lighted fusee.'' The language in italics has been deleted by this final rule. Former paragraph (a)(1)(iv) states that ''[w]hen required by the railroad's operating rules, a forward crew member with flagman's signals must protect the front of his train against opposing movements by immediately going forward at least the distance prescribed by timetable or other instructions for the territory *placing at least two torpedoes on the rail at least 100 feet apart*, displaying one lighted fusee, and remaining at that location until recalled.'' Again, the language in italics has been deleted by this final rule. Elimination of the references to torpedoes does not eliminate the requirement that each railroad have in effect an operating rule that complies with the requirements in this section. Furthermore, FRA has made minor amendments to make the regulatory language gender neutral.

Subpart F—Handling Equipment, Switches, and Fixed Derails

Section 218.91 Purpose and Scope

As previously explained in the supplementary information, FRA has identified that noncompliance with a small number of railroad operating rules has caused an inordinate percentage of total human factor caused accidents. FRA's purpose is first to establish clear and unambiguous procedures that will provide for the safety of railroad employees and the public. In the RSAC Working Group discussions that preceded the preparation of the proposed rule, FRA noted significant variation in basic safety procedures followed on participating railroads. Although some variation is necessary to address local conditions, the presence of extensive joint operations in the railroad industry makes it essential that certain common procedures apply. Joint operations are not new to the railroad industry, as evidenced by the historic role of terminal companies. However, the practice has more recently expanded through mergers and consequent awards of trackage rights and through the creation of hundreds of small railroads that are often provided access to larger railroad's facilities to facilitate efficient interchange of cars.

In order to ensure compliance with operating rules, it is essential that they be consistent, commonly understood, and applied in a predictable manner. Further, it must be understood that the rules may not be circumvented at the whim of a supervisor or employee to hasten completion of the work. The rules in this subpart are intended to support these purposes.

In addition, making these rules mandatory from a Federal standpoint provides an enforcement mechanism to discourage noncompliance.

FRA is standardizing this small number of railroad operating rules by establishing minimum requirements. The minimum requirements are based on accepted best practices and rules currently in use. Of course, railroads may choose to prescribe additional or more stringent requirements.

FRA received one comment regarding this section. AAR proposed that FRA add a paragraph that exempts employees subject to blue signal protection under subpart B of this chapter, or to employees moving equipment within the confines of a locomotive repair or servicing area, or a car shop repair track area. FRA disagrees with AAR's premise that employees performing these functions do not need to be qualified on the requirements of this subpart. It is absolutely imperative that all employees operating a hand-operated switch or fixed derail understand how to properly operate and determine the position of such switches and derails. We do not share AAR's belief that there is any conflict with the blue signal requirements of this chapter. Additionally, FRA did carve out one exception under proposed § 218.103(g)(2)(a), redesignated as § 218.107(c)(1)(i), so that hand-operated crossover switches could be left out of correspondence when used to provide blue signal protection under § 218.27.

FRA has also clarified in the title to this subpart, the purpose and scope section, and in § 218.109, that this subpart applies to ''fixed'' derails and does not apply to ''portable derails.'' In the NPRM, FRA did not distinguish between the two general types of derails, i.e., fixed and portable. FRA is using the term ''fixed derails'' to contrast it with derails that are portable. Portable, or temporary, derails can easily be transported and applied at different locations throughout the day in order to protect workers and equipment as needed. Fixed, or permanent, derails cannot be easily transported because they are typically affixed to the track structure in some manner. Fixed derails are normally found prior to entering a locomotive servicing area or car shop repair area, where they are used to protect workers in those areas from

encroachment by unauthorized movements of rolling equipment. Fixed derails are also used on industry tracks to prevent rolling equipment from unintentionally rolling out onto a main track.

Section 218.93 Definitions

The definitions in this section only have applicability to this subpart so it should be easier for the reader to locate each definition in this section rather than in subpart A—General, § 218.5.

Several definitions are consistent with other definitions of these terms in this chapter. These terms are *Associate Administrator for Safety, employee, locomotive, pedestrian crossing, qualified*, and *roadway worker*. In an effort to be as clear as possible, FRA is including definitions of these terms in this subpart for the benefit of anyone unfamiliar with these terms.

FRA is defining the term *clearance point* because this term is necessary to describe an important concept that is used several times in this subpart. ''Clearance point'' means the location near a turnout beyond which it is unsafe for passage by equipment or a person riding the side of a car on an adjacent track. While clearance points may be identified by marks on the rail, signs, or other visible identifiers, these points are often referring to an approximate location that will need to be deduced by an employee. Railroads shall implement procedures for identifying such approximate locations and for waiting to line hand-operated switches away until equipment that has entered the track has passed this point. *See* §§ 218.101(c) and 218.103(d). Without a definition of clearance point, it would be difficult to define what is meant by ''foul or fouling a track.'' Through the proper identification of clearance points, employees can avoid collisions and personal injury to other employees riding the sides of cars.

The definitions for *correspondence of crossover switches* and *crossover* are interrelated, and should be familiar to people working in the railroad industry. FRA defined the term ''correspondence of crossover switches'' in the NPRM and no comments were filed suggesting that the industry was confused by the term. Crossover switches are considered in correspondence under two conditions: (1) When it is desired to travel from one adjacent track to another, both crossover switches would need to be lined for the crossover movement; or (2) if no crossover movement is desired or intended, both crossover switches must be lined for the straight-away movement, i.e., straight track.

FRA is adding a definition of *crossover* because, while drafting this final rule, we realized that the industry has not settled on one common definition of the term. Some railroads define the term crossover in their rule books as ''a combination of two switches that connect two adjacent tracks.'' One railroad adds the following sentence to that definition: ''When lined, this switch combination allows movements to cross from one track to the other.'' Other railroads simply define a crossover as ''a track connection between two adjacent tracks.'' Meanwhile, Christoper Schulte's *Dictionary of Railway Track Terms*, (3d ed. 2003), defines a crossover as ''a pair or group of turnouts which allows rolling stock and on-track equipment to cross from one track to another.'' Still another dictionary of railway terms, Don Dressel's *Railroad Terminology, Definitions, & Slang*, (4th ed.1994), defines a crossover as ''two turnouts * * * connecting two nearby and usually parallel tracks.'' FRA is aware that there are many variations of track configurations that may resemble a crossover, or may fall generally within the parameters of one of the definitions referenced above but, as a practical matter, are not crossovers in the purest sense that FRA and most of the industry understand and intend the term to mean. Therefore, in the application of this subpart, the term crossover applies to a track connection between two adjacent, but not necessarily parallel, tracks, consisting of two switches, which is intended to be used primarily for the purpose of crossing over from one track to another. Categorically excluded from this application are track connections between adjacent tracks that, while they may physically permit equipment to pass from one track to another, are of sufficient length so as to be able to store or hold rolling equipment on them, or to set out bad order cars, or to store track equipment, or for any other purpose than solely for crossover movements. Of course, it is possible to have a crossover that holds just a few pieces of rolling equipment and that is not typically used for allowing other movements to pass or used for storage, but yet is used for such purpose. In response to these atypical situations, FRA intends to use its enforcement discretion on a case by case basis.

A definition for *foul or fouling a track* is provided because this term is necessary to describe an important concept that is used several times in this subpart. *Foul or fouling a track* means rolling equipment or on-track maintenance-of-way equipment is located such that the end of the equipment is between the clearance point and the switch points of the switch leading to the track on which the equipment is standing. The potential for an accident is great when equipment is left standing on a track in such a manner that a movement on an adjacent track would collide with it; this is especially true when the standing equipment is left so that it appears that equipment might be able to pass by on the adjacent track. Equipment, or a person riding a side of a car, on adjacent track could strike fouling equipment. This type of accident is usually a side-swipe type accident and the severity of the accident depends on the factors involved; e.g., the factors determining severity include, but are not limited to, the speed of the moving equipment, the type of equipment struck, the contents of the cars struck, whether a person was riding a car and whether an occupied locomotive struck the equipment. The issue of foul or fouling a track is addressed in § 218.101 titled ''Leaving Rolling and On-Track Maintenance-of-Way Equipment in the Clear,'' because certain scenarios of fouling are avoidable and FRA believes that each railroad should have an operating rule that prohibits this dangerous practice. The final rule was amended from the NPRM to clarify an issue raised during the RSAC process. FRA was asked to clarify what it meant by the term ''any part of the equipment.'' Some commenters questioned whether FRA would consider a high-and-wide load, or a shifted load of lumber protruding from the side of a flat car, as ''fouling'' an adjacent track even though the end of the car might still be within the clearance point of the switch. FRA's experience has been that when there are high-and-wide or shifted loads, railroads have implemented proper procedures for employees to take appropriate action and address the safety concerns. The situation FRA intends to address in this rule by defining ''foul and fouling'' occurs when the end of a car itself is fouling and struck by a movement on an adjacent track; the reason for FRA's narrower focus is because that situation is the type of accident described universally in the accident/incident reports filed with FRA that are categorized as ''cars left foul'' or ''car(s) shoved out and left out of clear.'' By referring to the end of the equipment, FRA's regulation is patterned after the long-standing operating rule, and we would hope make it easier to understand for employees. This

clarification is based on an RSAC recommendation. FRA will consider initiating a new rulemaking amending the definition of ''foul or fouling'' if future data reveals that high-and-wide or shifted loads become an increasing explanation for accidents/incidents.

FRA defines *hand-operated switch* broadly to identify any type of switch when operated by manual manipulation including traditional hand-operated (rigid) switches, power switches, and spring switches. Excluded from this definition are switches operated by push button or radio control if the switch is protected by distant switch indicators, switch point indicators, or other visual or audio verification that the switch points are lined for the intended route and fit properly. The definition includes all switches which are normally operated by manual manipulation of the switch lever. As FRA has defined this term, ''hand-operated switch'' includes switches operated by push button or radio control, but only when such switch is not protected by distant switch indicators, switch point indicators, or other visual or audio verification that the switch points are lined for the intended route and fit properly. For example, the two types of indicators provide a visual indication of the switch alignment; and other electronic advancements are capable of sending a message to a receiver indicating the switch's alignment; such that a visual check by an employee to determine that the switch is properly aligned would be redundant after receiving an electronic message that has already served that purpose. For switches that use push button or radio control technology, the ''manual manipulation'' aspect is that the employee is required to throw the switch; and the electronic aspect of the switch manipulation is primarily an option for avoiding personal injuries due to the throwing of a switch lever. FRA does not intend to address issues related to power-assisted switches operated from central consoles, whether within or outside of signaled territory, when so operated.

With regard to the definition of hand-operated switch, several members of the RSAC Operating Rules Working Group requested that FRA explain which employees would be required to comply with the requirements for hand-operated switches. FRA explained that the definition intended to characterize the types of switches normally operated by operating employees, whether or not there is some electronic aspect to the operation of the switch. Such operating employees include, but are not limited to, conductors, brakemen, trainmen, switchmen and remote control operators. On rare occasions, a conventional locomotive engineer might operate a switch, although, with push button and radio control technology, it is possible that locomotive engineers may find themselves operating a greater number of switches in future years. Maintenance-of-way and mechanical employees also have occasion to operate these switches. That being said, the rule is focused on the type of switch that is operated and not the job title of the person operating; thus, regardless of a person's job classification, a person who operates a switch fitting the definition of a ''hand-operated switch'' is required to comply with the requirements of this subpart.

BRS commented that the proposed definition of hand-operated switch was problematic. In general, the view raised by BRS, in comments and discussions during the RSAC working group, was that the definition did not accurately describe what signalmen would consider a ''hand-operated switch.'' In BRS's view, FRA's definition included other types of switches and was thus over-inclusive. BRS also raised a concern that if FRA has a definition of ''hand-operated switch'' in this subpart, that this definition might eventually be adopted by FRA in other parts of the chapter. FRA gave great consideration to this request and attempted to draft the definition according to the preferences expressed by BRS in its comments; however, FRA has decided not to amend the rule for the following reasons. In attempting to craft an alternative that defined hand-operated switch more narrowly, FRA found itself having to create and define at least three other terms as well (e.g., power switch, dual-control power switch, and manually-operated switch), in order to cover all of the types of switches FRA wanted the rule to cover. In our view, the regulation would be more complicated with four definitions when one will do. The definitions located in this section are explicitly identified as to be ''used in this subpart;'' any rule that FRA promulgates concerning the maintenance of different types of switches will be written in a separate part or subpart of this chapter and may require more technically detailed descriptions. Certainly, FRA is not required to maintain this definition of hand-operated switch throughout all of its regulations if it requires greater detail in other contexts. Considering all of the different crafts of workers, signalmen should have the least amount of difficulty understanding how to properly operate and verify switches. This regulation is geared more for the perspective of operational railroad workers who simply need to know that no matter what the signal department calls the switch, FRA requires it to be treated as the equivalent of a hand-operated switch if it is unprotected by any type of indicator or verifier, and has some manual operation aspect to it—regardless of whether that manual operation is by push button or radio control. BRS's concern is a valid one, but is one that is likely to perplex more signalmen than operations employees. Finally, we make the observation that EO 24 was issued without ever defining what FRA meant by a ''hand-operated switch'' in non-signaled territory; this emergency order, which this final rule supercedes, has been in effect since November 22, 2005, without any person requesting interpretive guidance on this term and yet FRA's experience has been that every railroad has applied EO 24 to those types of switches defined by the ''hand-operated switch'' definition FRA has promulgated in this rule.

Finally, BRS requested that FRA use this rulemaking to regulate the design, inspection, and maintenance of the signals that are protected by distant switch indicators, switch point indicators, or other visual or audio verification, i.e., all those non-hand-operated switches. FRA agrees that use of substandard technology can lead to inappropriate reliance on audible or visual indications that a switch is in the desired position and locked when it is not properly aligned and secured. FRA further notes that failure to provide fouling circuits in cases where employees cannot visually confirm that no equipment is out to foul the intended route could substantially undercut the redundant safety protections intended by this rule. Finally, we acknowledge that this rule fails to adequately address the ability of employees to confirm that conflicting movements are not approaching a switch location when radio controlled switches are employed and approach circuits are not in place. FRA also agrees with BRS that there is a safety concern if any railroad is failing to regularly inspect or maintain these ''other signal arrangements.'' However, FRA believes any such regulation of these other signal arrangements should be part of a separate rulemaking, not one intended to solely focus on railroad operating rules and practices. FRA has not yet initiated a rulemaking in this area, but held a technical conference on April 19, 2007, in Washington, DC to address the technical aspects of this issue (72 FR 14641; March 28, 2007). Interested parties may wish to file

comments to Docket No. FRA–2007–27623. Until FRA is able to provide suitable regulations to address technology being employed to perform functions described in this final rule, and similar functions, railroads should exercise caution and prudence in implementing that technology. FRA was encouraged to note that many participants in the Special Safety Inquiry appeared sensitive to this need.

FRA defined *highway-rail grade crossing* in the NPRM, but has refined the definition for purposes of this final rule. The definition in the NPRM mirrored the definition in § 234.5 of this chapter. FRA originally intended to try and keep the definition simple by carrying the same definition for this term used in the Grade Crossing Signal System Safety rule found at 49 CFR part 234; however, upon further reflection, FRA realized that the proposed definition would include many ad hoc crossings on private property that are often created and removed in short order. Some of these temporary crossings may also be illegal or built without consent of the railroad that owns the track. As the term ''highway-rail grade crossing'' is used in this rule in the context of protecting shoving or pushing movements, the proposed definition would have required that a railroad and its employees be responsible for determining that such ad hoc crossings are protected during shoving or pushing movements. It is conceivable that the proposed requirement could have created enforcement dilemmas, especially when a crossing is created without any notification to the railroad or train crew, or the operation occurs at night, on a curve, or there is some other reason that the ad hoc crossing would be difficult to spot without prior knowledge of its existence.

Consequently, to avoid setting this trap, FRA has changed the definition to exclude the type of ad hoc crossings that are not part of the DOT National Highway-Rail Grade Crossing inventory or are unmarked by signage indicating the presence of an at-grade crossing. If a crossing has a DOT inventory number but is not an ''at-grade crossing,'' the crossing does not fall within this definition. In contrast, if a crossing does not have a DOT inventory number, but has signage (e.g., crossbuck or stop sign) indicating the presence of an at-grade crossing, the crossing would fall within the definition. Although it is possible that a private property owner might quickly construct a crossing that included appropriate signs of the newly established at-grade crossing without the track owner's permission, it would seem ill-advised to absorb such expenses without proper permission; thus, we would expect that at nearly every crossing with crossbucks, stop signs, or other appropriate signage indicating the presence of an at-grade crossing, the railroad will be able to identify these crossings and alert its employees of the need to protect such crossings during shoving or pushing movements pursuant to § 218.99.

FRA did not propose, but has added, a definition of *industry track* in order to refine the requirements in § 218.101 ''Leaving Rolling and On-Track Maintenance-of-Way Equipment in the Clear.'' Industry track is defined as a switching track, or series of tracks, serving the needs of a commercial industry other than a railroad. Thus, it should be absolutely clear that a railroad yard does not contain industry track, even though, admittedly, there might be industry track connected to the yard. The RSAC recommended this definition as it distinguishes industry track from other types of tracks used for similar purposes (e.g., yard tracks, team tracks, sidings, etc.). The definition RSAC recommended, and which is the definition FRA is promulgating, is the same definition FRA uses in its Guide for Preparing Accident/Incident Reports.

FRA has maintained from the NPRM a definition of *locomotive* that is consistent with the definition contained in 49 CFR 240.7. FRA has promulgated this definition because the shoving and pushing requirements of this subpart apply to certified locomotive engineers who may be operating vehicles that meet this definition, but do not fall within the more mechanically-minded definition used elsewhere in this chapter and part. FRA is aware that this part already contains a more mechanically-minded definition, *see* § 218.5, and intends that the definition used in this subpart supercede that other definition. To clarify that there are two definitions of this term with different applicability, FRA has added language to the definitions to clarify which definition is applicable to subpart F and which is applicable to the part ''except for purposes of subpart F.''

FRA has added a definition of *qualified* which is identical to the definition added for 49 CFR 217.4 in this rule. A person cannot be qualified unless he or she has successfully completed all ''instruction, training, and examination'' programs required by both the railroad and this subpart. Where FRA specifies that a qualified employee is to do the work, it is because we want some assurance that the person either has actual knowledge, or may reasonably be expected to have knowledge, such that there is no question the person should be able to do the work in accordance with the railroad's operating rules. It is imperative that only employees who have been qualified should do such work that the rule restricts to qualified employees because a railroad that allows unqualified employees to do such work is increasing the likelihood of an accident/incident.

FRA defines *remote control operator* merely to aid in the clarification of shoving or pushing movement requirements involving remote control operations versus the requirements for conventional operations. Remote control operators are ''locomotive engineers'' per FRA's regulations found at 49 CFR part 240. Traditional engineers, i.e., those persons qualified to operate locomotives in a conventional manner, may be trained on remote control equipment—and are thus also certified for remote control operations; in that situation, the term remote control operator applies to the conventional engineer. Hence, the term ''remote control operator'' is not limited to those persons who only are certified to operate remote control locomotives, but to anyone certified to operate such locomotives. The industry uses the shorthanded term ''remote control operator'' to refer to ''remote control locomotive operators'' and, because FRA solicited but did not receive any comments to the contrary, we trust that no one is confused by the dropping of the reference to ''locomotives'' in the terminology. FRA received one comment from AAR raising two concerns with regard to this definition. First, AAR correctly noted that the proposed definition mistakenly cited § 240.5 when § 240.7 is the accurate cite; FRA has corrected this mistake. Second, AAR suggested an alternative definition of remote control operator because it stated that the industry does not normally describe such operators as locomotive engineers. AAR's suggestion for an alternative definition eliminates the term locomotive engineer from the definition, and refers to the operator as ''an employee certified by a railroad to operate remote control locomotives pursuant to part 240 of this chapter.'' FRA rejects AAR's second suggestion because we do not agree with the distinction AAR is trying to make. Functionally, a locomotive engineer operating from a control stand in a cab and a remote control locomotive operator play the same role in switching operations, and, in some cases, they play the same role in train movements.

Thus, we consider it fundamental to both part 240 of this chapter and this final rule that a remote control operator be considered a locomotive engineer.

FRA defines *remote control zone* in order to permit a shoving or pushing operation that is safe and yet protected differently from conventional shoving or pushing operations. This zone is a term adopted by railroads that designate one or more segments of track, typically in a yard, where remote control operators can safely switch cars without continually determining that the track is clear for the movement, as long as a prior determination has been made. Although the location of a remote control zone may be permanent, the regulation requires certain conditions to be met each time a zone is used for its intended purpose of allowing an operation without an employee assigned to protect the leading end in the direction of movement, i.e., the pull-out end, of the remote control movement. *See* § 218.99(d).

FRA has noticed some confusion between the terms ''remote control zone'' and ''remote control area.'' A ''zone'' is an integral part of remote control operations, whereas an ''area'' describes for informational purposes only a location within which remote control operations occur and does not directly affect such operations. The ''area'' is usually created by putting up signs to warn employees working in the vicinity that moving locomotives may be unmanned. The ''area'' is typically larger than the ''zone'' as it covers anywhere the remote control operation could take place. It is important to create these areas so that employees are warned to use care in moving around the yard with the knowledge that using hand signals to convey a message to a moving locomotive may be in vain as there may not be an engineer in the cab to see them. Thus, these terms do not mean the same thing and should not be used interchangeably.

FRA defines *roadway maintenance activity* to distinguish between those duties prescribed for roadway workers, including movement of on-track maintenance-of-way equipment other than locomotives, and other types of duties that a roadway worker may perform which are not so limited. In other words, a person designated a ''roadway worker'' may engage in an activity that is not a ''roadway maintenance activity.'' This term is used to describe an exception to the general shoving and pushing requirements found in § 218.99(e)(3).

FRA defines *roadway worker in charge* in order to provide a generic title to the roadway worker who is in charge of a roadway work group. The designation of such a worker enables FRA to require leaving main track switches in such a person's charge as well as being the conduit for switch alignment information when other workers in the group have operated switches. The communication among group members is similar in importance to the communication that is required between train crewmembers. FRA intends this term to have the same general usage as in subpart C of 49 CFR part 214.

FRA has added a definition of the term *siding* to describe an auxiliary track, adjacent and connected to a main track, used for meeting or passing trains. In § 218.101, the term ''siding'' is used in connection with an exception to leaving equipment in the clear. FRA understands that, in conversational or common usage, the term ''siding'' can also be taken to mean a customer's siding or an industry's siding. Meanwhile, the regulation exempts operations from abiding by the requirements for leaving equipment in the clear on industry tracks beyond the clearance point of the switch leading to the industry. By adding the definition of the term ''siding,'' FRA intends to clarify the narrow meaning of the term in this subpart from its broader, conversational usage.

FRA has added a definition of *signaled siding* to this rule to describe a siding within a traffic control system (TCS) territory or within interlocking limits where a signal indication authorizes the siding's use. In the NPRM, this definition was used to define a *controlled siding,* but, upon further reflection, FRA realizes that this definition actually defines a ''signaled siding.'' The NPRM used the term ''controlled siding'' in its exceptions to making a shoving or pushing movement on main tracks and controlled sidings, without requiring point protection, if certain conditions or prerequisites were met. The reason for the change to signaled siding is because the term controlled siding is not consistently applied to mean the same thing on all railroads. The term signaled siding, however, more accurately captures FRA's meaning and intent, which is a siding that is circuited (bonded) throughout its length. FRA also changed the term ''centralized traffic control (CTC)'' to ''traffic control system (TCS)'' to use the generic term rather than one specific brand of TCS.

FRA defines *switchtender* because a few railroads still utilize a worker with responsibilities for lining specific switches for trains and a person with this position is not a crewmember. FRA defines this term because we want to acknowledge that this type of worker may be qualified to operate switches, so switches can be safely left in a switchtender's charge. FRA has not defined ''switchtender'' in order to suggest that railroads create such positions or that there is any sort of requirement to employ switchtenders.

FRA defines the term *track is clear* to describe the required condition of the track prior to initiating or continuing a shoving or pushing movement under § 218.99. If the four conditions for determining that the track is clear are met, then if an accident occurs, it is unlikely to be the fault of the person making the determination. That is, when the portion of the track to be used is clear there should not be any rolling equipment, on-track maintenance-of-way equipment or conflicting on-track movements that could collide with the shoving or pushing movement; there should be no intervening motor-vehicles or pedestrians to strike as all intervening public highway-rail grade crossings, private highway-rail grade crossings outside the physical confines of a railroad yard, pedestrian crossings outside of the physical confines of a railroad yard, and yard access crossings are to be protected; there should be no intervening switches or fixed derails to run through or over as these devices should all be properly lined for the intended movement; and, the shoving or pushing movement should not accidentally collide with cars on a connecting track if the portion of the track to be used has sufficient room to contain the equipment being shoved or pushed.

Within the definition of track is clear are the conditions for determining that intervening public highway-rail grade crossings, private highway-rail grade crossings outside the physical confines of a railroad yard, pedestrian crossings outside of the physical confines of a railroad yard, and yard access crossings are protected. As shoving or pushing movements typically occur without a locomotive engineer in a locomotive leading the movement, it is vital to protect crossings to prevent easily avoidable accidents. The definition for track is clear considers the crossing protected if the gates are in the fully lowered position, and have not been observed or known to be malfunctioning. Whether or not there are working gates, a crossing may be protected by stationing a designated and qualified employee at the crossing who has the ability to communicate with trains. A third option for protecting a crossing would be available when crossings are equipped only with

flashing lights or passive warning devices; in that situation, the crossing would be considered protected when it is clearly seen that no traffic is approaching or stopped at the crossing and the leading end of the movement over the crossing does not exceed 15 miles per hour.

In response to AAR's comment and input during the RSAC process, FRA has modified the definition of ''track is clear'' from the NPRM in several places. FRA has removed the requirement that a crewmember or other qualified employee make a visual determination because that requirement is already found in redesignated § 218.99(b)(3), formerly paragraph (b)(2). FRA has changed the term ''conflicting movements'' in the proposed first numbered condition to ''conflicting on-track movements'' in the final rule. The purpose for this change is to reflect that the track can be considered clear even if maintenance-of-way equipment is in the vicinity of the track to be shoved or pushed onto; instead, if the equipment is not on a track at the time the move is commencing or continuing, it is not considered a conflicting movement that would prevent the movement from being initiated. As discussed previously, a definition of ''yard access crossing'' has been added to ensure that railroads protect the crossings in railroad yards that someone other than an employee is likely to use. FRA has amended paragraph (2)(i) to reflect the proposed section analysis that crossings are protected when the crossing gates are in the fully lowered position but only when the gates have not been observed or known to be malfunctioning; FRA notes that the employees involved in the shoving or pushing move in which a determination that the track is clear is required need to share any information regarding malfunctioning grade crossings and may collectively be responsible for improperly protecting an observed or known to be malfunctioning crossing. Finally, FRA has added the qualifier in the third condition that any intervening ''fixed'' derails, as well as intervening switches, shall be lined for the intended movement when determining that track is clear; although FRA would also expect employees to be on the lookout for portable derails before determining that the track is clear, there certainly is no excuse for operating over an intervening fixed derail.

FRA is defining, for purposes of this subpart, the term *yard access crossing* in order to further define what grade crossings must be protected to ensure that the ''track is clear'' (another term defined in this section) during shoving and pushing movements under § 218.99. A yard access crossing is a highway-rail grade crossing that is located within a yard and is either (1) open to unrestricted public access, or (2) open to persons other than railroad employees going about their normal duties, e.g., business guests or family members. A yard access crossing is one of the types of crossings that must be protected. The name is intended to describe a crossing in a railroad yard, that is regularly used by people who are not railroad employees (although railroad employees will, of course, also use these crossings). For example, one or more crossings in a yard may be open to anyone needing to get to a yard office or building. Family members and others may need to come drop off or pick up railroad employees, or make other pick-ups and deliveries; if that activity is permitted by the railroad and a crossing in the yard must be traversed, then the crossing shall be considered a yard access crossing for purposes of this rule. If the crossing is located away from yard buildings such that they would not need to be traversed by non-employees, then the crossing should not be considered a yard access crossing. FRA does not intend for every crossing in a yard to be considered a yard access crossing just because a non-employee might be foolish enough to take an unmarked or circuitous, unconventional route to the yard office. Of course, FRA advises each railroad to provide adequate signs for visitors to its yards so that there is no confusion about where to go—and thus no confusion for employees regarding which crossings are required to be protected. Generally speaking, we would expect that a crossing that consists of ballast thrown down to allow maintenance-of-way vehicles and employees to cross a track within a yard would not be the type of crossing a railroad would expect the members of the general public to cross; thus, those ad hoc crossings would nearly always not be considered a yard access crossing and would not need to be protected in accordance with the shoving and pushing requirements in this rule.

Section 218.95 Instruction, Training, and Examination

In paragraph (a), FRA requires that each railroad maintain a written program that will qualify its employees for compliance with operating rules implementing the requirements of this subpart to the extent these requirements are pertinent to the employee's duties. Thus, the pool of employees that would need to be covered by the program are those employees involved in shoving or pushing operations, remote control operations, and any operation where equipment might be left fouling a connecting track—as well as any employee that may be required to operate hand-operated switches and fixed derails. The written program may be a stand-alone program or consolidated with the program of instruction required under § 217.11 of this chapter. FRA anticipates that most railroads would choose to consolidate this program with the part 217 requirement. Although FRA encourages the efficiencies consolidation is sure to bring, FRA's expectation is that the consolidated written program will sufficiently emphasize the requirements of this subpart. Each railroad is required to establish the program no later than July 1, 2008, and continue to maintain it thereafter.

Paragraphs (a)(1) and (a)(2) provide more details regarding what should be included in the written program. Paragraph (a)(1) requires that the program include instruction on consequences of noncompliance, i.e., that FRA can take enforcement action through civil penalties or disqualification from safety sensitive service. *See* 49 CFR part 209, subpart D-Disqualification Procedures. Paragraph (a)(2) requires that the written program address the need to qualify employees on all aspects of the technology the employees will be utilizing when complying with the operating rules required by this subpart. For example, employees may be expected to operate a variety of hand-operated switches and must be taught how to properly operate them as well as what to do if a malfunction or deviation is detected. This final rule differs slightly from the proposal. In the NPRM, FRA requested comments regarding whether the final rule should include any specific reference to qualification of employees on the territory where they will be working. FRA explained in the proposal that it was not immediately obvious how this concept should be applied in the subpart F context. During the RSAC discussions and in comments, labor representatives asked for a more explicit recognition of this requirement and suggested revising paragraph (a)(2) to require that each worker be ''qualified,'' rather than just ''trained,'' on the items listed in that paragraph. FRA agrees and has changed the relevant proposed phrasing from ''shall include training'' to ''shall include qualifying the employee.'' Although this change does not amount to a specific requirement that every employee shall be territorially qualified, it is implicit that this type of qualification is required when necessary

to provide the knowledge required to comply with the subject rules. Locomotive engineers, including those that are remote control operators, are already required to be territorially qualified pursuant to part 240 of this chapter. Furthermore, FRA hopes to allay labor's fears by reminding interested parties that if territorial qualification is a necessary component for complying with one of the subpart F operating rule requirements and that qualification was not provided to an employee, FRA is unlikely to bring an enforcement action against the employee because FRA would likely have difficulty proving that the violation was ''willful.'' *See* 49 CFR part 209, app. A. Finally, FRA has revised paragraph (a)(2) by changing the word ''employed'' to ''necessary'' because, in context, the word ''employed'' implied ''used;'' the change clarifies that an employee cannot be deemed qualified to accomplish the work without satisfying the qualifications requirements in the program that specify any instruction, training and examination needed to operate the technology and understand any related procedures.

Paragraphs (a)(3) and (a)(4) address the implementation schedule for this subpart. Paragraph (a)(3) requires that prior to January 1, 2009, employees performing duties subject to these requirements shall be qualified per the minimum requirements in this subpart. It is further required under paragraph (a)(3) that employees who are hired during the period following April 14, 2008 through January 1, 2009, would not be provided such a grace period; instead, is required that new hires receive the proper qualification training before being allowed to perform duties subject to the requirements of this subpart. Furthermore, under paragraph (a)(4), after January 1, 2009, no further grace period is provided and employees shall receive recurrence training at least every three years. FRA is requiring this three year window because it is becoming a standard industry practice to re-qualify employees on operating rules at least every three years and that is a reasonable time period in which to conduct continuing education. The dates in paragraphs (a)(3) and (a)(4) were extended so that they would coincide with the calendar year, rather than the effective date of the final rule. Finally, pursuant to paragraph (a)(5), the record for each employee shall document qualification of employees under this subpart by including any records of required instruction, examination and training.

Both AAR and APTA requested that FRA change the training schedule through a longer grandfather provision than the one year proposed and extend all the schedules for implementation so that the required training could be accomplished during the normal three year cycle. The latter concern is that a large railroad with many employees to qualify will only need to train about a third of its employees each year, while FRA proposed requiring all current employees to be trained within one year from the date of the rule's publication. FRA is not adopting the suggestions because one full year should be sufficient time for a railroad to modify its operating rules according to this subpart and qualify its employees on the small number of operating rules covered by this subpart. Many railroads may find little difference, if any, between the subpart F requirements and their existing operating rules. Experienced employees should have little difficulty understanding the nuances of any of the new rules, so FRA does not envision qualifying existing employees to be greater than a refresher course with limited subjects to be covered. FRA perceives that the commenters may be expressing a frustration that the railroads will need to schedule this qualification class and not be able to logistically combine it with a regularly scheduled operating rules training class under § 217.11 for every one of its employees; i.e., employees scheduled to receive operating rules training this year would be covered, but not those previously scheduled for the following two years. FRA permits railroads to combine the training under this subpart with the § 217.11 training, but not to extend the deadlines for the subpart F training. Again, AAR and APTA's requests are denied mainly because the qualifications requirements under this subpart cover a limited number of operating rules and subject areas that experienced employees should readily comprehend without many questions or concerns.

Paragraph (b) requires that qualification records required by this subpart be retained at a railroad's system headquarters and at the division headquarters, if any, where the employee is assigned. This will enable FRA to quickly obtain such qualification records upon request. FRA has not required a retention schedule for these records as we believe the section mandates that at a minimum: (1) Records must be kept for each employee qualified and (2) when an employee is requalified, there is no longer a need for a railroad to retain the old record as it has been superceded by the new one. Paragraph (b) also includes the option to allow a railroad to retain these records electronically in accordance with §§ 217.9(g) and 217.11(c) of this chapter; this option was added to address a comment from APTA for FRA to specify that electronic recordkeeping would be acceptable.

Paragraph (c) provides a mechanism for FRA to review and disapprove of a railroad's written program required under paragraph (a). It also requires minimum procedures and structure to the review process. The paragraph provides that the Associate Administrator for Safety will only disapprove programs of instruction, training, and examination required by this section for cause stated. As the disapproval decision is made for cause, it is significant for the railroad to understand exactly why FRA is disapproving the program; thus, notification of such disapproval will be made in writing and specify the basis for the disapproval decision. If the Associate Administrator for Safety disapproves the program, the railroad has 35 days from the date of the written notification of such disapproval to either (1) amend its program and submit it to the Associate Administrator for Safety for approval, or (2) provide a written response in support of the program to the Associate Administrator for Safety. If the railroad chooses the second option to defend the allegedly defective program, the Associate Administrator for Safety will inform the railroad of FRA's final decision in writing. Although the rule is silent regarding whether a railroad may request an extension, FRA intends for the Associate Administrator for Safety, as the agency's decision-maker, to have the flexibility to decide procedural issues, such as having the ability to grant or deny requests for extensions of time, as the issues arise. The Associate Administrator for Safety renders a final decision in writing which will specify the terms and conditions under which the program will be considered approved or disapproved. If the decision denies the railroad's request in whole or in part, FRA intends for the railroad to amend its program and submit it to the Associate Administrator for Safety for approval within 35 days of the final decision as that is the period of time accorded for amending programs when a railroad chooses not to appeal the disapproval. Again, a railroad may request an extension of time to amend its program and submit it to the Associate Administrator for Safety for approval, and FRA intends for the Associate Administrator for Safety to have the flexibility to decide whether to

grant or deny such procedural requests. Although enforcement action is always discretionary, FRA believes that enforcement action is warranted when a railroad fails to appropriately and timely amend its program; for this reason, FRA is requiring in paragraph (c)(2) that a failure to submit the program with the necessary revisions to the Associate Administrator for Safety will be considered a failure to implement a program under this part.

The approach in paragraph (c) recognizes that FRA will typically want to review such written programs during audits or investigations and that FRA should have the authority to request changes to the program if it does not meet the minimum requirements of this rule. The oversight authority vests with the Associate Administrator for Safety. Although FRA would have authority to review in detail each railroad's program, FRA is not requiring each railroad to submit its program for review and explicit approval. Rather, FRA will review the qualification programs of the railroads over a multi-year cycle, in connection with review of the overall program of operating rules, to determine if they are effective. Among the factors that would be considered would be the extent to which the program is founded on appropriate task analysis, the completeness of the curriculum, the types of instructional methods, appropriateness of written and other tests, criteria for successful completion, and—most importantly—the ability of employees said to be qualified to apply the rules in practical situations. The final rule contains more details than in the NPRM but the overall approach is not significantly different.

Section 218.97 Good Faith Challenge Procedures

FRA received a wide-variety of comments pertaining to the proposed good faith challenge procedures section. In short, the labor organizations generally supported the procedures and offered small suggestions for improvement, while the associations representing railroad management generally requested more significant changes based on legal and policy concerns. The legal concerns raised by the comments are addressed earlier in this rule in the preamble. *See* IV. General Comments/Major Issues, Good Faith Challenge—Legal Issues. While most of the procedures in this paragraph are maintained from the proposed rule, FRA has amended this section to allay valid concerns raised by the comments and to correct deficiencies in enforcing the challenge.

The main purpose of requiring that each railroad establish operating rules containing certain minimum requirements under this subpart is to ensure safe handling requirements of certain operations by employees where human factor caused accidents have historically occurred. Codifying these requirements will enable FRA to take enforcement action when necessary, and will therefore discourage noncompliance with these important safety rules. FRA is convinced that human factor caused accident rates and incidents of noncompliance would be significantly lower if each railroad were properly qualifying employees and consistently enforcing its own operating rules. FRA's perception is that on occasion some railroad officers are permissive in allowing occasional violations of operating rules in order to achieve short-term perceived efficiencies. For example, a railroad officer may order an employee to shove blind, i.e., without ensuring that the track is clear for the movement, in an effort to finish a job quickly and get a train out of the yard. If the move originated from a direct order by a railroad official, the employee might fear challenging the railroad official on the order or might have complied with so many similar orders in the past as to not perceive the danger in occasionally violating an operating rule. Another example could occur when an employee is told he or she may leave work early as soon as a particular assignment is complete. Rather than taking the longer but safer route to determine that a switch was left properly lined, the employee assumes the switch was left properly lined, even though some time has passed since the employee last observed it. This rule is intended to check emergence of the culture that occasionally accepts some degree of noncompliance with a railroad's operating rules.

One essential aspect of changing this undesirable culture of complacency with some noncompliance is to establish better lines of communication between employees and railroad officers. Section 218.95 requires that railroads have a written program that will ensure that employees are well trained and qualified to do the work. A qualified employee should readily recognize when a railroad officer has given the employee an order that does not comply with the railroad's own operating rules. In order to address this issue further, FRA is requiring good faith challenge procedures.

The good faith challenge procedures are about establishing dialogues between employees and railroad officials. A good faith challenge is initiated by an employee who believes that if he or she obeys a particular order issued by a railroad official, the employee would violate one or more of the operating rules required by this subpart. At its core, the good faith challenge and its attendant procedures should force a railroad official to listen to an employee's concern regarding such an order and to reconsider the validity of the order. FRA has created a mechanism for appealing the first official's order to a second official in the situation where dialogue and compromise do not resolve the discrepancy.

FRA has added paragraph (a) so that the regulation sets forth the responsibility of employees to provide consistence with other good faith challenge regulations promulgated by FRA. *See* 49 CFR 214.503(a) and 214.313. This paragraph clarifies that whenever an employee makes a good faith determination that the employee has been directed to violate either FRA regulations or a railroad's operating rules regarding the handling of equipment, switches, and fixed derails, the employee shall inform the railroad or employer (as not all rail employees work directly for a railroad) of the belief that the order may be in violation. Thus, in the interest of safety, an employee has a duty to raise challenges to perceived non-complying orders. With the addition of paragraph (a), all of the proposed paragraphs required renumbering.

As explained in the proposed rule, FRA refers to the challenge as the ''good faith'' challenge because we do not intend for employees to abuse it. We expect bad faith challenges to never or rarely occur and for the challenge to provide, in part, for a dialogue between employee and supervisor that railroads should be permitting and encouraging without being prompted by regulation. That said, it is possible for bad faith challenges to occur. For example, if several experienced employees in a particular yard were all to initiate separate challenges where no real dispute could be articulated, this concerted effort to create a work stoppage or slowdown would be in bad faith. It might also be considered bad faith, or at least cause for concern, if an employee repeatedly made similar challenges that were without merit; in such an instance, the facts and circumstances of each incident would need evaluation as the problem could be inadequate qualifications or experience—not necessarily a challenge made in bad faith. It is certainly not an act of bad faith for an employee who

makes a challenge to have simply misinterpreted the operating rule or practice, and we would have serious concerns with a railroad that sought to punish an employee merely for asserting the challenge and being wrong. Again, we emphasize that we do not anticipate abuse of the challenge as FRA has not heard any anecdotal discussions of abuse with the already existing good faith challenges. Furthermore, if the good faith challenge is found to be regularly abused, FRA would consider amending the challenge to reduce the likelihood of abuse or abolishing the challenge during a future rulemaking.

FRA is promulgating good faith challenge procedures that are more detailed than those established for roadway workers because the officer/employee relationship dynamic is different for roadway work versus operations work. That is, the strict chain of command is more prevalent in operations than roadway work. Thus, a supervisor of roadway work may be more accepting of a challenge than an operations supervisor, e.g., a yardmaster.

The concept of a good faith challenge applied to operations is not wholly unknown in the railroad industry. For example, we applaud the efforts of Metro-North Railroad, which has instituted a good faith challenge that is much broader than what FRA is requiring through this rule. Metro-North allows good faith challenges to any directive that would violate an operating rule or instruction in the following areas: operating rules, timetable, equipment operating instructions, electrical instructions, hazardous material instructions, safety instructions, and bulletin orders and general notices. Metro-North provides its employees the right to have a second supervisor review the challenge and lists the titles of the supervisors who are able to perform a second review: Operations Managers, District Superintendents, Line Superintendents, General and System Road Foremen, Chief Rail Traffic Controllers, and Operating Rules Department Supervisors. Metro-North also pledges that it will not subject an employee to discipline for a violation of a rule or instruction when being ordered to comply by a second supervisor, provides for the right to document the challenge prior to the completion of the tour of duty, and the right to a written decision if requested promptly. Metro-North has also instituted its own form for tracking each challenge. Of course, FRA is prescribing minimum good faith challenge requirements only and each railroad may prescribe additional or more stringent requirements. *See* 49 CFR 218.1.

Proposed paragraph (a) is redesignated as paragraph (b). Paragraph (b) provides the general procedures for implementing a good faith challenge specific to the requirements of this subpart; railroads or employers of railroad employees subject to this subpart, of course, are free to implement a good faith challenge in areas not subject to this subpart as Metro-North has done. Paragraph (b) requires that each employer be responsible for the training and compliance by its employees with the requirements of this subpart. Obviously, railroads will have to instruct employees on all aspects of the good faith challenge or it will have no effect. The good faith challenge procedures must be made available to roadway workers as the definition of ''employee'' includes ''an individual who is engaged or compensated by a railroad or by a contractor to a railroad to perform any of the duties defined in this subpart. Although FRA does not anticipate that roadway workers would be involved in many, if any, shoving or pushing movements, the regulations pertaining to switches, fixed derails and leaving equipment in the clear would likely be applicable. FRA intends to take enforcement action where a railroad fails to properly instruct employees or a railroad's officers fail to comply with implementation of the good faith challenge procedures.

Paragraph (b)(1) requires that each employer adopt and implement written procedures which guarantee each employee the right to challenge in good faith whether the procedures that will be used to accomplish a specific task comply with the requirements of this subpart or any operating rule relied upon to fulfill the requirements of this subpart. Therefore, it is not enough for an employer to maintain such a guarantee in its written procedures as the employer has a duty to implement this guarantee. If an employee is denied the right to make a challenge, or is denied any aspect of the required procedures, FRA may seek enforcement action against the employer or individual responsible for denying the employee's right. Of course, the requirement's applicability would only be for a challenge to any order that violates a requirement in subpart F.

Paragraph (b)(1) of the rule also requires a railroad to adopt and implement written procedures as the mechanism for instituting the good faith challenge. Such written procedures should not lead to protracted arguments that are unusually disruptive to operations as FRA is requiring that each railroad's procedures provide for ''prompt'' challenges. FRA's expectations are that such challenges should be resolved in a matter of minutes, certainly not an hour or more. It is within this context that FRA also specified the concept that a railroad's written procedures provide for ''equitable resolution of challenges;'' by this requirement, FRA meant for a railroad officer to give deference to an employee's challenge if the employee has suggested a safe way to do the work that is in compliance with the relevant operating rules. Follow-up to clarify the correct application of the rule leading to the challenge can be done at a later time or date so that a definitive answer may be provided by the railroad to the railroad officer and employee involved; e.g., a railroad's manager of operating rules may want to issue a bulletin generically outlining the challenge and the proper application of the rule. As a good practice, a railroad should take this extra step to clarify a definitive answer even if the employee does not request such a review, as provided for in paragraph (d)(4), as it may be used as a learning experience for other employees and supervisors.

FRA is revising proposed paragraph (a)(2), which has been redesignated as paragraph (b)(2). The proposed paragraph would have required that a railroad's good faith procedures indicate that the challenge is not intended to supplant any rights or remedies available to the employee under a collective bargaining agreement or under the statute providing for employee protections found at 49 U.S.C. 20109. As discussed earlier, the employee protections of this statute have been expanded and the authority to investigate whistleblower complaints has been transferred to DOL. The paragraph's revisions require that the written procedures required by this section shall indicate that the good faith challenge described in paragraph (b)(1) is not intended to abridge any rights or remedies available to the employee under a collective bargaining agreement, or any Federal law including, but not limited to, 29 U.S.C. 651 *et seq.*, 6 U.S.C. 1142, or 49 U.S.C. 20109. The citation to 29 U.S.C. 651 *et seq.* is a reference to the Occupational Safety and Health Act of 1970 (OSH Act of 1970) that is implemented by DOL's Occupational Safety and Health Administration (OSHA) and is designed to regulate employment conditions relating to occupational safety and health and to achieve safer and more healthful workplaces. Section 11(c) of the OSH Act of 1970, found at 29 U.S.C.

660(c), generally protects employees from retaliation for raising concerns or filing complaints alleging workplace safety or health violations under the Act. The citations to 6 U.S.C. 1142 and 49 U.S.C. 20109 are references to protections afforded to public transportation employees and employees of a railroad carrier engaged in interstate or foreign commerce respectively, including employees of contractors and subcontractors. Both of these provisions are implemented by DOL. Although FRA views these statutory provisions as wholly separate from the regulation we are promulgating and FRA's enforcement authority, the statutory provisions provide employees with rights and remedies in cases of retaliation for refusing to violate or assist in the violation of any Federal law, rule, or regulation related to railroad safety as well as taking other enumerated actions. The citation to these laws in the written procedures is a reminder to employees of their rights and remedies which provide an opportunity to pursue an assortment of relief, including punitive damages, against an employer for an improper action.

FRA's decision to expand paragraph (b)(2) is being made in conjunction with the deletion of proposed (b)(2). Proposed paragraph (b)(2) would have required that each railroad's good faith written procedures contain a requirement that would provide that an employee making a good faith challenge shall not be discharged or in any way discriminated against for making the challenge. FRA viewed the proposal as an essential aspect of the good faith challenge procedures as employees would certainly be discouraged from raising a challenge if the employer is not prohibited from retaliating against an employee for making a challenge. However, as explained in the preamble, the recently amended statutory employee protection provisions changed the landscape of whistleblower protection for railroad employees such that FRA no longer perceives a need for a separate regulatory requirement against retaliatory conduct. *See* B. Good Faith Challenge—Legal Issues, 4. Anti-Retaliation Provision.

Proposed paragraph (a)(3) is redesignated as paragraph (b)(3). This paragraph requires that a railroad instruct affected employees on the good faith challenge procedures contemporaneously with the training railroads are required to provide under 49 CFR 217.11. The idea is that an employee's chance of understanding the proper application of the good faith challenge should be greatest at the time the employee is receiving instruction on the relevant operating rules. Of course, FRA does not expect a railroad to instruct an employee whose duties do not involve handling equipment, switches and derails. If an employee's duties change to include these activities, the railroad will have to provide the instruction prior to assigning the new duties.

The good faith challenge procedures are a critical component of this final rule, which is narrowly tailored with the intention to drive down the number of accidents caused by human factors. Employees learn in the classroom but there are often so many topics covered in an operating rules class that it could be difficult for an employee to retain everything taught. To compensate, railroads traditionally provide operating rule books not only to put employees on notice that compliance with these rules is expected, but also, as a reference so that each employee can check the rules and be reminded of their requirements. In similar fashion, FRA is requiring in paragraph (b)(4), previously proposed paragraph (a)(4), that each railroad provide a current copy of its written good faith procedures to each affected employee. By requiring a current copy, FRA has incorporated the idea in the proposed rule that each railroad provide each affected employee with any amendments to its written procedures prior to the effective date of the amendments. Also, like any other record FRA requires, a railroad would need to make the written procedures available for inspection by FRA during normal business hours.

Proposed paragraph (b) has been redesignated as paragraph (c). Paragraph (c) requires additional procedures for each railroad to include in its written good faith procedures. Each of these more specific requirements lays the framework for what FRA envisions as a respectful dialogue between two individuals with differences of opinion on an operations issue with a safety component; the two individuals are, of course, an employee and an officer of the railroad or employer.

Paragraph (c)(1) requires written procedures granting each employee the right to challenge any directive which, based on the employee's good faith determination, would cause the employee to violate any requirement of this subpart or any operating rule relied upon to fulfill the requirements of this subpart. The good faith challenge procedures should eliminate any stigma employees have regarding challenging railroad officers on safety issues pertaining to handling equipment, switches and derails. Likewise, standardization of the challenge should cause railroad officers to truly reflect on the orders issued and whether any aspect of an order would result in noncompliance with the relevant railroad operating rules.

Proposed paragraph (b)(3) contained two components, one of which has been redesignated as paragraph (c)(2). Paragraph (c)(2) contains a similar requirement to the first component of proposed (b)(2), but with some important differences. Several railroads, and the associations that represent them, objected to the proposed paragraph in that it stated that the good faith written procedures include a provision ''that no work is to be performed with respect to the challenged task until the challenge is resolved.'' The proposal was intended to duplicate a similar provision found in the roadway worker rule that required allowing the challenging employee ''to remain clear of the track until the challenge is resolved.'' 49 CFR 214.311(b). And while this requirement has not posed any problems for employers of roadway workers, many railroads expressed dismay at this provision and sought additional amendment or deletion of this paragraph.

The amendments to paragraph (c)(2) are intended to protect the employee who made the challenge from being required to comply with the challenged directive while the challenge is unresolved. The first part of the paragraph requires that the written program ''provide that the railroad or employer shall not require the challenging employee to comply with the directive until the challenge resulting from the good faith determination is resolved.'' This language more closely conforms to FRA's other good faith challenge regulations than the NPRM.

In RSAC Working Group meetings, FRA heard two related complaints from railroads regarding proposed paragraph (b)(3). One, several railroads commented that the proposed regulatory text did not address whether the challenging employee could be ordered to do other work while the challenge is unresolved. As it was FRA's intent to allow for this type of work, we have added paragraph (c)(3) to address this issue. Paragraph (c)(3) requires that the written procedures shall provide that the railroad or employer may require the challenging employee to perform tasks unrelated to the challenge until the challenge is resolved. Of course, whether or not a railroad or employer chooses to exercise the option of switching an employee's duties while

the challenge is being resolved is a decision for the railroad or employer.

The second of the two complaints from railroads regarding proposed paragraph (b)(3) involved a concern that the NPRM indicated that nobody could do the work with respect to the challenged task until the challenge was resolved. FRA did not agree that the NPRM prohibited another employee from doing the challenged task prior to resolving the challenge. Meanwhile, we had, and still have, reservations about providing a railroad or employer with a clear path to order some other employee to do work that another employee is challenging as non-complying—and thus unsafe. In response to the requests for clarification, paragraph (c)(4) has been added. This paragraph requires the written procedures to provide that the employer may direct an employee, other than the challenging employee, to perform the challenged task prior to the challenge being resolved as long as this other employee is informed of the challenge and does not also make a good faith determination that the challenged task would violate FRA regulations regarding the handling of equipment, switches, and fixed derails as required in this subpart, or a railroad's operating rules implementing the requirements of this subpart. Thus, paragraph (c)(4) prohibits an employer from ordering a second employee to do the work without verbally notifying this second employee that another employee has asserted a good faith challenge. At a minimum, for purposes of this paragraph being ''informed of the challenge'' means that the person giving the directive shall explain that another employee has made a good faith determination that the task does not comply with an operating rule or FRA regulation, as well as provide a synopsis of the specifics of the challenge. This option permits an employer, who is certain that the challenging employee is wrong, an opportunity to get the work done by another qualified person. Of course, any employee asked to perform a task that does not comply with this subpart has the same right to challenge the task, regardless of whether any other employee has also challenged that task. Also, all employees have the same responsibility under paragraph (a) to inform the employer of directives that violate this subpart or any operating rules implementing this subpart.

The second part of proposed paragraph (b)(3), which has been redesignated as (c)(5), identifies the ways that a challenge may be ''resolved.'' Each of the ways that a challenge may be resolved has been designated in its own paragraph numbered (i) through (iv). One, we expect that some railroad officers when challenged will realize that the employee's suggested alternative method of operation is an acceptable option that is in compliance with this subpart and the carrier's operating rules implementing this subpart. The officer may or may not agree that the original directive was non-complying but the challenge in this case can be resolved amicably. Two, after making a challenge and receiving an explanation or recitation of the rule from the officer, an employee may likewise realize that the officer's directive was in compliance and decide to comply with the directive. Three, in some situations, the challenge may lead to a discussion of options on how the task can be performed in compliance with the operating rules. That discussion may lead to a realization either that both persons were only partially correct or there is another option not previously asserted. Under those circumstances, an amicable resolution would be the advancement of a third option that was reached through communication and compromise, and is therefore satisfactory to both parties. Four, there may be instances when an officer believes the directive is permitted by the operating rules, and that either the employee's challenge is being made in bad faith or there is no reasonable alternative to the direct order; in those situations, the written procedures will provide for review as further determined under paragraph (d) of this section.

Proposed paragraph (c), which was redesignated as paragraph (d), requires each railroad to provide additional written procedures in the event that a challenge cannot be resolved amicably. Thus, the additional procedures in this paragraph are required to be complied with when the person issuing the directive determines that the employee's challenge has not been made in good faith or there is no reasonable alternative to the direct order. As it is often difficult to determine that a person is acting in bad faith, the person issuing the directive should typically give the challenging employee the benefit of the doubt that the challenge is being made in good faith and attempt to resolve the challenge without the need for further review.

In the event of a stalemate, where the challenging employee and the person issuing the directive cannot agree to resolve the challenge, paragraph (d) requires that the written procedures provide that four additional requirements be met. Paragraph (d)(1) carries over from the NPRM the requirement that an immediate review by another railroad or employer officer be provided. The immediate review must be held by another officer who cannot be unduly influenced by the officer who issued the challenged directive or the review will not have the appearance of fairness. FRA expects that fair review will be accomplished if the reviewing officer is a different officer who is not a subordinate of the officer who issued the challenged directive. FRA envisions this immediate review as a quick check with another officer that should not be unduly burdensome.

In the NPRM, FRA requested comments regarding whether some smaller railroads might have difficulty complying with an immediate review requirement. FRA did receive comments, mostly oral during the RSAC Railroad Operating Rules Working Group meetings, explaining that the smallest railroads would likely encounter problems providing an immediate review when so few officers would be available to conduct them. Consequently, FRA has decided to revise the requirement in paragraph (d)(1) so that the immediate review will not be mandatory for each railroad with less than 400,000 total employee work hours annually.

In paragraph (d)(1)(i), FRA retains from the NPRM the requirement that the immediate review not be conducted by the person issuing the challenged directive, or that person's subordinate. APTA commented that it is not always clear what other officers are in another's chain of command, and whether one officer is subordinate to another. Although not directly addressed in the rule, the rule's silence on this issue is intended to provide each railroad with the flexibility to describe its approach in its procedures and how the intent of the rule will be followed. Similarly, during the RSAC Railroad Operating Rules Working Group meetings, AAR and APTA voiced opposition to the idea of the promulgation of a good faith challenge. Both associations were concerned that implementation of such a challenge would pose numerous logistical difficulties as well as a perceived high potential for abuse by employees. One concern raised was that on-time performance could easily be compromised if an employee raised a challenge and a quick compromise solution could not be reached. The rule does not need to address this issue as each railroad or employer needs to address it by setting up effective protocols for supervisors to follow when issuing direct orders to proceed; i.e., each yardmaster or other supervisor should know who to contact in the event that an immediate review is

needed. A railroad may wish to provide contact lists to each supervisor of other supervisors so that each supervisor has multiple people to contact in the event a challenge needs immediate review. Again, the intent of the rule is to provide for an immediate review by a railroad officer who cannot be unduly influenced by the officer who issued the initial order so that a fair review may be perceived. As explained previously in this analysis, Metro-North has addressed this issue in its good faith challenge program and has thus provided an example of how to address this issue.

The requirement in paragraph (d)(1)(ii) is based on a requirement in proposed paragraph (c)(1). During an immediate review, the reviewing officer has the same options to resolve the challenge as the person who issued the challenged directive, however, the officer making the immediate review shall also have the option described in paragraph (d)(2). FRA believes that there has to be some finality to the immediate review process and that one review is enough. Of course, paragraph (d)(1) provides the minimum immediate review requirements and a railroad is not prohibited from providing a second immediate review or other additional requirements.

Paragraph (d)(2) provides that if the officer making the railroad's or employer's final decision concludes that the challenged directive would not cause the employee to violate any requirement of this subpart or the railroad's or employer's operating rule relied upon to fulfill the requirements of this subpart and directs the employee to perform the challenged directive, the officer shall further explain to the employee that Federal law may protect the employee from retaliation if the employee refuses to do the work and if the employee's refusal is a lawful, good faith act. This paragraph is based on the option in proposed paragraph (b)(3) that suggested permitting an officer to resolve a challenge by issuing a direct order to proceed with the work as initially ordered. There may be situations where the officer making the final decision concludes that the direct order would not violate this subpart, or any operating rule relied upon to fulfill the requirements of this subpart; in that situation, the officer may direct the employee to perform the challenged directive after explaining to the employee that Federal law may protect the employee from retaliation if the employee refuses to do the work and if the employee's refusal is a lawful, good faith act. This notification requirement serves several purposes. One, it reminds the employee of the statutory anti-retaliation protection prior to the employee choosing between doing or refusing to do the work. Two, it reminds the employee that if he or she refuses to do the work, the statutory protections will not protect him or her from retaliation if the employee is acting unlawfully or in bad faith. Three, the officer's act of providing this notification to the employee also provides a reminder to the officer that the employee is likely protected from retaliation for refusing to do the work except where there is evidence proving that the employee's refusal is unlawful or made in bad faith. An officer ordering an employee to do such work would be expected to have a high degree of confidence in issuing such an order, and we would expect railroads and employers to carefully instruct officers on these procedures, as a challenging employee might file a complaint or lawsuit based on the failure to follow proper good faith challenge procedures or for later retaliation based on a refusal to do the work.

Paragraph (d)(3) maintains a similar requirement from proposed paragraph (c)(2) that the written procedures provide the employee with an opportunity to document electronically or in writing any protest to the railroad or employer's final decision before the tour of duty is complete. The employee shall also be afforded the opportunity to retain a copy of the protest. Examples of electronic records may include, but are not limited to, recorded radio communications, electronic mail (i.e., e-mail), or filling out a computer form or database. If electronic recording is permitted by the railroad's program, railroads will need to maintain methods for providing the employee with a copy of that record. Maintaining such a record facilitates the employee's ability to follow-up on any further review requested under paragraph (d)(3). FRA considered whether to require that the employee be provided with the opportunity to create this record immediately following the direct order to proceed with the task, however, FRA has accepted several railroads' arguments that this could prove too disruptive to operations, especially passenger and commuter operations where on-time performance is critical. Additional time delays would result if an employee had the right to immediately document the challenge before returning to work. FRA has addressed this issue by requiring in paragraph (d)(3) that the employee be afforded an opportunity to document the protest electronically (e.g., by radio transmission to be recorded) or in writing any time ''before the tour of duty is complete.'' This additional requirement also reflects an existing statutory requirement that entitles an individual to document a protest of a direct order of a railroad carrier official or supervisor under protest communicated to the official or supervisor. 49 U.S.C. 21304. Of course, ''the absence of such a protest will not be viewed as warranting a presumption of willfulness on the part of the employee who might have communicated it.'' 49 CFR part 209, app. A, ''Civil Penalties Against Individuals.'' Paragraph (d)(3) does not supercede the statutory requirement nor does it exceed it. Given the existing statutory requirement, the time needed to document a protest should not pose a new burden on railroads.

FRA has deleted proposed paragraph (c)(3) which stated that the written program ''provide that the employee be orally advised that completing the work as ordered will not subject the employee to penalties or consequences for noncompliance with this subpart.'' When FRA published the NPRM, this paragraph was intended to further clarify existing statutory rights under 49 U.S.C. 21304. Upon further reflection, FRA found the proposed paragraph could be confusing in that it might suggest that a railroad officer or supervisor could bind the FRA in the use of the agency's enforcement discretion. This might be true even where the railroad official misapplied the law, or the individual was not entitled to the right. APTA also raised a valid concern that the proposed paragraph could easily be misinterpreted in another way; e.g., an employee who invokes a good faith challenge on a shoving move may believe that he can't be disciplined, or have certification revoked if the employee is a locomotive engineer, for passing a stop signal related to that same movement even though the officer did not give the crew authority or permission to pass the signal. Despite the fact that this paragraph was deleted and that employees are not required to be orally advised that completing the work as ordered will be a defense to penalties or consequences of noncompliance under this subpart, section 21304 is still applicable. Thus, ''[a]n individual is deemed not to have committed a willful violation if the individual was following the direct order of a railroad carrier official or supervisor under protest communicated to the official or supervisor.'' 49 U.S.C. 21304.

Proposed paragraph (c)(4), redesignated as paragraph (d)(4), requires that the direct order procedures shall also provide the employee with the right to one more review by a railroad officer designated by name or title in the written procedures who will make the final interpretation of the applicable operating rule. The railroad is not prohibited from designating more than one individual by name or title, although it would likely be useful to have one person or office overseeing these interpretations. In the proposed rule, FRA did not specify a deadline for issuing the verification decision; after further consideration, FRA has decided that some reasonable time limit should be imposed to prevent a railroad from taking an inordinate amount of time to respond to an employee's request. FRA has decided to require that a railroad issuing a verification decision must do so within 30 days after the expiration of the month during which the challenge occurred. Thus, regardless of whether the challenge occurred on November 1st or 30th, the verification decision must be provided to the employee no later than December 30. FRA considered imposing a strict 30-day deadline, but decided that this type of deadline, patterned after the one found in 49 CFR 225.11, for reporting of accidents/incidents, provides greater flexibility without unduly delaying the verification decision. This paragraph was also changed to require that the employee make the request for further review in writing; the proposed paragraph left open the possibility of a verbal request which, if left unanswered, could potentially lead to arguments over whether the request was actually made. FRA is not requiring that the written request be on a form, but a railroad may choose to create one. However, rather than permit the employee to decide whether or not the railroad should provide the employee with a written decision as in the NPRM, the railroad is required to provide the employee with a written decision so that there is no dispute regarding whether the railroad fulfilled this obligation. A final written decision will also permit FRA with the opportunity to more easily investigate claims that the challenge had merit or the railroad is not properly applying the Federal regulations.

FRA did not propose, but has added, paragraph (e) to address recordkeeping and record retention issues pertaining to the good faith challenge procedures. For example, in the NPRM, FRA required each railroad to maintain written procedures, but did not specify where the procedures needed to be kept so FRA could inspect or copy them. Paragraph (e)(1) addresses this issue by requiring a copy of the procedures to be retained at both the railroad's system headquarters and at each division headquarters. This paragraph also explains that the procedures shall be made available to representatives of the FRA for inspection and copying during normal business hours.

In paragraph (e)(2), FRA has added a new record retention requirement for any written good faith challenge verification decision made in accordance with paragraph (d)(4). The good faith challenge procedures are designed so that most challenges will be resolved on the spot through employee/officer discussions that will not produce a written decision. When the conflict between the parties cannot be resolved on the spot, a written decision is required. FRA needs to be able to review those written verification decisions to analyze what types of conflicts did not get resolved amicably. Those types of challenges may have some merit and result in further FRA involvement to resolve underlying safety issues. The written decision should provide enough background to understand the challenge by citing the applicable rules and procedures, and providing an in-depth explanation of any interpretations necessary to analyze the factual circumstance. FRA is also requiring that those decisions be retained for at least one calendar year after expiration of the year during which the decision was issued. The requirement for record retention, while not proposed, follows as a logical requirement from proposed paragraph (c)(4) permitting the employee to request that the railroad provide a written decision. We cannot fathom that a railroad would produce such a written decision and not retain it for some reasonable period thereafter in order to retain an unaltered original and possibly to use as a reference to help address future, similar challenges.

Paragraph (e)(3) was added to clarify that each railroad is authorized to retain any records required by this section in an electronic format so long as the electronic records are kept in accordance with the standards set forth in § 217.9(g)(1) through (5) of this chapter. Of course, any records required by this section may be maintained in either written or electronic form at the option of the railroad.

Section 218.99 Shoving or Pushing Movements

Although the majority of this section remains the same as the proposed rule, a number of changes have been made in consideration of the comments received. Four commenters raised specific issues in written comments: BMWED, AAR, UTU, and BLET. The discussions of these comments are integrated into the paragraphs under which they apply.

Generally, in conventional operations, shoving or pushing movements occur when the controlling locomotive is not leading the movement because the locomotive engineer is not in a position to have an unobstructed view of the track in the direction of the shoving movement. However, in remote control operations, there may be an issue with respect to point protection in either direction of movement. The terms ''shoving'' and ''pushing'' have the same meaning but FRA uses both terms because our nation's railroads have split in the usage of each term.

The requirement proposed in paragraph (a) has been redesignated as paragraph (a)(1) and revised, but the reasons behind the requirement remains the same. The reasons behind this paragraph are to ensure that (1) each railroad adopt and comply with an operating rule which complies with the requirements of this section; and (2) when any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person be considered to have violated the requirements of this section. The NPRM was not intended to mean, but could possibly have read, that each person was only to uphold and comply with the railroad's operating rule and not the regulation itself. The revisions to this paragraph are intended to clarify FRA's intent.

Paragraph (a)(2) adds a new requirement that the shoving or pushing movement requirements of this section do not apply to free rolling equipment—a clarification that was not in the proposed rule. FRA added this clarification regarding free rolling equipment because several participants at the RSAC working group meetings were unclear regarding whether FRA intended the rule to apply to switching activities that result in free rolling equipment, in which a shoving or pushing movement is the initial movement that allows equipment to roll free without power attached. The addition of paragraph (a)(2) is intended to clarify that this section does not apply to the rolling equipment once it is free rolling. It would be impossible to engage in this type of acceptable switching activity if a determination would need to be made that the ''track is clear'' prior to each release of a free

rolling car. Therefore, the rule does not apply to kicking, humping, or dropping cars as FRA does not consider those activities to be controlled shoving or pushing movements. Furthermore, FRA's experience is that each railroad that permits these activities maintains operating rules that require employees to protect free rolling equipment from traveling over highway-rail grade crossings, pedestrian crossings, and yard access crossings. FRA is rejecting the idea of regulating the movement of free rolling equipment initiated by a shoving or pushing movement because we have not seen an increase in the number of accidents/incidents in this area attributed to human factor causes; of course, if we document an increasing trend of such accidents/incidents, FRA will consider whether to initiate a rulemaking.

As specified in paragraphs (b) through (d), shoving or pushing movements can be made safely if precautions are taken. This section states those minimum precautions and requires that each railroad have in effect specific operating rules incorporating the precautions. The precautions take direct aim at those human factor causes that have been identified as causing the increasing trend of noncompliance and accidents. As specified in paragraph (e), there are other movements that could be considered shoving or pushing movements but FRA believes these other movements can be treated differently as they are safe if certain operating conditions are met.

Paragraph (b)(1) requires that prior to rolling equipment being shoved or pushed, the locomotive engineer and the employee directing the move shall be required to participate in a job briefing which will cover the means of communication to be used and how protection will be provided. The job briefing requirement in this paragraph, which remains the same as the proposed paragraph, requires that the locomotive engineer (conventional or remote control operator) shall have a job briefing detailing the method of communication used to relay information, e.g., radio, hand signals, or pitch and catch. If the employee providing protection is not part of the crew, the job briefing shall include how that qualified employee will provide that protection; for example, if a yardmaster is the qualified employee, the conductor directing the move would explain in the briefing that the yardmaster intends to provide point protection by viewing a monitor that provides a real-time image of the track from a camera set up in the yard. Under this scenario, the yardmaster would be performing covered service under the hours of service laws.

Paragraph (b)(2) of the final rule contains the requirement that during the shoving or pushing movement, the employee controlling the movement shall not engage in any task unrelated to the oversight of the shoving or pushing movement. This requirement, which was not in the proposed rule, was added to address a concern brought to FRA's attention following the fatal accident involving a remotely controlled movement that led to FRA's issuance of Safety Advisory 2007–01. 72 FR 2333. It was also a position raised by BMWED, UTU and BLET in their comments. In both the NPRM and this final rule, the preamble addresses the problem that remote control operators may not always have complete situational awareness of the movement even if the operator is observing the movement. Obviously, if a remote control operator or other employee controlling the shoving or pushing movement is distracted by engaging in an unrelated task, that person's disengagement with the movement, even briefly, may increase the probability or severity of an accident/incident. For example, in the accident in Manlius, New York that was the subject of Safety Advisory 2007–01, FRA raised the issues of ''multi-tasking'' and trying to accomplish other tasks that cause the person to divert attention from providing point protection. These are two separate issues. The issue of ''multi-tasking'' as raised in the notice involved a remote control operator who allegedly operated from the passenger seat of a moving motor vehicle; such moves are inherently fraught with hazards, although this was not the cause of this accident/incident. The issue of diverted attention occurred after the operator determined that the track was clear for the entire length of the movement; instead of looking down the track waiting for his train to come into view, FRA's investigation suggested that the remote control operator (RCO) may have been attending to duties unrelated to the movement as the RCO did not observe the collision and initiated a brake application only after hearing a radio transmission from the yardmaster.

By requiring that the employee directing the movement not engage in any task unrelated to the oversight of the movement, the regulation increases the probability that the controlling employee will be in a position to reduce the severity of any accident that might occur. FRA considers a ''task unrelated to the oversight of the movement'' to be any activity that carries significant potential to distract the person directing the movement from adequately overseeing the movement. The unrelated task would most likely be a work related activity, but certainly tasks of a personal nature could be considered significantly distracting. Any unrelated task that would remove the person from a location where oversight could be effectively performed is strictly prohibited. The following are not significantly distracting activities and are arguably not even ''tasks:'' momentary glances away from the direction of movement; acknowledging another person's presence; and sneezing. In contrast, the filling out of any form, e.g., a switch list, would be a distracting, unrelated task that can not be safely accomplished while the movement is occurring.

FRA acknowledges that its adoption of the requirement in paragraph (b)(2) will not prevent all accidents. A rule that requires a controlling employee to continuously observe the leading end of the movement might be more effective in preventing accidents; however, as FRA stated earlier, a ''continuous observation'' requirement would force more employees to either walk or ride the point—creating an even greater vulnerability that someone could get hurt. An employee walking the point could slip, trip, or fall, and an employee riding the point could be injured or killed in any collision with another piece of rolling equipment. In addition, this final rule's required determination that the track is clear prior to initiating the shoving or pushing movement should substantially reduce the likelihood of any collisions. That is, a determination that the track is clear includes the determination that ''the portion of the track to be used is unoccupied by rolling equipment, on-track maintenance-of-way equipment, and conflicting on-track movements.'' The application of FRA's final rule reduces the likelihood of an accident between a carman operating a pickup truck across a yard crossing if the pickup truck is crossing the track at a type of yard crossing to be protected (i.e., a 'highway-rail grade crossing' or ''yard access crossing'' as those terms are defined under § 218.93). In addition, the severity of a collision between a shoving or pushing movement and off-track maintenance-of-way equipment may be reduced by an alert employee protecting the point who responds quickly to stop the movement. Meanwhile, railroad employees operating off-track machinery will need to continue to be careful to follow railroad operating rules that require them to protect themselves when

crossing tracks at unprotected yard crossings.

Former paragraph (b)(2), which has been redesignated as paragraph (b)(3) states the requirements for establishing point protection during shoving or pushing movements. The rule requires that only a crewmember or other qualified employee shall provide point protection. In this context, crewmembers or qualified employees include remote control operators working together, members of other train crews, and other employees, regardless of job title, who are qualified to perform the job (see definitions of ''employee'' and ''qualified'' in this subpart). The requirements of this section address work that is ''covered service'' under the hours of service laws. 49 U.S.C. 21101, et seq. Thus, to be a qualified employee, the employee will need to receive instruction and testing, be subject to Federal regulations controlling alcohol and drug use and hours of service recordkeeping provided for, respectively, in parts 217, 219 and 228 of this chapter. The purpose of requiring a qualified employee, as opposed to any employee, is to prevent persons that may not be qualified (e.g., taxi drivers, crane operators, or clerks) from making safety sensitive operating decisions without the proper instruction and safeguards in place. Incidently, if an unqualified person were to perform this work in violation of the rule, the person would still have to be accounted for under the hours of service laws or the railroad would incur additional liability.

FRA has decided that some of the proposed requirements in paragraph (b)(2)(i) needed alteration based on comments received and the consideration of the facts surrounding the accident that led to the issuance of Safety Advisory 2007–01. The purpose of this paragraph remains the same, although the final rule's requirements are altered from that originally proposed. Shoving accidents often occur because a train crew makes a shoving movement without determining that the track is clear in the direction of movement. The proposed rule suggested a requirement that the employee providing point protection visually determine, for the duration of the shoving or pushing movement, that the track is clear within the range of vision or for the complete distance to be shoved or pushed. AAR commented that the phrase ''the duration of the shoving movement'' is problematic as there could be instances where an employee's vision is momentarily obscured and so it would not be possible to always provide a continuous, visual observation for the entire duration of the movement. Further discussions at the RSAC working group meetings raised additional concerns. Both labor and management representatives were concerned that the requirement meant that every shoving or pushing movement would require an employee to be in position to watch the leading end of the movement even when doing so would place the employee in danger. The proposed rule would have required employees watching shoving and pushing movements to walk greater distances than most current operating rules and practices require, the result being a greater likelihood of experiencing slip, trip or fall injuries. FRA agrees with these comments. We certainly did not intend to reduce one kind of accident only to increase another type.

AAR suggested an alternative to ''the duration of the shoving movement'' proposed requirement. AAR's suggestion was to change the first sentence in paragraph (b)(2)(i) to read as follows: ''[v]isually determining that the track is clear and will remain clear either within the range of vision or for the complete distance the equipment is to be shoved or pushed.'' This alternative is similar to FRA's proposal and many current railroad operating rules, however, the plain meaning of the alternative does not reflect how it is typically interpreted. The plain meaning of this alternative appears to also contain the expectation that a continuous, visual observation for the entire duration of the movement is required even if the ''the duration of the shoving movement'' language has been removed. Meanwhile, a near universal position was that employees can safely make shoving or pushing movements without continuously observing the leading car for the entire distance of the movement. The key to a safe move is the determination that the portion of the track to be used for the intended move is clear. The determination that the track is clear will be made prior to initiating a shoving or pushing movement, but additional portions of track may be determined to be clear during the duration of one continuous shoving or pushing movement. Furthermore, FRA did not agree with AAR's suggestion to include the phrase ''and will remain clear'' as this phrase adds a condition that is outside of the control of the employee providing the point protection.

After considering the comments, FRA realized that its proposed rule was also flawed in that it was repetitive. The definition of ''track is clear'' and the proposed point protection paragraph both required that a crewmember or qualified employee make a visual determination. This repetitive issue has been resolved by removing the visual determination requirement from the ''track is clear'' definition.

The final rule differs from the proposed rule in that the determination that the track is clear no longer explicitly requires that the determination can be made ''either within the range of vision or for the complete distance the equipment is to be shoved or pushed.'' FRA believes this proposed phrase merely added extraneous language, and thus it has been deleted from the final rule. As a practical matter, the deletion of this phrase should not have any impact on how an employee provides point protection. If a crewmember or other qualified employee responsible for controlling a shoving or pushing movement can ensure that every requirement specified in the definition of track is clear has been met, the employee may initiate and continue the movement for the full distance of the movement. For example, if a shoving movement of less than 100 car lengths is to be made onto track that is capable of holding 100 cars and a crewmember or other qualified employee observes that the track is clear for the entire length of the track, the employee may initiate movement onto or down the track; as the shoving movement continues, the employee will provide updates to the locomotive engineer, as necessary, until the entire movement is complete. Meanwhile, if the employee providing the visual determination that the track is clear can only see part of the way down the track to be shoved or pushed, and does not have the option to travel ahead of the movement to determine that the track is clear for the entire length of the movement, the employee shall only be permitted to initiate movement for the distance that the employee can visually ensure that the track is clear. In this second example, the facts are the same except that there is curvature in the track that does not allow the observing employee to see more than 20 car lengths at a time; in this situation, the employee may initiate movement onto or down the track but must have either continuous visual contact with the locomotive engineer or be in radio communication with the locomotive engineer, so as to provide distance instruction on how far the locomotive engineer may safely shove, until the shoving or pushing movement is complete. In other words, there is nothing in this rule that prohibits

incremental or multiple determinations that the track is clear until the complete distance to be shoved or pushed is traversed.

In paragraph (b)(3), the term ''rolling equipment,'' which is defined in § 218.5, is used. The definition of ''rolling equipment'' states that the term ''includes locomotives, railroad cars, and one or more locomotives coupled to one or more cars.'' Thus, the definition of ''rolling equipment'' explicitly includes locomotives. Meanwhile, FRA is aware that some railroads may incorrectly consider any movements involving consists made of locomotives alone not to be shoving or pushing movements. By adding that lite locomotives are also covered in paragraph (b)(3) and defining ''lite locomotive consist'' in this subpart, FRA is ensuring that lite locomotive consists are covered by the shoving or pushing movement requirements. To do otherwise would permit lite locomotive consists to shove blind without adequate point protection.

FRA has expressed the intention to provide railroads and qualified employees with the option of making the visual determination required in paragraph (b)(3)(i) with the aid of monitored cameras or other technological means, provided that the technological means and attendant procedures provide an equivalent level of protection to that of a direct visual determination. Railroads shall ensure that any monitored camera have sufficient resolution and real time coverage to provide protection equal to a direct visual determination. Concerning attendant procedures, one such procedure may be for an employee viewing a monitor to communicate updates to the locomotive engineer or controlling crewmember at appropriate intervals. FRA equates the employee monitoring the camera to the employee controlling the movement who must not engage in any task unrelated to the oversight of the movement; thus, each railroad utilizing such cameras shall implement attendant procedures limiting any of the monitoring employee's ancillary duties that might distract from the employee's ability to provide continual visual determinations and communication.

FRA also amended paragraph (b)(3)(i) to add a requirement that if a railroad intends to use monitored cameras or other technology to determine that the track is clear, the railroad is required to abide by the procedures prescribed in this section as well as the additional requirements prescribed in appendix D to this part. As explained in the analysis to appendix D, the addition of this mandatory appendix is to establish safeguards for establishing technology driven point protection. The alternative would continue the haphazard application of such technology, without appropriate assurances of Federal, State, or local governmental input when such technology potentially impacts the general public.

Other technological means may include, but are not limited to, a completely circuited track indicating track occupancy, and electronic switch position indicators. AAR requested that FRA consider shove lights to be an ''equivalent technological means.'' Shove lights are lights that are sequentially circuited on the ends of tracks to indicate a shoving movement's approach to the opposite end of a track. Shove lights are limited, however, as they do not show if the track is occupied between the entrance of the track and the beginning of the track circuit; in other words, shove lights alone cannot provide absolute notification that the track is clear of equipment. Consequently, FRA is willing to consider shove lights as an acceptable technological alternative to visually protecting the point as long as either: (1) The track is completely circuited to indicate occupancy; or, (2) a visual determination is made that the track is clear to the beginning of the circuited section of the track.

The requirements listed in proposed paragraph (b)(2)(ii), redesignated as paragraph (b)(3)(ii), state that a crewmember or other qualified employee give signals or instructions necessary to control the movement. Such signals or instructions may be made verbally, i.e., either via face-to-face or radio communication. However, any effective method of communication is acceptable. For example, some acceptable forms of communication include, but are not limited to, hand signals, whistle signals, and electronic signals utilizing remote control technology.

In paragraph (c), FRA requires that all remote control movements be treated as shoving or pushing movements, except when the remote control operation is being conducted like a conventional pulling operation such that the operator controlling the movement is riding the leading locomotive in a position to observe conditions ahead in the direction of movement. Under this situation, the operator is riding the point in a position to visually determine that the track ahead of the movement is clear, and is certainly in a position to determine the direction the equipment is moving. One particular reason for a remote control operator to ride the point is to be in a position to observe that grade crossings are not obstructed.

Paragraph (c) also states two additional requirements for remote control operations during shoving or pushing movements. The first additional requirement, paragraph (c)(1), is necessary so that the remote control operator, either directly or indirectly, can confirm that the movement is observed moving in the direction intended. If the remote control operator does not confirm or receive confirmation that the equipment is traveling in the intended direction, the operator must immediately stop the movement. Accident reports indicate that remote control operators who have forgotten which way the controlling locomotive is headed may unintentionally make a reverse movement when a forward movement was intended, or vice versa; had these operators been abiding by this rule, at least some of these types of accidents could have been avoided by abiding by this rule. Further discussion on this issue may be found in the **SUPPLEMENTARY INFORMATION** section titled ''Situational Awareness.''

FRA suggests that each railroad instruct its remote control operators that, whenever possible, the operator or crewmember should view the controlling locomotive when determining the direction of movement, as opposed to any other piece of equipment in the movement. It is not always logistically possible or safe for the operator or crewmember to have direct visual contact with the controlling locomotive when initiating movement—which explains why FRA is not requiring it. However, where it is logistically possible and safe to do so, that should be the preferred method. If a person is viewing the direction the controlling locomotive moves, the person would have a greater chance of observing a problem with the locomotive becoming uncoupled from the rest of the movement or a similar problem if a coupler broke between other equipment in the movement. In the alternative, as intended by paragraph (c)(1), an operator or crewmember watching the equipment for the direction of movement will need to be cognizant of time and distance from the controlling locomotive so that immediate action may be taken to stop the movement if the movement is initiated but not observed to be moving within expectations.

The title of paragraph (c) has been changed from ''Remote control movement requirements'' in the NPRM to ''Additional requirements for remote control movements.'' The reason for the

change in title is to emphasize that the requirements in paragraph (c) apply to shoving movements implemented with remote control locomotives and adds additional requirements to those general movement requirements described in paragraph (b). In other words, by changing the title, we are hoping to avoid confusion that some railroads might perceive paragraph (c) as the only requirements for shoving movements implemented with remote control locomotives. Comments were not received regarding paragraph (c).

Paragraph (c)(2) adds another requirement for remote control movements that was suggested in the preamble of the NPRM, but was not part of the proposed regulatory text. At the end of the section-by-section analysis for this section in the NPRM, FRA raised concerns regarding the reliance on technology used to contain remote control operations within zones, where remote control operators cannot directly observe the far end of the pull-out movement. Such technology is used to prevent incursions into other rail operations. The NPRM noted that ''[a]lthough the rule text does not contain language on this point, FRA requests comment on whether such technology should be required to fail safe in design or at least include redundant safeguards.'' FRA did not receive any comments on this issue and has decided to act to address the concern. The safety concern is that without a specific requirement some railroads might try to implement technology that is not demonstrated to be safe and therefore provides a false sense of protection to remote control crews. Without some kind of standard for concluding that the technology has either been demonstrated to be failsafe or demonstrated to provide suitable redundancy to prevent unsafe failure, a remote control crew could unreasonably conclude that the technology is safe enough to stop a movement when such reliance is unfounded. Given this inevitable reliance, failsafe or redundant technology is required to prevent collisions and derailments at the perimeter of these zones. The pull-out protection technology would not likely be relied upon as the typical method of stopping the movement from leaving the zone, but might be used to expedite a movement where the crew would ordinarily be slowed down by having to count cars and estimate the length of the movement in relation to the configuration of the facility. When determining whether the technology, such as transponders backed up by a global positioning system (GPS) with a facility database is acceptable, FRA finds that 49 CFR part 236, subpart H and the corresponding appendix C to part 236 (''Safety Assurance Criteria and Processes'') contains appropriate safety analysis principles.

In paragraph (d), FRA recognizes that many railroads utilizing remote control technology will create a designated area of track, controlled by a remote control operator, that can make a remote control operation more efficient; this area is called a remote control zone and it is defined in this subpart. When a remote control zone is activated, a designated remote control operator has the authority to deny other movements entry into the tracks designated as within the zone. However, it is not until the remote control crewmembers determine that a particular segment meets the definition of ''track is clear'' that the operation may shove, push, or pull cars into the cleared track segment of the zone as required in paragraph (b)(3).

Paragraph (d) permits the point protection required by paragraph (b)(3) to be provided by a prior determination that the track is clear for a remote control operation that is shoving within an activated remote control zone, as long as the movement will take place on the pull-out end, the zone is not jointly occupied, and certain conditions are met for the prior determination that provides a reasonable assurance that the track is clear. If conditions change, such that the track is no longer clear, a new determination that the track is clear must be made. This paragraph has undergone substantial revision from the NPRM, although the underlying concept has remained unchanged. In the NPRM, the proposed rule mis-characterized this requirement as an exception to the point protection requirement, when we intended and described a point protection requirement. The final rule clarifies FRA's intent that point protection, and all the general movement requirements under paragraph (b), are applicable to remote control movements in the zone when the remote control movement is to take advantage of the zone setup. Thus, when the movement occurs in an activated zone, on the pull-out end, and is not jointly occupied, it is possible for the remote control operator to rely on a prior determination that the track is clear rather than making a separate determination for each shoving or pushing movement.

Paragraph (d) states the obvious that, at some point in time, after the zone is activated, an initial determination must be made that the track is clear. If there is no initial determination, then the crew certainly does not have any prior determination to fall back on. Paragraph (d)(3) provides the requirements for determining that a prior determination that the track is clear may be relied on. These changes, which are further described below, should better reflect, in hopefully what will be considered plain language, what a remote control crew needs to do to determine that the track is clear so that railroads may take advantage of shoving or pushing within a remote control zone.

Paragraph (d)(1) specifies that the remote control zone exception to a separate track is clear determination for each shoving or pushing movement applies only when the controlling locomotive of the remote control movement is on the leading end in the direction of movement. This describes a movement that is typically referred to as a remote control movement occurring on the pull-out end, and that reference is made in this paragraph. When the controlling remote control locomotive is not located on the leading end in the direction of movement, the remote control crew cannot rely on a prior determination that the track is clear and shall, instead make a separate track is clear determination for each shoving or pushing movement regardless of whether the operation is to take place within the remote control zone. FRA does not subscribe to the view that an entire yard can be characterized as a remote control zone and, as long as it is not jointly occupied, the remote control crewmembers are free to shove or push anywhere in the zone without determining that the track is clear for each shoving or pushing movement; again, the reason FRA disagrees with this view is that we believe that is an unsafe practice and that is why the rule only permits the zone exception to apply to remote control movements when the controlling locomotive of the remote control movement is on the leading end in the direction of movement.

Paragraph (d)(1) is changed from the NPRM to reflect that the remote control movement does not need to be ''operated from a controlling locomotive'' to fit the exception, but instead ''the controlling locomotive'' of the movement shall be on the leading end in the direction of the movement. This change was made to prevent future confusion that the proposed language might be interpreted to only apply when a remote control operator was actually on the controlling locomotive, when it was intended to allow for the operator to either be on the locomotive or someplace else when the controlling locomotive on the leading end in the

direction of movement is operated. In other words, the amendment is made to specifically include remote control operations no matter where the operator is located.

FRA has switched the numbers of proposed paragraphs (d)(2) and (d)(3) in an effort to lay out the sequence of determinations in a logical order.

Paragraph (d)(2) requires that the zone may not be jointly occupied at the time that a remote control crew exercises the exception permitting the reliance on a prior determination that the track is clear. This condition is directed to prevent collisions between a remote control operation that is controlling the zone, and any equipment or switches controlled or manipulated by a jointly occupying crew. Thus, this condition means that if there is a jointly occupying crew, the remote control crewmembers shall determine that the track is clear for each shoving or pushing movement and shall not rely on a prior determination that the track is clear. FRA has deleted from the proposed requirement the phrase ''and has not been jointly occupied since the last determination that the track is clear.'' This condition has been deleted because an amendment to proposed paragraph (d)(2), redesignated (b)(3)(iii) addresses the issue by diverting from this proposed requirement. That is, paragraph (b)(3)(iii) permits the last jointly occupying crew to make a direct relay of the track is clear determination to the remote control crewmembers. The basis for this latter change is that accidents have generally occurred when jointly occupying crews did not seek permission into the remote control zone, not that the jointly occupying crews failed to provide accurate information regarding whether the track was left clear. This issue is explained in more detail below.

Paragraph (d)(3) describes the three methods for a remote control crew to determine whether a prior determination that the track is clear is acceptable when the controlling locomotive of the remote control movement is on the leading end in the direction of movement and the zone is not jointly occupied. Paragraph (d)(3)(i) describes that, if the remote control crewmembers themselves made the prior determination, it is acceptable and a separate determination is unnecessary for each movement. Paragraph (d)(3)(ii) carries over the option from the proposed rule that one remote control crew may pass onto a relieving remote control crew an activated zone that meets the definition of track is clear. Some railroads currently allow for this transfer for efficiency purposes; otherwise, any relieving crew would need to make an initial determination that the pull-out end of the track is clear.

FRA has added a third option, not proposed, that would permit the crewmembers from a jointly occupying crew to directly communicate to a remote control crewmember that the zone is no longer jointly occupied and meets the requirements for track is clear. This option is based on an RSAC consensus item that recommended allowing the verbal determination that the ''track is clear'' between the crews jointly occupying the remote control zone, provided that it is a direct communication between the crews involved, and not through a third party. The RSAC's rationale is that a verbal, direct communication to determine ''track is clear'' between remote control crews is currently permitted at shift changes, so why not after a joint occupancy? After further review of FRA's accident database, we cannot find sufficient justification to disallow this practice. If FRA develops any accident data to suggest that the practices permitted by paragraphs (d)(3)(ii) or (iii) are unsafe, we will consider amending the rule. The addition of this third option is largely based on comments received by the AAR stating that this option is currently implemented safely by its members. We want to emphasize that the ''direct'' communication requirement means that the crew that completed its joint occupation of the zone must speak directly with one of the remote control crewmembers. Thus, it is unacceptable for a yardmaster or other employee to relay the information between the two sets of crewmembers.

There is a greater chance of a communication error if information is allowed to be relayed from someone who does not have firsthand information. Indirect communication reduces the likelihood that a remote control crewmember would have the option to ask the crew that previously jointly occupied the zone a follow up question. ''Directly communicate,'' in this instance, does not mean that crewmembers are prohibited from communicating by radio, or any other communication that is not face-to-face. As further clarification, the rule includes the description that ''directly communicates'' means ''not through a third party.'' To illustrate this point, please consider the situation where two remote control operations are working side-by-side in the same remote control area. The two operations cannot share a pull-out end safely, because that would mean there is joint occupation, and, thus, each operation must be in control of different zones. (For the difference between a remote control area and a remote control zone, please see the section analysis for the definition of ''remote control zone'' under § 218.93). Likewise, if another crew enters and departs the remote control zone, that last jointly occupying crew cannot contact just any remote control crewmember working in the area, but instead is required to directly communicate with a remote control crewmember from the crew of the zone just departed. To allow otherwise would mean that, at best, the last jointly occupying crew would pass on the determination that the track is clear indirectly, and, at worst, not at all.

As specified in paragraph (e), shoving or pushing movements are safe under certain operating conditions and, thus, FRA chooses to exempt these listed operations from the requirements in paragraphs (b) through (d) under the specified conditions. One, paragraph (e)(1) exempts push-pull operations when operated from the leading end in the direction of movement because if a cab control car is on the leading end of a movement and a locomotive engineer is operating the train from the cab control car, the operation is as safe as a conventional locomotive operation that does not involve shoving or pushing. Two, paragraph (e)(2) also describes a situation where a locomotive engineer is operating a train from the leading end in the direction of movement, albeit with assistance from other power. That other power assisting in the movement may be occupied and operated by a locomotive engineer, i.e., a manned helper locomotive, or an unmanned locomotive, i.e., a distributed power locomotive. Because the additional power may be located in the back or the middle of the train, this type of operation could be considered a shoving or pushing movement. The exception clarifies that as long as a manned locomotive is being operated from the leading end of the train in the direction of movement, this type of operation will not be considered a shoving or pushing movement that must comply with paragraphs (b) through (d). FRA has made minor changes to this paragraph from the NPRM in order to clarify that the manned helper locomotives or distributed power shall be ''assisting a train'' when ''the train is being'' operated from the leading end in the direction of movement for the exception to apply.

Pursuant to paragraph (e)(3), the third operational exception to the shoving or pushing minimum requirements set out in paragraphs (b) through (d) of this section is the allowance of the

performance of roadway maintenance activity under the direct control of a roadway worker performing work in accordance with railroad operating rules specific to roadway workers. In other words, a crewmember or qualified employee is not required to provide point protection when a train crew is working under the direct control of a roadway worker and that roadway worker can provide adequate point protection. For example, if a ballast or work train is operated by a train crew, a roadway worker may direct the ballast or work train crew to move the train in order to perform the maintenance activity. This exception would not permit a railroad to have an operating rule allowing a roadway worker to direct a train crew on logistical or revenue moves and such action would violate paragraph (c) of this section.

Paragraph (e)(4) permits an exception from the shoving and pushing rules because few of the shoving or pushing accidents have occurred on a main track or signaled siding. From 2002 through 2005, only about 5 percent of shoving or pushing accidents occurred on main track. However, in order to make this exemption work, a long list of conditions apply that would provide an equivalent level of safety to that of the requirements found in paragraphs (b) through (d) of this section. The requirements should look familiar to the industry as the requirements follow commonly used railroad operating rules. *See* General Code of Operating Rules (GCOR) 5th Edition, (effective Apr. 3, 2005) Rules 6.5, 6.6, and 6.32, and Northeast Operating Rules Advisory Committee (NORAC) Rules 116 and 138e. The following clarification is provided for a few of the requirements that may not be quite as evident as the others. Paragraph (e)(4)(i)(A) requires that if another movement or work authority is in effect within the same or overlapping limits, the shoving or pushing movement shall not be initiated until the leading end of the movement is protected by a qualified employee. Paragraph (e)(4)(ii) requires that movement is limited to the train's authority because the danger of an accident increases substantially when a train shoves beyond the limits of its current authority. The requirement in paragraph (e)(4)(iv) is met by meeting either (A), (B), or (C), as meeting any one of these three requirements should ensure safe movement into and over a highway-rail grade crossing or pedestrian crossing as those terms are defined in the definitions section of this subpart. To meet the requirement of paragraph (e)(4)(iv)(B), a designated and qualified ''employee,'' as defined in this subpart, must be stationed at the crossing and have the capability to communicate with trains in sufficient time to inform the train of the condition of the crossing; the rule does not specify the method of communication as the key issue is that the communication be effective. In paragraph (e)(4)(v), FRA uses the terms ''interlocking limits,'' which is defined in § 218.5 of this part, and ''controlled point limits,'' which is undefined but FRA considers as having the same meaning as ''interlocking limits.'' Interlocking limits means the tracks between the opposing home signals of an interlocking. In paragraph (e)(4)(v)(C), a crewmember is in a position to determine that the train's movement has occupied the circuit controlling a signal such that the crewmember has the ability to determine that it is the leading wheels of his or her own movement that has activated the signal circuit.

Section 218.101 Leaving Rolling and On-Track Maintenance-of-Way Equipment in the Clear

The title of this section has changed from the NPRM, as well as a corresponding change in paragraph (b), to clarify that the section is intended to apply to both rolling and on-track maintenance-of-way equipment. In the NPRM, FRA used the generic term ''equipment'' and assumed that the term would be understood to include both types of equipment. Rather than risk confusion regarding whether the regulation only applies to rolling equipment, the rule now specifies that both rolling equipment and on-track maintenance-of-way equipment are covered by this section.

The requirement proposed in paragraph (a) has been revised, but the reasons behind the requirement remains the same. The reasons behind this paragraph are to ensure that (1) each railroad adopt and comply with an operating rule which complies with the requirements of this section; and (2) when any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section. The NPRM was not intended to mean, but could possibly have read, that each person was only to uphold and comply with the railroad's operating rule and not the regulation itself. The revisions to this paragraph are intended to clarify FRA's intent that each railroad adopt and comply with an operating rule which establishes minimum requirements for preventing equipment from fouling connecting tracks unsafely, and that each railroad implement procedures that will enable employees to identify when the equipment is fouling. The purpose for requiring that each railroad, railroad officer, supervisor, and employee shall be considered in violation of this section when a railroad operating rule that complies with this section is violated is so that FRA has the authority to enforce this regulation as opposed to merely requiring that each railroad maintain and have in effect such a rule. In order to fully understand this section, one must consider FRA's definitions of ''clearance point'' and ''foul or fouling a track'' under § 218.93.

Paragraph (b) sets forth the general rule that rolling and on-track maintenance-of-way equipment not be left where it will foul a connecting track except as permitted in paragraphs (b)(1) through (b)(4) discussed below. This paragraph differs from FRA's proposed rule in that each of the two proposed exceptions were divided into two simpler exceptions. We hope that by breaking out the two proposed exceptions into four exceptions that the section will be easier to understand.

Paragraph (b)(1) permits equipment standing on a main track to foul a siding track switch if the fouling switch is lined for the main track on which the equipment is standing. For example, it is permissible for a train on the main track to be stopped at an absolute signal with the rear of the train fouling a siding switch lined for the main track upon which the train is standing. Additionally, this would prohibit the switch that is being fouled from being thrown underneath the train while it is fouling the switch. *See also* § 218.103(b)(4) and (b)(7). Signal systems and main track authority rules should protect such movements from approaching trains.

Paragraph (b)(2) permits equipment standing on a siding to foul a main track switch if the fouling switch is lined for the siding on which the equipment is standing. While this is permissible, it is obviously not safe to do so unless movements on the main track are required to operate prepared to stop for the switch.

Paragraph (b)(3) permits equipment that is standing on a yard switching lead track (commonly referred to as a lead track, switching lead, or ladder track) to foul a yard track if the switch is lined for the yard switching lead track upon which the equipment is standing. Conversely, it is not permissible for equipment to be standing on a yard track and foul the yard switching lead

track, regardless of the position of the switch on which the equipment is standing (fouling). In simple terms, it is permissible to occupy a yard switching lead track and foul a track connected to it, but it is not permissible to occupy the connecting track in a manner that fouls the yard switching lead track.

Paragraph (b)(4) permits equipment to be left where it will foul a connecting track when the equipment is on an industry track beyond the clearance point of the switch leading to the industry. During the RSAC process, several commenters raised the issue that when picking up or setting off cars at an industry customer, a railroad is often faced with limited industry track on which to set off or pick up cars. The problem of limited track at some industries would make compliance with this rule extremely difficult within those industries and could potentially have a detrimental economic effect on those industry customers, as well as the railroads that service those industry customers. FRA's accident/incident data does not reflect that fouling within an industry has been a problem. FRA accident data indicates that of the 5% total human factor accidents caused by equipment left in the foul during the four-year period 2003 through 2006, only 0.5% (½ of one percent) occurred on industry tracks. Further, industries are constantly moving equipment around within their plants for loading/unloading, or for other purposes, thereby rendering the enforceability of the regulation within industry tracks somewhat dubious at best. Meanwhile, if an industry has limited track, and that track is crowded with rolling equipment, FRA expects railroads servicing those industries to operate at extremely slow speeds and with particularly careful observation to protect all movements from anything that may be potentially fouling the track. This change from the NPRM is based on an RSAC recommendation. FRA will certainly consider initiating a new rulemaking to include industry tracks in this section if accident/incidents increase due to fouling equipment.

Paragraph (c) requires that each railroad, whether at the system, division, or terminal level, shall implement procedures for instructing employees who handle equipment so that the employees can identify clearance points and avoid leaving equipment out to foul. One way to implement such procedures is to show employees that there are readily observable clearance points on or near the track, e.g., marks on the rails or ties indicating a clearance point. When clearance points are not identified on or near the track, railroads must institute procedures for instructing employees on how to calculate clearance points; e.g., a railroad may choose to implement a procedure requiring employees to stand next to the rail and extend an arm to simulate the width of equipment. Great care should be used in instituting procedures for determining clearance points so that the margin of error is appropriate where employees are permitted to ride the side of a car and as the clearance point would be further back on the track for employees with bigger or longer bodies than the average person. This section is not intended to apply to close clearance as it relates to buildings, loading docks, or doorways, although a railroad may choose to provide procedures for implementing safe operations under such circumstances.

FRA received a comment from the AAR to delete this entire section because, in AAR's view, this section duplicates requirements found in other sections of the NPRM. After discussions in the RSAC process, the RSAC achieved consensus that this section is necessary, and recommended that FRA retain it. The requirement that equipment not be left where it will foul other tracks is a long-standing operating rule in the industry which is merely being Federalized to strengthen enforceability. Leaving equipment in the foul accounted for 5% of all human factor accidents during the four-year period 2003 through 2006. The RSAC acknowledged that there are other elements in the NPRM that require the track to be clear prior to a pushing or shoving movement, and for all hand-operated switches to be properly lined before fouling a track, and that these requirements might appear, perfunctorily, to obviate the need for a fouling rule. However, the RSAC also recognized that leaving equipment in the foul sets the stage for a potential accident in the event one or more of the ancillary requirements in the regulation are overlooked. In light of RSAC's consensus recommendation, and FRA's view that a specific rule is useful to reducing the many accidents attributed to failing to leave equipment in the clear, FRA is retaining this section.

FRA received several comments from BLET suggesting operational situations where it may be possible to leave equipment in the clear safely. For example, BLET suggested that FRA prohibit leaving equipment in the foul where the authorized speed is greater than restricted speed. Another BLET suggestion was for FRA to add a requirement that permission must be obtained from the employee controlling the track prior to leaving equipment in the foul. FRA appreciates BLET's suggestions because each suggestion provided the basis for useful RSAC discussions exploring the intricacies of leaving equipment in the clear. In the end, though, FRA did not adopt BLET's suggestions because adding such suggestions would likely complicate what FRA believes is a fairly clear and concise rule.

Finally, FRA acknowledges that some railroads have yard tracks or other types of track arrangements outside of a yard which are not described as exceptions to the general requirement in paragraph (b), and fouling equipment under these particular track arrangements may not pose a real safety concern. Because of the many different types of track arrangements that are atypical, it would be difficult to craft a rule that fully encompasses every such arrangement and excepts those that pose no danger. Where there is truly an atypical arrangement that appears to violate this section but poses no true safety hazard, FRA intends to consider the safety implications when deciding whether to exercise its enforcement authority.

Section 218.103 Hand-Operated Switches, Including Crossover Switches

In the NPRM, this section was titled ''Hand-operated Switches and Derails.'' After the RSAC process had concluded, FRA considered the scope of this section and decided that it covered several interrelated but separate issues. By including so many requirements in one section, the section appeared disjointed. Consequently, this section differs from the proposed section because it contains only a portion of the requirements found in proposed § 218.103. The rest of the proposed requirements have been redesignated within §§ 218.105, 218.107, and 218.109. Although each of these sections contains slight modifications from the proposed requirements, overall, the final rule does not differ greatly in its requirement from what was proposed.

The requirement proposed in paragraph (a) has been revised, but the reasons behind the requirement remains the same. The reasons behind this paragraph are to ensure that (1) each railroad adopt and comply with an operating rule which complies with the requirements of this section; and (2) when any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person

be considered to have violated the requirements of this section. The NPRM was not intended to mean, but could possibly have read, that each person was only to uphold and comply with the railroad's operating rule and not the regulation itself. The purpose for requiring that each railroad, railroad officer, supervisor, and employee shall be considered in violation of this section when a railroad operating rule that complies with this section is violated is so that FRA has the authority to enforce this regulation as opposed to merely requiring that each railroad maintain and have in effect such a rule. This section applies to all hand-operated switches, as that term is defined in § 218.93, including hand-operated crossover switches. This represents a departure from FRA's current enforcement scheme which is limited to hand-operated switches in non-signaled territory as specified in EO 24.

Paragraph (a)(2) has been added to require that each railroad specify minimum requirements for an adequate job briefing concerning hand-operated switches, including crossover switches. This requirement was found in the proposed rule in paragraph (i), but was redesignated in paragraph (a)(1). Because this is such a fundamental requirement, it was redesignated at the beginning of the section. As previously mentioned in the **SUPPLEMENTARY INFORMATION** section titled ''Accident at Graniteville, SC and Safety Advisory 2005–01,'' NTSB found that catastrophic accidents, such as the one at Graniteville, SC, could be prevented by adequate job briefings. The requirement is for each railroad to have its own rules and procedures governing the minimum requirements for a satisfactory job briefing, which to FRA's knowledge, nearly all railroads already do. It is essential that employees working together know exactly what each person's role is in the job, what the methods of operation and protection will be, and the order in which segments of the job are to be accomplished. With such knowledge, one employee could recognize the mistakes of another and correct them before any operating rule violation or serious accident occurred.

Paragraph (b) sets forth certain general rules for employees who operate or verify the position of a hand-operated switch. A reference to § 218.93 has been added so that anyone reading this section will understand that ''hand-operated switch'' has a specific meaning for this section and subpart. Proposed paragraph (i)(2) has been redesignated as paragraph (b)(1). Paragraph (b)(1) requires frequent job briefings at important junctures. It is critical that employees know what is expected of them before they start working, know what is expected to happen if the work plan changes after work is initiated but before the work is completed, and to confirm whether all the work was completed to everyone's satisfaction and according to the operating rules. For experienced employees, each job briefing should not be a particularly long meeting; in fact, FRA expects that some job briefings may last less than one minute, but the length of an adequate briefing will most likely depend on the complexity of the job.

Proposed paragraph (b)(1) has been redesignated as paragraph (b)(2). This paragraph sets forth the fundamental requirement that an employee operating or verifying a hand-operated switch's position shall be ''qualified,'' as that term is defined in this subpart. It would be easy for an unqualified person to make a mistake in switch alignment or fail to recognize a defective switch because, unlike a qualified employee, the unqualified person is not trained on proper switch operation or on how to detect a defective switch. It is exactly these types of defective conditions that cause accidents and may be preventable by promulgation of this rule.

Proposed paragraph (b)(2) has been redesignated as paragraph (b)(3). This paragraph establishes a requirement that each railroad have an operating rule warning employees that each person who operates or verifies the position of a hand-operated switch is individually responsible for the position of the switch in use. The purpose of this paragraph is to remind an employee that FRA may take enforcement action against the employee personally for a willful violation. FRA hopes that the personal liability aspect of this rule will reinforce among employees the critical importance of ensuring that hand-operated switches are left properly lined before leaving the location of the switch.

Proposed paragraphs (b)(3) and (b)(4) have been redesignated as paragraphs (b)(4) and (b)(5) respectively. These paragraphs require employees to make certain observations. A slight modification has been made to each of these paragraphs by changing the phrase ''visually ensure'' to ''visually determine.'' The reason for this change is to maintain consistent terminology throughout this subpart. The requirements listed are to ''visually determine'' that hand-operated switches are properly lined for the intended route, that no equipment is fouling the switches, that the points fit properly, and the target, if so equipped, corresponds with the switch's position. These requirements specify the need for the operating/verifying employee to take a good, hard look at the switch. For example, a proper observation would deduce whether the switch points fit properly against the stock rail, i.e. no gaps. The operating/verifying employee should certainly not be relying on second-hand knowledge of the switch or derail's position in verifying its position.

Paragraph (b)(4) differs from the proposed requirement in that FRA has added that when an employee visually determines that hand-operated switches are properly lined for the intended route that the employee also visually determine that ''no equipment is fouling the switches.'' If there is rolling equipment close by, an employee may have to identify the clearance points to determine whether the equipment is in fact fouling or it is safe to operate over the switch. *See* § 218.101. For example, if an employee can see that the switch is properly lined from the locomotive cab but is not absolutely certain that rolling equipment is in the clear, this rule prohibits movement over the switch until a proper determination can be made; in this example, the situation will likely require that the movement be stopped and a crew member get off the locomotive or train to determine the clearance points. If there is another method to safely determine the clearance points, e.g., if the rail is marked, then the requirement may be satisfied by this alternative method for determining the clearance points. FRA is not requiring that an employee disembark from a movement in all instances to determine clearance points, but is instead requiring that employees act responsibly when making this visual determination.

The issues addressed by proposed paragraphs (b)(5) and (b)(6) have been addressed by redesignated paragraph (b)(6). Paragraph (b)(5) had proposed a requirement that if the switch or derail is equipped with a lock, hook or latch, it must be in the hasp, before making movements in either direction over the switch. Proposed paragraph (b)(6) referred to physically testing a hand-operated switch or derail's lock to ensure it is secured. FRA stated in the proposed section-by-section analysis, and we restate here that this regulation does not require switches to be equipped with locks, hooks or latches. FRA's intention remains that employees must ensure that the switch is secured from unintentional movement of the switch points before making movements in either direction over the switch. Rather than confuse the requirements by

getting into the tedium of explaining how to lock, hook, or latch when FRA does not even require such securement devices, FRA has decided to set forth a rule that distinguishes the securement with a lock, hook, or latch from the securement of the switch from unintentional movement over it. For example, some switches do not have locks, hooks, or latches but are considered secure from unintentional movement when the switch handle is rotated down parallel to the ground. If the requirement in paragraph (b)(6) is followed, it should prevent derailments and accidental misalignments caused by the switch points moving under equipment.

FRA has also added the phrase ''after operating a switch'' to clarify that the requirement in paragraph (b)(6) does not apply to an employee who is merely verifying the position of a hand-operated switch, as opposed to actually operating the position of such a switch. Operations would be significantly delayed if every time a train crew needed to verify the position of a hand-operated switch it would also have to ensure that the switch is secure from unintentional movement of the switch points. Such a requirement would require that the train be stopped prior to movement over the switch, and a crewmember disembark to check the switch. It is reasonable to expect that the last employee who operated the switch ensured that the switch was properly secured. If certain types of switches are found to regularly fail to protect against unintentional movements, FRA will consider whether to initiate a rulemaking then.

A new requirement has been added to paragraph (b)(7). The final rule adds the prohibition of operating the switch while rolling and on-track maintenance-of-way equipment is fouling the switch. FRA overlooked this straightforward prohibition in the NPRM, although the NPRM arguably covered the issue through other proposed requirements. *See* §§ 218.101(c) and 218.103(d). However, following the fatal accident of a remote control operator riding the side of a car on August 30, 2007, in BNSF's Mormon Yard in Stockton, California, FRA realized that, from an enforcement perspective, neither of these other requirements explicitly covered an employee who operated a switch when someone else left equipment fouling the switch. (Although FRA's investigation of the Morman Yard accident is on-going, preliminary information indicates that a crew left some cars fouling a crossover switch, and the crossover switch was later lined for the crossover by one member of a remote control crew without moving the fouling cars. The other remote control crewmember, while riding the side of a car, operated through the crossover and was struck and killed by the static fouling equipment.) By adding this prohibition to the final rule, each railroad employee who operates or verifies the position of hand-operated switches will be required to ensure that before a switch is operated or verified, and a movement over the switch is initiated, the employee is responsible for checking that equipment is not fouling the switch, whether or not the employee had left the equipment fouling.

Paragraph (b)(7) has also been amended for clarification purposes. The proposed requirement stated that an employee shall ''ensure that switches are not operated while the equipment is standing or moving over a switch.'' The final rule requires that an operating/verifying employee shall ensure that a switch is not operated while rolling and on-track maintenance-of-way equipment is fouling the switch, or standing or moving over the switch. Thus, in addition to the added prohibition previously discussed, the final rule clarifies what it meant by ''equipment.'' The reason for this rule is that operating a switch under a moving train or while rolling and on-track maintenance-of-way equipment is standing over it is an obvious recipe for disaster but apparently occurs with enough frequency that a requirement is necessary to discourage taking this risk. The NPRM contained a related proposed requirement that several commenters believed was ambiguous, and BMWED described as unnecessary. Given the retention of the requirement in paragraph (b)(7), we agree with the comments. This related proposed requirement was found in paragraph (f) of the NPRM. Proposed paragraph (f) mirrored an operating rule many railroads have which requires an employee, who has lined a hand-operated switch to let equipment enter or leave the main track, to stand at least 20 feet from that switch until the movement is complete. Upon further reflection, FRA believes the proposed paragraph (f) is not practical to comply with and enforce in all situations due to physical restrictions.

Under paragraph (b)(8), it is required that after operating a switch, an employee ensure that each switch , when not in use, is locked, hooked, or latched, if so equipped. This means that if the switch is equipped with a latch or hook, it must be applied and secured after it is operated. For locks, this means the lock is in the hasp, and the lock is locked. If it is a latch or hook, the latch or hook must be in the hasp. For purposes of this section, ''not in use'' means that there is either no crew or equipment in the vicinity of the switch or there is a crew in the vicinity of the switch but the crew has no intention of using the switch. FRA has also added the phrase ''after operating a switch'' to clarify that the requirement in paragraph (b)(8) does not apply to an employee who is merely verifying the position of a hand-operated switch, as opposed to actually operating the position of such a switch.

Proposed paragraph (d) has been redesignated as paragraph (c). This paragraph requires that when rolling and on-track maintenance-of-way equipment has entered a track, approaching a hand-operated switch not lined for its intended movement, it shall not foul a track (see definition of ''foul or fouling a track'' in this subpart) until the switch is properly lined for the intended movement. If the switch is intended to be trailed through, such as with a spring switch, or a yard type switch commonly referred to as a ''rubber switch,'' a ''run-through switch,'' or a ''variable switch,'' movement shall not trail through the switch until the route is seen to be clear or the equipment has been granted movement authority by the employee in charge of that track segment or switch. Additionally, if a train, rolling equipment or on-track maintenance-of-way equipment is closely approaching a switch and an employee observes a conflicting movement also closely approaching the switch, the track with the approaching conflicting movement shall not be fouled.

Proposed paragraph (e) has been redesignated as paragraph (d). Paragraph (d) specifies that when rolling and on-track maintenance-of-way equipment has entered a track, it is required that the hand-operated switch to that track shall not be lined away from the track until that equipment has passed the ''clearance point'' (as defined in this subpart) of that track. If complied with, this requirement will prevent an employee from operating a switch while equipment is fouling it, directly on it, or in close proximity to it. The purpose of this requirement is to prevent injuries and accidents caused by improper operation of switches. Injuries should be reduced by this requirement because when switches are operated with equipment fouling a switch, or directly on a switch, a switch can be hard to operate or may be put under tension such that when an employee begins to operate the switch handle, it may move unexpectedly; thus, back injuries and other muscle strains may be reduced. In

addition, accidents may be reduced as employees will not be allowed to operate switches under tension, i.e., when cars are on a switch.

Section 218.105 Additional Operational Requirements for Hand-Operated Main Track Switches

As explained in the section-by-section analysis to § 218.103, FRA has divided proposed § 218.103 into several sections so that the requirements will be easier to follow and be in a more logical order. The requirements found in this section were derived from proposed § 218.103.

The requirement proposed in paragraph (a) has been revised, but the reasons behind the requirement remains the same. The reasons behind this paragraph are to ensure that (1) each railroad adopt and comply with an operating rule which complies with the requirements of this section; and (2) when any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person be considered to have violated the requirements of this section. The NPRM was not intended to mean, but could possibly have read, that each person was only to uphold and comply with the railroad's operating rule and not the regulation itself. The purpose for requiring that each railroad, railroad officer, supervisor, and employee shall be considered in violation of this section when a railroad operating rule that complies with this section is violated is so that FRA has the authority to enforce this regulation as opposed to merely requiring that each railroad maintain and have in effect such a rule.

Proposed § 218.103(c)(1) titled ''Hand-operated Main Track Switches'' has been redesignated as § 218.105(b) and retitled ''Designating switch position,'' but has otherwise remained unchanged. This paragraph provides regulatory authority over the hand-operated main track switches so that FRA regulates the positioning of all such switches. In contrast, FRA only prescribes requirements for hand-operated main track switches in non-signaled territory in EO 24.

The rule specifies that each railroad will retain discretion regarding the normal position of a hand-operated main track switch. Generally, railroad operating rules pertaining to the operation of switches provide that the normal position for a main track switch is lined and locked for movement on the main track when not in use. The purpose of this rule is so that trains traveling on main track will not be inadvertently diverted onto another track. (Of course, this can be avoided if all trains were required to approach all main track switches prepared to stop, but that requirement would impose a substantial burden on railroads under most circumstances and would also introduce other safety concerns.) Railroads may designate a different position as normal, as some operations may be more efficient with a hand-operated main track switch's ''normal'' position designated in what would otherwise be referred to as the ''reverse'' position. No matter what position a railroad designates as the normal position of each hand-operated main track switch, the requirement is for such designations to be made in writing. The railroad may designate the normal position of the switch in its operating rules, system special instructions, timetables, general orders, or any other written documentation that will provide adequate notice to employees operating and verifying hand-operated main track switches.

FRA is unaware of any railroads that do not require locking of main track switches as a safeguard against unauthorized use. Paragraph (b) requires that employees operating and verifying hand-operated main track switches should pay careful attention to ensure that these switches, when not in use, are lined and locked in that position except under two circumstances. The first circumstance under which the employee does not need to return the switch to the designated normal position occurs when the train dispatcher directs otherwise; thus, the train dispatcher, with movement control over that main track segment, directs the crew using the switch to leave the switch in other than the normal position. The dispatcher would then be responsible for the switch and must follow railroad operating procedures for the necessary protection of the switch. Such ''necessary protection'' entails that the dispatcher take steps to ensure that the next train crew approaching the switch has a track warrant informing that the switch has been left reversed. In some instances, the dispatcher will need to make a note in a log of train movements, or other similar document, to ensure that subsequent dispatchers have access to the reversed switch information. The second circumstance under which the employee does not need to return the switch to the designated normal position occurs when the switch is left in the charge of a crewmember of another train, a switchtender, or a roadway worker in charge. Paragraph (b)(2) should be an alternative safe procedure because these other employees will likewise be individually responsible for the safe and proper operation of that hand-operated main track switch; the employees performing these jobs shall be qualified on operating switches and verifying switch position according to this subpart, so there should be no inherent problems with the transfer of responsibility for the switch. Regardless of the position of the switch when the train dispatcher directs otherwise or the switch is left in the charge of another qualified employee, it must still be locked, hooked or latched, if so equipped, when not in use, as required by § 218.103(b)(8).

Just in case there is any confusion that the operation of a hand-operated main track switch is a function requiring job briefings, paragraph (c), formerly proposed § 218.103(i)(3), sets forth the requirements for such briefings where employees should be engaging in meaningful communication. Thus, in paragraph (c)(1), FRA specifically requires that before a train leaves the location where any hand-operated main track switch was operated, all crewmembers shall have verbal communication to confirm the position of the switch. Similarly, paragraph (c)(2) addresses that communication amongst employees is vital when roadway workers are working within the same work limits and operate hand-operated main track switches. Thus, when any roadway work group is working under the protections of the specified form of working limits, any employee who operates a hand-operated main track switch within such limits shall do so under the direction of the roadway worker in charge. Further, it is required that the employee operating the hand-operated main track switch shall report to the roadway worker in charge the position of all hand-operated main track switches the employee has operated to the roadway worker in charge prior to the expiration of the authority limits.

In some roadway work group situations, a roadway worker may be instructed during a job briefing to convey switch position information to an employee who is not the roadway worker in charge. In this alternative situation, the contact person is acting as an intermediary between the employee operating the switch and the roadway worker in charge. This intermediary person is commonly referred to as an ''employee in charge.'' The rule permits the employee in charge to pass on the switch position information from the employee operating the switch to the roadway worker in charge without firsthand verification of the switch

position. The important aspect of this requirement is that the work group members are communicating the switch position and not who conveys the information. The allowance of this option reflects the reality of current operations.

A recurring concern raised by the labor organizations was that some railroads permit a maintenance-of-way employee to operate a hand-operated main track switch in non-signaled territory, typically for purposes of servicing the switch, without contacting the dispatcher or the crewmembers of any potentially on-coming trains. The concerns regarding this practice centered on whether appropriate protection was being afforded to on-coming trains that potentially could be diverted from the main track if the employee servicing the switch was unable to restore the switch to the normal position prior to the train's arrival. BMWED questioned whether it made sense to require strict communication requirements to verify the position of switches prior to the expiration of exclusive track occupancy authority but not require any communication under this other circumstance. FRA views these situations as completely different as the former applies to job briefings among a roadway worker group, not a communication with a dispatcher or control operator as BMWED is arguing for in the latter. BMWED was also concerned with the liability the rule would have for the employee who failed to restore a switch being serviced if a train came along. With regard to the liability issue, FRA has not added any regulatory requirement for such an employee servicing a switch and thus the employee's liability is unaffected by this rule.

FRA's decision not to require an employee servicing a switch to communicate with the dispatcher or control operator is based on several factors. One of the biggest factors is that FRA learned of this practice through discussions with the RSAC working group but could not find any data to support that this practice has been a problem or cause of accidents/incidents. It is FRA's understanding that this is a practice mainly on the western railroads where employees can often see on-coming trains great distances away. In the situations where employees may not be able to easily view an on-coming train, it is a common practice for a maintenance-of-way employee to contact a dispatcher or control operator in order to obtain a sense of when the next train is likely to come along. An employee working under such conditions would likely maintain a high level of situational awareness to on-coming trains as the employee understands that he or she is providing his or her own protection, and the information obtained is not always accurate. FRA is concerned with promulgating a requirement that the employee contact the dispatcher or control operator in every instance as the formality of making that communication mandatory could lead maintenance-of-way employees to develop a false sense of safety when true block protection is not being provided.

Unless a switch is broken, it should take seconds, not minutes, to operate a switch back to normal if a train is known to be approaching. FRA assumes that a maintenance-of-way employee who realizes that a switch is broken, as opposed to needing some oil or routine maintenance, would immediately contact a dispatcher or control operator in order to obtain the authority to set up working limits or other adequate protection that would allow the employee the time to repair the switch. Certainly, FRA would not expect railroads to permit the servicing of a switch when heavy train traffic is expected. FRA would also expect railroads to coordinate such work when train schedules are available and adequate time for such service can be planned. Although FRA is not implementing any regulations on this issue, we recommend that railroads implement procedures to safeguard employees and trains when a switch requires servicing.

Proposed § 218.103(c)(2) has been redesignated as § 218.105(d). This paragraph requires that in non-signaled territory, before an employee releases the limits of a main track authority and a hand-operated switch is used to clear the main track, and, prior to departing the switch's location, certain conditions be met. An employee is prohibited from releasing the limits after departing the switch's location so that the employee who has any question about the condition of the switch has access to verifying its condition. This requirement is intended to prevent an employee from releasing the limits while located in the yard office or while traveling away from the switch's location in a taxi.

In paragraph (d)(1), the first proposed condition that must be met is that the employee releasing the limits, after conducting a job briefing in accordance with this subpart, must report to the train dispatcher that the hand-operated main track switch has been restored to its normal position and locked, unless the train dispatcher directs that the hand-operated main track switch be left lined and locked in the reverse position. The reference to another paragraph in this section is intended to remind the employee releasing the limits that before a train, train crew, or maintenance-of-way employee leaves the location where any hand-operated main track switch was operated, all crewmembers and maintenance-of-way employees shall have a verbal communication to confirm the position of the switch. Soon after this job briefing, it is time to call the dispatcher and confirm the same information that should have been included in the train crew or maintenance-of-way employees' job briefing. If the train dispatcher wants the employee to leave the switch in the reverse position, this communication is the train dispatcher's opportunity to inform the employee of such a request. It is required that the employee and dispatcher confirm with each other the switch position and that the switch is locked so that there is little chance that any trespasser with a key or bolt cutters could tamper with the switch. As in paragraph (b)(1), a train dispatcher who directs that the switch be left in the reverse position must provide the protection necessary to ensure that the subsequent train crew or operator of on-track equipment that will approach the switch has a track warrant informing them of the switch's reverse position. Again, such ''necessary protection'' entails that the dispatcher take steps to ensure that the next train crew or operator of on-track equipment approaching the switch has a track warrant informing that the switch has been left reversed. In some instances, the dispatcher will need to make a note in a log of train movements or other similar document to ensure that subsequent dispatchers have access to the reversed switch information.

Paragraphs (d)(2) and (3) detail two more conditions that must be met when main track authority limits are being prepared for release. The second condition is that if the employee's report of the switch position is correct, i.e., matches the operating rule or dispatcher's direction, the train dispatcher shall repeat the reported switch position information to the employee releasing the limits and ask whether the repeated information is correct. Typically, railroad procedures require the train dispatcher to ask whether ''that is correct'' with regard to confirming this type of information, so the regulation is intended to reflect those commonly used procedures. The third condition is that the employee releasing the limits then confirm that

this information is correct with the train dispatcher. Railroads and employees who currently release such limits should recognize that these requirements follow the traditional rules of such release. The purpose of the dispatcher and employee repeating the switch's condition is so that both employees can confirm that the other is repeating the correct information regarding the position of the switch and that it is locked.

The rule retains the requirement in EO 24 that an employee releasing the limits of a main track authority in non-signaled territory communicate with the train dispatcher that all hand-operated main track switches operated have been restored to their normal position, unless the train dispatcher directs otherwise, but only to the extent that the switches are at the location where the limits are being released. With the elimination of a SPAF, it would be difficult for an employee to recall the condition of any particular hand-operated main track switch operated and there would likely be a reaction for an employee to believe he or she left all such switches in proper position—without much opportunity to double-check the condition of those faraway switches at that time. As mentioned previously, accidents often occur where the limits are being released and that is why the rule has placed emphasis on addressing the problem at those locations. The switches located at the point of release of the limits should be readily accessible for any employee who is unsure of the condition the switch was last left in. The rule also adds the requirement that the employee report that the switch has been locked; locking of the main track switch should prevent easy access to unauthorized users.

The requirements in paragraph (d) carry over certain employee/dispatcher communication requirements from EO 24 that provide additional checks to ensure that hand-operated main track switches are left properly lined and locked. The requirement is carefully tailored to address the switches at the location being released because FRA has determined that many of the accidents are occurring at that location. As several comments were received in response to EO 24 regarding an equivalent requirement carried over in paragraph (d), it should be helpful to describe what FRA means by the term ''releasing the limits of a main track authority.'' The term means releasing all or a portion of the limits (i.e., rolling up the limits) of an existing main track authority.

Section 218.107 Additional Operational Requirements for Hand-Operated Crossover Switches

As explained in the section-by-section analysis to § 218.103, FRA has broken up proposed § 218.103 into several sections so that the requirements will be easier to follow and be in a more logical order. The requirements found in this section were derived from proposed § 218.103.

The requirement proposed in paragraph (a) has been revised, but the reasons behind the requirement remain the same. The reasons behind this paragraph are to ensure that (1) each railroad adopt and comply with an operating rule which complies with the requirements of this section; and (2) when any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person be considered to have violated the requirements of this section. The NPRM was not intended to mean, but could possibly have read, that each person was only to uphold and comply with the railroad's operating rule and not the regulation itself. The purpose for requiring that each railroad, railroad officer, supervisor, and employee shall be considered in violation of this section when a railroad operating rule that complies with this section is violated is so that FRA has the authority to enforce this regulation as opposed to merely requiring that each railroad maintain and have in effect such a rule.

Paragraph (b) was formerly proposed § 218.103(g)(1). This paragraph sets forth the general rule that both hand-operated switches of a crossover shall be properly lined before equipment begins a crossover movement. Properly lined means that switches at both ends of the crossover are lined for the crossover movement. As train crews expect crossover switches to be properly lined, i.e., in correspondence (see definition of ''correspondence of crossover switches''), an accident can easily occur when crossover switches are out of correspondence. A related concern that is addressed by this paragraph is what to do when equipment is traversing a crossover; the rule requires that all equipment be clear of both ends of the crossover before restoring the switches to the normal position. If employees apply a railroad operating rule that incorporates this rule, the requirement should prevent the unintentional running through of crossover switches or unintentional movements onto another track that could potentially strike other rolling equipment.

Paragraph (c) was formerly proposed § 218.103(g)(2). This paragraph identifies four exceptions to the general rule that hand-operated crossover switches should be in correspondence. The reason for the exceptions is that each operation is safe or safer with the crossover switches out of correspondence than in correspondence. That is, each exception identifies a situation in which employees on the track are protected by diverting trains and equipment without slowing down operations.

FRA is aware that some configurations of crossover switches are quite complicated, typically due to the location of adjacent or adjoining tracks and other attendant switches. Railroads should address these complicated configurations of crossover switches when employees are instructed on the physical characteristics of the territory. Without proper instruction on how to apply a railroad's operating rule for correspondence of crossover switches, it will be difficult to hold employees accountable. However, railroads can be held accountable if employees do not properly apply such an operating rule and lack of instruction is one of the causes. Of course, if a railroad provided instruction but a violation was committed due to the complexities of the crossover configuration, FRA will exercise discretion regarding whether any enforcement action is necessary.

Paragraph (c)(1)(i) was formerly proposed § 218.103(g)(2)(i)(A). This paragraph permits mechanical department workers to line one end of a crossover away from the track under blue signal protection to allow workers on, under, or between rolling equipment. *See* 49 CFR 218.27. Similarly, paragraph (c)(1)(ii), formerly proposed § 218.103(g)(2)(i)(B), permits providing track protection for roadway workers on track that is considered ''inaccessible'' under § 214.327 of this chapter. Paragraph (c)(1)(iii), formerly proposed § 218.103(g)(2)(i)(C), permits those railroads that have the technology, in traffic control system (TCS) territory to allow a signal maintainer to perform maintenance, testing or inspection of the switch at only one end of a crossover while continuing to operate trains over the other crossover switch. FRA does not have any evidence to suggest this exception is an unsafe practice. Finally, the fourth exception, found in paragraph (c)(1)(iv), which was formerly proposed at the end of proposed paragraph (g)(1), recognizes that a safe operation is probable during continuous switching operations where

only one crew is using both tracks connected by the crossover.

FRA has eliminated the stated requirement in proposed § 218.103(g)(2)(ii) that crossover switches shall be immediately restored to correspondence after the protection afforded by one of the four exceptions in paragraph (c) is no longer required. After further consideration, FRA concluded that this requirement is implicit and it would be redundant to state it. If one of the paragraph (c) exceptions no longer applies, the general rule in paragraph (b) must be complied with—meaning that both hand-operated switches of a crossover shall be properly lined before rolling and on-track maintenance-of-way equipment begins a crossover movement.

Section 218.109 Hand-Operated Fixed Derails

As explained in the section-by-section analysis to § 218.103, FRA has broken up proposed § 218.103 into several sections so that the requirements will be easier to follow and be in a more logical order. The requirements found in this section were derived from proposed § 218.103.

FRA has also clarified in the title to this subpart, the purpose and scope section, and in § 218.109, that this subpart applies to ''fixed'' derails. In the NPRM, FRA did not distinguish between the two general types of derails, i.e., fixed and portable. FRA is using the term ''fixed derails'' to contrast it with derails that are portable. Portable, or temporary, derails can easily be transported and applied at different locations throughout the day in order to protect workers and equipment as needed. Fixed, or permanent, derails cannot be easily transported because they are typically affixed to the track structure in some manner. Fixed derails are normally found prior to entering a locomotive servicing area or car shop repair area, where they are used to protect workers in those areas from encroachment by unauthorized movements of rolling equipment, and on most industry tracks at or near the switch connecting with the main track. By clarifying that this subpart and section applies to fixed derails, FRA is providing up front notification that this subpart does not apply to the operation of portable derails.

During the nearly four and a half year period from January 2003 through May 2007, 154 accidents/incidents were reported by railroads to have been caused, either primarily or secondarily, by a person's failure to apply or remove a derail. Only 3 of these 154 accidents were reported as caused by a failure to apply or remove a portable derail and thus 98% of the reportable accidents/incidents were caused by the misapplication of the railroad's operating rules for fixed derails. As the primary reason for issuing this rule is to reduce accidents/incidents attributed to human factor causes, this rule's focus on reducing accidents/incidents attributed to mishandling fixed derails is appropriately targeted.

The requirement proposed in paragraph (a)(1) has been revised, but the reasons behind the requirement remains the same. The reasons behind this paragraph are to ensure that (1) each railroad adopt and comply with an operating rule which complies with the requirements of this section; and (2) when any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person be considered to have violated the requirements of this section. The NPRM was not intended to mean, but could possibly have read, that each person was only to uphold and comply with the railroad's operating rule and not the regulation itself. The purpose for requiring that each railroad, railroad officer, supervisor, and employee shall be considered in violation of this section when a railroad operating rule that complies with this section is violated is so that FRA has the authority to enforce this regulation as opposed to merely requiring that each railroad maintain and have in effect such a rule.

Paragraph (a)(2) carries over the proposed requirement from § 218.103 that each railroad specify minimum requirements for an adequate job briefing concerning hand-operated fixed derails. The requirement is for each railroad to have its own rules and procedures governing the minimum requirements for a satisfactory job briefing, which to FRA's knowledge, nearly all railroads already do. It is essential that employees working together know exactly what each person's role is in the operation, what the methods of operation and protection will be, and the order in which segments of the job are to be accomplished. With such knowledge, one employee could recognize the mistakes of another and correct them before any operating rule violation or serious accident occurred.

Paragraph (b) derives from proposed § 218.103(h). This paragraph sets forth the general rules for hand-operated fixed derails. Paragraph (b)(1) requires that the normal position of fixed derails is in the derailing position; but, a railroad may specify in its operating rules or special instructions that the normal position of a fixed derail is in the non-derailing position. Paragraph (b)(2) requires that fixed derails shall be kept in the derailing position whether or not any rolling or on-track maintenance-of-way equipment is on the tracks they protect, except as provided in paragraph (b)(1) or when changed to permit movement. Thus, the general rule requires that the fixed derails be returned to the derailing position once the movement is complete while the rule still allows for the flexibility of a railroad to designate otherwise or an exception in paragraph (b)(1) to apply in less common circumstances. If fixed derails are being used for protection of workers using blue signals, these rules would not be applicable as FRA already has other regulations governing derails in that circumstance. *See* 49 CFR part 218, subpart B.

The entire purpose of a derail, whether fixed or portable, is to protect something or someone. Derails are typically used to prevent equipment from rolling out onto main tracks in front of trains. They are also used to protect workers who are on a track to repair track or equipment. Derails may be placed in addition to warnings provided by signs, flags, gates, and notices in timetables and special instructions; thus, derails protect employees when other employees operating equipment or a train fail to heed these other warnings, or unattended equipment rolls freely. Although a properly applied derail that stops equipment or a train has served its purpose, FRA prohibits movements over a fixed derail in the derailing position under paragraph (b)(3). Paragraph (b)(3) will permit FRA to take enforcement action when a railroad or person causes a movement to be made over a derail in the derailing position. As the typical situation involving movement over a derail occurs at low speeds and does not result in serious injuries or excessive damage to railroad property, the industry has accepted, in FRA's view, too much tolerance for this type of incident. Consequently, while FRA plans to use its enforcement discretion, the purpose of this requirement is to reverse the permissive culture of the railroad industry that has accepted operating over a derail.

Paragraph (c) derives from § 218.103(b) and (h)(3). This paragraph addresses the same type of list of requirements that FRA is requiring for hand-operated switches, but applies them to hand-operated fixed derails. For instance, paragraph (c)(1) requires that

employees operating or verifying the position of a fixed derail shall conduct job briefings before work is begun, each time a work plan is changed, and at completion of the work. It is essential that employees performing these tasks communicate with one another at key intervals to prevent error free operations over derails. Paragraph (c)(2) requires that employees operating or verifying the position of a fixed derail shall be qualified on the railroad's operating rules relating to the operation of the derail. In FRA's view, it seems intuitive that a railroad cannot expect an employee to know how to properly operate or verify the position of a hand-operated fixed derail without qualifying the employee. Once qualified, an employee will be held individually responsible for the position of the derail in use; for the purpose of paragraphs (c)(3) and (c)(6), a fixed derail is considered ''in use'' if a movement is either operating over the derail, or continuously or intermittently operating over the derail while it is in the non-derailing position. Paragraph (c)(6) addresses that employees operating or verifying the position of a fixed derail shall ensure that when not in use, derails are locked, hooked, or latched in the normal position if so equipped. As FRA mentioned in the analysis to § 218.103, FRA's rule does not require switch or derail targets, latches, locks or hooks; however, if a switch or derail is equipped with any of these devices, FRA requires that the employees check that these devices are properly placed or correspond as intended. If the derail is so equipped, it shall be locked in the normal position regardless of whether the normal position is designated by the railroad as in the derailing position or non-derailing position.

Appendix D to Part 218—Requirements and Considerations for Implementing Technology Aided Point Protection

In the preamble to the NPRM, FRA restated its policy on using technology, such as cameras and monitors, to assist crews in providing point protection during shoving or pushing movements. The NPRM was the first proposed regulatory provision on this subject, and, in addition to the preamble discussion, the issue was also directly raised by proposed § 218.99(b)(2)(i). FRA received some comments on this policy and it was discussed with the RSAC working group. Generally speaking, the railroads wanted to continue using such technology without seeing any need for further regulation; meanwhile, the labor organizations were concerned that without adequate safeguards, i.e., regulations, the use of such technology posed too many questions related to adequate functionality and reliability. After further consideration, FRA has concluded that implementing the policy as mandatory requirements is necessary to assure Federal, State and local governments, that adequate safeguards are in place to protect the general public.

The first section of appendix D addresses the general requirements and considerations for all point protection aided by technology. One of the big concerns with not having a qualified employee protecting the point is determining that the technology, and the procedures for its use, provide an equivalent level of protection to that of a direct visual determination by a crewmember or other qualified employee properly positioned to make the observation. To do that, a person must be properly qualified. FRA has addressed the qualifications issue by carrying over from the proposed rule, in § 218.95(a)(2), the requirement that each railroad must qualify employees ''in any technology (and related procedures) necessary to accomplish work subject to the particular requirements, actions required by the employee to enable and use the system, means to detect malfunctioning of equipment or deviations from proper procedures, actions to be taken when malfunctions or deviations are detected, and information needed to prevent unintentional interference with the proper functioning of such technology.'' In summary, the rule requires employees to be qualified on proper use of the technology and what to do when the technology does not work as intended. Most malfunctions of the technology should be detectable, and result in abandoning the use of the technology for determining point protection until the malfunction can be corrected.

Although each railroad will retain some flexibility in implementing technological aids to provide point protection, the stated requirements and considerations will provide FRA with the ability to more quickly and directly enforce a change if a railroad attempts to implement a setup that does not adequately address all of the factual circumstances noted for consideration. For instance, a railroad shall not permit a camera/monitor setup that utilizes a black and white monitor that does not allow the person viewing the monitor to adequately determine a signal indication for the shoving or pushing movement. Similarly, FRA could take enforcement action against a railroad or individual for using a camera/monitor setup during severe weather conditions that did not permit adequate camera views of whether a crossing's gates were down or the track is, in fact, clear of equipment. Another consideration before implementing technology aided point protection is who will be allowed to view the monitor and assist the crew; thus, FRA will consider enforcement action if employees do not conduct adequate job briefings or maintain adequate lines of communication between the employee controlling the movement and the employee viewing the monitor.

It is also worth mentioning that each railroad shall ensure that the technology provides ''real time coverage,'' i.e., a view without any delay that could impact the safety of the operation and provide less protection than that of a direct visual determination. With that regard, we are concerned with internet or web-based monitoring systems that do not provide a direct feed to the monitor and could potentially be delayed by routing through a third party server or other internet portal. Although FRA is not prohibiting such web-based monitoring systems, additional safeguards would need to be employed in order to ensure that real time coverage can be obtained and the setup relied upon.

The second section of appendix D specifies additional requirements for the scenario in which remote control locomotive operations will be using technology aided point protection at highway-rail grade crossings, pedestrian crossings, and yard access crossings. All of the general requirements and considerations of the first section are also applicable to these remote control operations over grade crossings except that there should be less of a chance of a communication problem as FRA is instituting a new requirement that the remote control operator controlling the movement shall be the only person permitted to view the monitor during such operations. As the appendix explains, the purpose of this new requirement is to protect the general public, which is at greater risk of being struck by equipment at the crossings specified than employees qualified to operate in a yard environment. If the remote control operator controlling the movement is viewing the monitor, that operator should be able to react more quickly if a vehicle or pedestrian enters the crossing being viewed than if the information first had to be relayed by another person. Shaving a few precious seconds off the reaction time by eliminating the need for the relaying of information may be enough to mitigate the severity of an accident. FRA realizes

that the few railroads using this technology prior to implementation of this rule will each likely need to amend any relevant operating rules or procedures. As many of these operations involve two crewmembers who have the ability to control the movement, complying with this requirement should not be significantly burdensome. In fact, this requirement may cut down on the odd practice of having one remote control operator/crewmember controlling the movement when a second, equally capable operator/crewmember is in the best possible position to view the equipment ahead of the movement.

FRA has converted the policy statement published in the NPRM into a list of mandatory requirements for remote control locomotive operations utilizing camera/monitor setups at the types of crossings specified. The list has been altered slightly to rephrase each item as a mandatory requirement. The first requirement, to have a Crossing Diagnostic Team evaluate the crossing, is arguably the most important. Each railroad cannot be permitted to setup remote cameras at crossings for use by remote control operators without consulting FRA, and relevant State and local government officials. All types of information related to the safety of the crossing would need evaluation prior to deciding whether technology could be used safely at that crossing and determining exactly what modifications are necessary to ensure the operation is safe. Because we are requiring the expertise of a diagnostic team, FRA is permitting the diagnostic team to conclude that some or all of requirements 2, 4, 5, and 6 do not need to be complied with when a crossing is equipped with supplemental safety devices that prevent motorists from driving around lowered gates; however, the diagnostic team cannot waive the requirement that the remote control operator controlling the movement be the person viewing the monitor (requirement number 3), nor the requirement that the railroad notify the Associate Administrator for Safety in writing when this type of protection has been installed and activated at a crossing (requirement number 7). This latter requirement to contact FRA in writing has been added to ensure that FRA grade crossing specialists and signal inspectors can be made aware of when these setups have been activated and, thus, may begin monitoring the safety of such operations.

If a railroad implemented a remote camera setup to be used by a remote control operation at a highway-rail grade crossing, pedestrian crossing, or yard access crossing prior to April 14, 2008, i.e., the effective date of this final rule, the railroad may continue to use that setup without a new crossing diagnostic team evaluation as long as a diagnostic team was previously used to make the necessary determinations. However, even if a diagnostic team was used prior to that date, compliance is required with the other requirements unless specified by a diagnostic team.

As FRA explains in its conclusion, we expect that technology will develop and improve over time. The use of new technology is typically driven by efficiencies achieved, of which safety may only be one component. Meanwhile, FRA cannot always keep up with the latest technologies without notification and we have a duty to determine whether a new technology to aid point protection provides an equivalent level of protection to that of a direct visual determination. Thus, FRA is requiring that railroads wishing to utilize the latest technologies contact the Associate Administrator for Safety in writing prior to implementation.

VI. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures, and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of this final rule. Document inspection and copying facilities are available at the Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. Access to the docket may also be obtained electronically through the Federal eRulemaking Portal at *http://www.regulations.gov*. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590; please refer to Docket No. FRA–2005–23080.

FRA analyzed the foregoing final rule and found that there will be relatively little change in the burden upon railroads, however, the FRA believes that much greater compliance with rules which are almost identical to what the railroads have promulgated as their own operating rules will likely result in a reduction in human factor accidents, especially those human factors causes most directly targeted by the rulemaking. FRA believes that most railroads can achieve average reductions of 35% in these accidents, because there is one Class I railroad with better than average compliance with its own operating rules which routinely has human factor accident rates 35% below the industry average. The costs of the foregoing are minimal, because most of the procedures mandated are already incorporated in the railroads' own operating rules. The biggest costs will be related to publication of changed language, and management of the operating rules programs. The rule would have even less impact on small entities, as they are excused from most of the burdens which regulate management of their operating rules testing programs. The final rule would generate twenty-year discounted benefits of $191,189,965, and twenty-year discounted costs of $20,756,051, for a twenty-year discounted net benefit of $170,433,914, if the assumptions in this analysis are correct.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of proposed and final rules to assess their impact on small entities. FRA has prepared and placed in the docket an Analysis of Impact on Small Entities (AISE) that assesses the small entity impact of this final rule. Document inspection and copying facilities are available at the Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. Access to the docket may also be obtained electronically through the Federal eRulemaking Portal at *http://www.regulations.gov*. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590; please refer to Docket No. FRA–2005–23080.

FRA notes that the impact on small entities have been considered throughout the development of this final rule both internally and through consultation within the RSAC forum, as described in Section II of this preamble. After the Railroad Operating Rules Working Group failed to reach a consensus recommendation, FRA reported the Working Group's unofficial areas of agreement and disagreement to the RSAC.

The AISE developed in connection with this final rule concludes that this proposal would not have a significant economic impact on a substantial number of small entities. Thus, FRA certifies that this final rule is not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act or Executive Order 13272.

C. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq*. The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section—49 CFR	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
217.7—Operating Rules; Filing and Recordkeeping:					
—Filing rules, timetables, and special instructions.	1 New Railroad	1 submission	1 hour	1	$43
—Amendments to operating rules, timetables, and timetable special instructions by Class I, Class II, Amtrak, and Commuter Railroads.	55 Railroads	165 amendments	20 minutes	55	2,365
—Class III and Other Railroads: Copy of Current Operating Rules, Timetables, and Special Instructions.	20 New Railroads	20 submissions	55 minutes	18	774
—Class III Railroads: Amendments to operating rules.	632 Railroads	1,896 amendment	15 minutes	474	20,382
217.9—Program of Operational Tests:					
—Railroad and railroad officer testing responsibilities: Field Training.	687 Railroads	4,732 training sessions	8 hours	37,856	1,892,800
—Written records of officer testing qualifications.	687 Railroads	4,732 records	2 minutes	158	[1] 0
—Written program of operational tests/inspections.	20 New Railroads	20 programs	9.92 hours	198	8,514
—Amendments to operational tests/insp. programs.	55 Railroads	165 amendments	1.92 hours	317	13,631
—Records of individual tests/inspections.	687 Railroads	9,180,000 rcds	5 minutes	765,000	38,250,000
—Review of tests/inspections/adjustments to the program of operational tests—Quarterly reviews.	687 Railroads	37 reviews	1 hour	37	[1] 0
—Officer designations & Six Month reviews.	687 Railroads	37 designations + 74 reviews.	5 seconds + 1 hour	74	[1] 0
—*Passenger Railroads:* Officer designations & Six-Month reviews.	20 Railroads	20 designations + 34 reviews.	5 seconds + 1 hour	34	[1] 0
—Records retention: Periodic reviews.	687 Railroads	589 review rcds	1 minute	10	[1] 0

CFR Section—49 CFR	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
—Annual summary on operational tests/inspections.	37 Railroads	37 summary rcds	61 minutes	38	1,634
217.11—Program of Instruction on Operating Rules:					
—Railroads instruction of employees.	687 Railroads	130,000 instr. employees.	8 hours	1,040,000	52,000,000
—Current copy of employee periodic instruction prog.	20 New Railroads	20 programs	8 hours	160	6,880
—Amendments to current employee instruction prog.	687 Railroads	220 amendments	.92 hour	202	8,686
218.95—Instruction, Training, and Examination:					
—Records of instruction, training, examination.	687 Railroads	98,000 empl. rcds	5 minutes	8,167	351,181
—FRA disapproval of program: Railroad responses.	687 Railroads	50 submissions	1 hour	50	2,150
—Amended programs.	687 Railroads	20 amended docs	30 minutes	10	730
218.97—Good Faith Challenge Procedures.	687 Railroads	687 procedures	2 hours	1,374	[1] 0
—Copies to employees of good faith procedures.	687 Railroads	130,000 copies	6 minutes	13,000	[1] 0
—Copies of amendments to good faith procedures.	687 Railroads	130,000 copies	3 minutes	6,500	[1] 0
—Good faith challenges to railroad directives.	98,000 Employees	15 challenges	10 minutes	3	[1] 0
—Resolution of challenges.	687 Railroads	15 responses	5 minutes	1	[1] 0
—Direct order to proceed procedures: Immediate review by railroad testing officer/employer.	687 Railroads	5 reviews	15 minutes	1	[1] 0
—Documentation of employee protests to direct order.	687 Railroads	10 protest docs	15 minutes	3	[1] 0
—Copies of protest documentation.	687 Railroads	20 copies	1 minute	.33	[1] 0
—Further review by designated railroad officer.	687 Railroads	3 reviews	15 minutes	1	[1] 0
—Employee requested written verification decisions.	687 Railroads	10 written decisions	10 minutes	2	88
—Recordkeeping/ Retention—Copies of written procedures.	687 Railroads	760 copies	5 minutes	63	2,709
—Copies of good faith challenge verification decisions.	687 Railroads	20 copies	5 minutes	2	86
218.97—Good Faith Challenge Procedures	687 Railroads	687 procedures	2 hours	1,374	[1] 0
—Copies to employees of good faith procedures.	687 Railroads	130,000 copies	6 minutes	13,000	[1] 0

CFR Section—49 CFR	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
—Copies of amendments to good faith procedures.	687 Railroads	130,000 copies	3 minutes	6,500	[1] 0
—Good faith challenges to railroad directives.	98,000 Employees	15 challenges	10 minutes	3	[1] 0
—Resolution of challenges.	687 Railroads	15 responses	5 minutes	1	[1] 0
—Direct order to proceed procedures: Immediate review by railroad testing officer/employer.	687 Railroads	5 reviews	15 minutes	1	[1] 0
218.99—Shoving or Pushing Movements:					
—Required operating rule compliant with this section.	687 Railroads	687 rule modific	1 hour	687	[1] 0
—General Movement Requirements: Job briefings.	100,000 RR employees	60,000 briefings	1 minute	1,000	50,000
—Point Protection: Visual determination of clear track and corresponding signals or instructions.	100,000 RR employees	87,600,000 deter/instructions + 87,600,000 signals.	1 minute	2,920,000	128,480,000
—Remote Control Movements: Confirmations by Crew.	100,000 RR employees	876,000 confirm	1 minute	14,600	642,400
—Remote Control zone, exceptions to point protection: Determination/Communication track is clear.	100,000 RR employees	876,000 deter/communications.	1 minute	14,600	642,400
—Operational exceptions: Dispatcher permitted movements that are verified.	6,000 RR Dispatchers	30,000 verified/permitted movements.	1 minute	500	22,000
218.101—Leaving Rolling and On-Track Maintenance-of-Way Equipment in the Clear:					
—Operating Rule that Complies with this section.	687 Railroads	687 amended op. rules 3.	30 minutes	344	[1] 0
218.103—Hand-Operated Switches and Derails:					
—Operating Rule that Complies with this section.	687 Railroads	687 amended op. rules	60 minutes	687	[1] 0
—Minimum requirements for adequate job briefing.	632 Railroads	632 modif rules	60 minutes	632	[1] 0
—Actual job briefings conducted by employees operating hand-operated main track switches.	632 Railroads	1,125,000 brfngs	1 minute	18,750	825,000

CFR Section—49 CFR	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
218.105—Additional Job Briefings for hand-operated main track switches.	687 Railroads	60,000 briefings	1 minute	1,000	[1] 0
—Exclusive track occupancy: Report of position of main track switches and conveyance of switch position.	687 Railroads	100,000 reports + 100,000 convey.	1 minute	3,334	[1] 0
—Releasing authority limits: Acknowledgments and verbal confirmations of hand-operated main track switches.	6,000 RR Dispatchers	60,000 reports + 60,000 confirm.	30 sec. + 5 sec	583	[1] 0
218.109—Hand-operated fixed derails—Job briefings.	687 Railroads	562,500 brfngs	30 seconds	4,688	234,400

[1] Incl. RIA.

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202–493–6292 or Gina Christodoulou at 202–493–6139, or via e-mail at *robert.brogan@dot.gov* or *gina.christodoulou@dot.gov*.

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. Any comments should be sent to: The Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, att: FRA Desk Officer. Comments may also be sent via e-mail to OMB at the following address: *oira_submissions@omb.eop.gov*.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with Federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the proposed regulation. Where a regulation has Federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This is a rule with preemptive effect. Subject to a limited exception for essentially local safety hazards, its requirements will establish a uniform Federal safety standard that must be met, and State requirements covering the same subject are displaced, whether those standards are in the form of State statutes, regulations, local ordinances, or other forms of state law, including State common law. Preemption is addressed in §§ 217.2 and 218.4, both titled ''Preemptive effect.'' As stated in the corresponding preamble language for §§ 217.2 and 218.4, section 20106 of Title 49 of the United States Code provides that all regulations prescribed by the Secretary related to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety or security hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. This is consistent with past practice at FRA, and within the Department of Transportation.

FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. FRA notes that the above factors have been considered throughout the development of this NPRM both internally and through consultation within the RSAC forum, as described in Section II of this preamble. After the Railroad Operating Rules Working Group failed to reach a consensus recommendation, FRA reported the Working Group's unofficial areas of agreement and disagreement to the RSAC. The RSAC has as permanent voting members two organizations representing State and local interests: AASHTO and ASRSM. The RSAC regularly provides recommendations to the FRA Administrator for solutions to

regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the Federalism implications of this rulemaking from these representatives or from any other representative. States and other governments were afforded opportunity to consult by virtue of the NPRM and comment period.

It should be noted that on April 27, 2005, FRA received from the State of California a petition for rulemaking on the subject of remote control operations referred to in the **SUPPLEMENTARY INFORMATION** section as ''Technology Aided Point Protection.'' The petition requested that FRA initiate a rulemaking ''to formally approve and establish rules affecting RCL [i.e., remote control locomotive] operations by railroads over public highway-rail at-grade crossings.'' California's petition did not raise an issue regarding preemption. On October 27, 2005, FRA denied California's rulemaking petition because it was procedurally deficient and it did not include sufficient information upon which to base a rulemaking proceeding. *See* Docket No. FRA–2005–21094 (found at *http://dms.dot.gov/*). Nevertheless, this final rule contains specific provisions of the kind requested in the California petition.

For the foregoing reasons, FRA believes that this final rule is in accordance with the principles and criteria contained in Executive Order 13132.

E. Environmental Impact

FRA has evaluated this final rule in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this final rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28547, May 26, 1999. In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in 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) currently $128,100,000 in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. The final rule would not result in the expenditure, in the aggregate, of $128,100,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

List of Subjects

49 CFR Part 217

Penalties, Railroad safety, and Reporting and recordkeeping requirements.

49 CFR Part 218

Occupational safety and health, Penalties, Railroad employees, Railroad safety, and Reporting and recordkeeping requirements.

The Final Rule

■ For the reasons discussed in the preamble, FRA amends parts 217 and 218 of Title 49, Code of Federal Regulations as follows:

PART 217—[AMENDED]

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. Section 217.2 is added to read as follows:

§ 217.2 Preemptive effect.

Normal State negligence standards apply where there is no Federal action covering the subject matter. Under 49 U.S.C. 20106 (section 20106), issuance of the regulations in this part preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local railroad safety or railroad security hazard; that is not incompatible with a law, regulation, or order of the United States Government; and that does not unreasonably burden interstate commerce. Section 20106 permits State tort actions arising from events or activities occurring on or after January 18, 2002, for the following: violation of the Federal standard of care established by regulation or order issued by the Secretary of Transportation (with respect to railroad safety, such as these regulations) or the Secretary of Homeland Security (with respect to railroad security); a party's violation of, or failure to comply with, its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries; and a party's violation of a State standard that is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a law, regulation, or order of the United States Government, and does not unreasonably burden interstate commerce. Nothing in section 20106 creates a Federal cause of action on behalf of an injured party or

confers Federal question jurisdiction for such State law causes of action.

■ 3. Section 217.4 is amended by adding the following definitions of *Associate Administrator for Safety, FRA,* and *Qualified* in alphabetical order to read as follows:

§ 217.4 Definitions.

* * * * *

Associate Administrator for Safety means the Associate Administrator for Safety of the Federal Railroad Administration or that person's delegate as designated in writing.

* * * * *

FRA means the Federal Railroad Administration.

Qualified means that a person has successfully completed all instruction, training, and examination programs required by the railroad and this part and that the person, therefore, has actual knowledge or may reasonably be expected to have knowledge of the subject on which the person is expected to be competent.

* * * * *

■ 4. Section 217.9 is revised to read as follows:

§ 217.9 Program of operational tests and inspections; recordkeeping.

(a) *Requirement to conduct operational tests and inspections.* Each railroad to which this part applies shall periodically conduct operational tests and inspections to determine the extent of compliance with its code of operating rules, timetables, and timetable special instructions, specifically including tests and inspections sufficient to verify compliance with the requirements of subpart F of part 218 of this chapter, in accordance with a written program as required by paragraph (c) of this section.

(b) *Railroad and railroad testing officer responsibilities.* The requirements of this paragraph are applicable on or after July 1, 2008.

(1) Each railroad officer who conducts operational tests and inspections (railroad testing officer) shall:

(i) Be qualified on the railroad's operating rules in accordance with § 217.11 of this part;

(ii) Be qualified on the operational testing and inspection program requirements and procedures relevant to the testing and inspections the officer will conduct;

(iii) Receive appropriate field training, as necessary to achieve proficiency, on each operational test or inspection that the officer is authorized to conduct; and

(iv) Conduct operational tests and inspections in accordance with the railroad's program of operational tests and inspections.

(2) Written records documenting qualification of each railroad testing officer shall be retained at the railroad's system headquarters and at the division headquarters for each division where the officer is assigned and shall be made available to representatives of the FRA for inspection and copying during normal business hours.

(c) *Written program of operational tests and inspections.* Every railroad shall have a written program of operational tests and inspections in effect. New railroads shall have such a program within 30 days of commencing rail operations. The program shall—

(1) Provide for operational testing and inspection under the various operating conditions on the railroad. As of July 1, 2008, the program must address with particular emphasis those operating rules that cause or are likely to cause the most accidents or incidents, such as those accidents or incidents identified in the quarterly reviews, six month reviews, and the annual summaries as required under paragraphs (e) and (f) of this section, as applicable;

(2) Require a minimum number of tests and inspections per year covering the requirements of part 218, subpart F of this chapter;

(3) Describe each type of operational test and inspection required, including the means and procedures used to carry it out;

(4) State the purpose of each type of operational test and inspection;

(5) State, according to operating divisions where applicable, the frequency with which each type of operational test and inspection is to be conducted;

(6) As of July 1, 2008, identify the officer(s) by name, job title, and, division or system, who shall be responsible for ensuring that the program of operational tests and inspections is properly implemented. The responsibilities of such officers shall include, but not be limited to, ensuring that the railroad's testing officers are directing their efforts in an appropriate manner to reduce accidents/incidents and that all required reviews and summaries are completed. A railroad with divisions shall identify at least one officer at the system headquarters who is responsible for overseeing the entire program and the implementation by each division.

(7) Include a schedule for making the program fully operative within 210 days after it begins.

(d) *Records.* (1) Each railroad to which this part applies shall keep a record of the date, time, place, and result of each operational test and inspection that was performed in accordance with its program. Each record shall specify the officer administering the test and inspection and each employee tested. These records shall be retained at the system headquarters and at each division headquarters where the tests and inspections are conducted for one calendar year after the end of the calendar year to which they relate. These records shall be made available to representatives of the FRA for inspection and copying during normal business hours.

(2) Each railroad shall retain one copy of its current program for periodic performance of the operational tests and inspections required by paragraph (a) of this section and one copy of each subsequent amendment to such program. These records shall be retained at the system headquarters and at each division headquarters where the tests and inspections are conducted for three calendar years after the end of the calendar year to which they relate. These records shall be made available to representatives of the FRA for inspection and copying during normal business hours.

(e) *Reviews of tests and inspections and adjustments to the program of operational tests.* This paragraph (e) shall apply to each Class I railroad and the National Railroad Passenger Corporation effective July 1, 2008 and to all other railroads subject to this paragraph effective January 1, 2009.

(1) *Reviews by railroads other than passenger railroads.* Each railroad to which this part applies shall conduct periodic reviews and analyses as provided in this paragraph and shall retain, at each division headquarters, where applicable, and at its system headquarters, one copy of the following written reviews, provided however that this requirement does not apply to either a railroad with less than 400,000 total employee work hours annually or a passenger railroad subject to paragraph (e)(2) of this section.

(i) *Quarterly review.* The designated officer of each division headquarters, or system headquarters, if no division headquarters exists, shall conduct a written quarterly review of the accident/incident data, the results of prior operational tests and inspections, and other pertinent safety data for that division or system to identify the relevant operating rules related to those accidents/incidents that occurred during the quarter. The review shall also include the name of each railroad testing officer, the number of tests and inspections conducted by each officer, and whether the officer conducted the minimum number of each type of test or

inspection required by the railroad's program. Based upon the results of that review, the designated officer shall make any necessary adjustments to the tests and inspections required of railroad officers for the subsequent period(s). Quarterly reviews and adjustments shall be completed no later than 30 days after the quarter has ended.

(ii) *Six month review.* The designated officer of each system headquarters office responsible for development and administration of the program of operational tests and inspections shall conduct a review of the program of operational tests and inspections on a six month basis to ensure that it is being utilized as intended, that the quarterly reviews provided for in this paragraph have been properly completed, that appropriate adjustments have been made to the distribution of tests and inspections required, and that the railroad testing officers are appropriately directing their efforts. Six month reviews shall be completed no later than 60 days after the review period has ended.

(2) *Reviews by passenger railroads.* Not less than once every six months, the designated officer(s) of the National Railroad Passenger Corporation and of each railroad providing commuter service in a metropolitan or suburban area shall conduct periodic reviews and analyses as provided in this paragraph and shall retain, at each division headquarters, where applicable, and at its system headquarters, one copy of the reviews. Each such review shall be completed within 30 days of the close of the period. The designated officer(s) shall conduct a written review of:

(i) The operational testing and inspection data for each division, if any, or the system to determine compliance by the railroad testing officers with its program of operational tests and inspections required by paragraph (c) of this section. At a minimum, this review shall include the name of each railroad testing officer, the number of tests and inspections conducted by each officer, and whether the officer conducted the minimum number of each type of test or inspection required by the railroad's program;

(ii) Accident/incident data, the results of prior operational tests and inspections, and other pertinent safety data for each division, if any, or the system to identify the relevant operating rules related to those accidents/incidents that occurred during the period. Based upon the results of that review, the designated officer(s) shall make any necessary adjustments to the tests and inspections required of railroad officers for the subsequent period(s); and

(iii) Implementation of the program of operational tests and inspections from a system perspective, to ensure that it is being utilized as intended, that the other reviews provided for in this paragraph have been properly completed, that appropriate adjustments have been made to the distribution of tests and inspections required, and that the railroad testing officers are appropriately directing their efforts.

(3) *Records retention.* The records of periodic reviews required in paragraphs (e)(1) and (e)(2) of this section shall be retained for a period of one year after the end of the calendar year to which they relate and shall be made available to representatives of FRA for inspection and copying during normal business hours.

(f) *Annual summary of operational tests and inspections.* Before March 1 of each calendar year, each railroad to which this part applies, except for a railroad with less than 400,000 total employee work hours annually, shall retain, at each of its division headquarters and at the system headquarters of the railroad, one copy of a written summary of the following with respect to its previous calendar year activities: The number, type, and result of each operational test and inspection, stated according to operating divisions where applicable, that was conducted as required by paragraphs (a) and (c) of this section. These records shall be retained for three calendar years after the end of the calendar year to which they relate and shall be made available to representatives of the FRA for inspection and copying during normal business hours.

(g) *Electronic recordkeeping.* Each railroad to which this part applies is authorized to retain by electronic recordkeeping the information prescribed in this section, provided that all of the following conditions are met:

(1) The railroad adequately limits and controls accessibility to such information retained in its electronic database system and identifies those individuals who have such access;

(2) The railroad has a terminal at the system headquarters and at each division headquarters;

(3) Each such terminal has a computer (i.e., monitor, central processing unit, and keyboard) and either a facsimile machine or a printer connected to the computer to retrieve and produce information in a usable format for immediate review by FRA representatives;

(4) The railroad has a designated representative who is authorized to authenticate retrieved information from the electronic system as true and accurate copies of the electronically kept records; and

(5) The railroad provides representatives of the FRA with immediate access to these records for inspection and copying during normal business hours and provides printouts of such records upon request.

(h) Upon review of the program of operational tests and inspections required by this section, the Associate Administrator for Safety may, for cause stated, disapprove the program. Notification of such disapproval shall be made in writing and specify the basis for the disapproval decision. If the Associate Administrator for Safety disapproves the program,

(1) The railroad has 35 days from the date of the written notification of such disapproval to:

(i) Amend its program and submit it to the Associate Administrator for Safety for approval; or

(ii) Provide a written response in support of the program to the Associate Administrator for Safety, who informs the railroad of FRA's final decision in writing; and

(2) A failure to submit the program with the necessary revisions to the Associate Administrator for Safety in accordance with this paragraph will be considered a failure to implement a program under this part.

■ 5. Section 217.11(c) is revised to read as follows:

§ 217.11 Program of instruction on operating rules; recordkeeping; electronic recordkeeping.

* * * * *

(c) Each railroad to which this part applies is authorized to retain by electronic recordkeeping its program for periodic instruction of its employees on operating rules provided that the requirements stated in § 217.9(g)(1) through (5) of this part are satisfied.

■ 6. Appendix A to part 217 is amended by revising the entry for § 217.9 to read as follows:

APPENDIX A TO PART 217—SCHEDULE OF CIVIL PENALTIES

Section	Violation	Willful violation
* * * * * * *		
217.9 Operational tests and inspections:		
(a) Failure to implement a program	$9,500–12,500	$13,000–16,000
(b) Railroad and railroad testing officer responsibilities:		
(1) Failure to provide instruction, examination, or field training, or failure to conduct tests in accordance with program	9,500	13,000
(2) Records	7,500	11,000
(c) Record of program; program incomplete	7,500–12,500	11,000–16,000
(d) Records of individual tests and inspections	7,500	.....
(e) Failure to retain copy of or conduct:		
(1)(i) Quarterly review	9,500	13,000
(1)(ii) and (2) Six month review	9,500	13,000
(3) Records	7,500	11,000
(f) Annual summary	7,500	11,000
(h) Failure to timely or appropriately amend program after disapproval	9,500–12,500	13,000–16,000
* * * * * * *		

PART 218—[AMENDED]

■ 7. The authority citation for part 218 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 8. Section 218.4 is added to read as follows:

§ 218.4 Preemptive effect.

Normal State negligence standards apply where there is no Federal action covering the subject matter. Under 49 U.S.C. 20106 (section 20106), issuance of the regulations in this part preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local railroad safety or railroad security hazard; that is not incompatible with a law, regulation, or order of the United States Government; and that does not unreasonably burden interstate commerce. Section 20106 permits State tort actions arising from events or activities occurring on or after January 18, 2002, for the following: Violation of the Federal standard of care established by regulation or order issued the Secretary of Transportation (with respect to railroad safety, such as these regulations) or the Secretary of Homeland Security (with respect to railroad security); a party's violation of, or failure to comply with, its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries; and a party's violation of a State standard that is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a law, regulation, or order of the United States Government, and does not unreasonably burden interstate commerce. Nothing in section 20106 creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

■ 9. Section 218.5 is amended by revising the definitions of *Flagman's signals* and *Locomotive* to read as follows:

§ 218.5 Definitions.

* * * * *

Flagman's signals means a red flag by day and a white light at night, and fusees as prescribed in the railroad's operating rules.

* * * * *

Locomotive means, except for purposes of subpart F of this part, a self-propelled unit of equipment designed for moving other railroad rolling equipment in revenue service including a self-propelled unit designed to carry freight or passenger traffic, or both, and may consist of one or more units operated from a single control.

* * * * *

■ 10. Section 218.37 is amended by revising paragraphs (a)(1)(iii) and (a)(1)(iv) to read as follows:

§ 218.37 Flag protection.

(a) * * *

(1) * * *

(iii) When a train stops on main track, flag protection against following trains on the same track must be provided as follows: A crew member with flagman's signals must immediately go back at least the distance prescribed by timetable or other instructions for the territory and display one lighted fusee. The crew member may then return one-half of the distance to the crew member's train where the crew member must remain until the crew member has stopped the approaching train or is recalled. When recalled, the crew member must leave one lighted fusee and while returning to the crew member's train, the crew member must also place single lighted fusees at intervals that do not exceed the burning time of the fusee. When the train departs, a crew member must leave one lighted fusee and until the train resumes speed not less than one-half the maximum authorized speed (including slow order limits) in that territory, the crew member must drop off single lighted fusees at intervals that do not exceed the burning time of the fusee.

(iv) When required by the railroad's operating rules, a forward crew member with flagman's signals must protect the front of the crew member's train against opposing movements by immediately going forward at least the distance prescribed by timetable or other instructions for the territory, displaying one lighted fusee, and remaining at that location until recalled.

* * * * *

■ 11. Add new subpart F to part 218 to read as follows:

Subpart F—Handling Equipment, Switches, and Fixed Derails

Sec.

218.91 Purpose and scope.
218.93 Definitions.
218.95 Instruction, training, and examination.
218.97 Good faith challenge procedures.
218.99 Shoving or pushing movements.
218.101 Leaving rolling and on-track maintenance-of-way equipment in the clear.
218.103 Hand-operated switches, including crossover switches.
218.105 Additional operational requirements for hand-operated main track switches.
218.107 Additional operational requirements for hand-operated crossover switches.
218.109 Hand-operated fixed derails.

Subpart F—Handling Equipment, Switches, and Fixed Derails

§ 218.91 Purpose and scope.

(a) The purpose of this subpart is to prevent accidents and casualties that can result from the mishandling of equipment, switches, and fixed derails.

(b) This subpart prescribes minimum operating rule requirements for the handling of equipment, switches, and fixed derails. Each railroad may prescribe additional or more stringent requirements in its operating rules, timetables, timetable special instructions, and other instructions.

§ 218.93 Definitions.

As used in this subpart—

Associate Administrator for Safety means the Associate Administrator for Safety of the Federal Railroad Administration or that person's delegate as designated in writing.

Clearance point means the location near a turnout beyond which it is unsafe for passage on an adjacent track(s). Where a person is permitted by a railroad's operating rules to ride the side of a car, a clearance point shall accommodate a person riding the side of a car.

Correspondence of crossover switches means both crossover switches are lined for the crossover or both are lined for the straight tracks.

Crossover means, for purposes of this subpart only, a track connection between two adjacent, but not necessarily parallel, tracks, consisting of two switches, which is intended to be used primarily for the purpose of crossing over from one track to another.

Employee means an individual who is engaged or compensated by a railroad or by a contractor to a railroad to perform any of the duties defined in this subpart.

Foul or fouling a track means rolling equipment or on-track maintenance-of-way equipment is located such that the end of the equipment is between the clearance point and the switch points leading to the track on which the equipment is standing.

FRA means the Federal Railroad Administration.

Hand-operated switch means any type of switch when operated by manual manipulation. For purposes of this subpart, a hand-operated switch does not include switches operated by push button or radio control when such switch is protected by distant switch indicators, switch point indicators, or other visual or audio verification that the switch points are lined for the intended route and fit properly.

Highway-rail grade crossing means, for purposes of this subpart only, an at-grade crossing where a public highway, road, street, or private roadway, including associated sidewalks and pathways, crosses one or more railroad tracks at grade, and is identified by a U.S. DOT National Highway-Rail Grade Crossing Inventory Number, or is marked by crossbucks, stop signs, or other appropriate signage indicating the presence of an at-grade crossing.

Industry track means a switching track, or series of tracks, serving the needs of a commercial industry other than a railroad.

Lite locomotive consist means two or more locomotive units coupled without cars attached, regardless of whether the locomotive units are connected so that they may be operated from a single control stand.

Locomotive means, for purposes of this subpart only, a piece of on-track equipment (other than specialized roadway maintenance equipment or a dual purpose vehicle operating in accordance with § 240.104(a)(2) of this chapter):

(1) With one or more propelling motors designed for moving other equipment;

(2) With one or more propelling motors designed to carry freight or passenger traffic or both; or

(3) Without propelling motors but with one or more control stands.

Pedestrian crossing means a separate designated sidewalk or pathway where pedestrians, but not vehicles, cross railroad tracks. Sidewalk crossings contiguous with, or separate but adjacent to, highway-rail grade crossings, are presumed to be part of the highway-rail grade crossings and are *not* considered pedestrian crossings.

Qualified means that a person has successfully completed all instruction, training, and examination programs required by the railroad and this subpart and that the person, therefore, has actual knowledge or may reasonably be expected to have knowledge of the subject on which the person is expected to be competent.

Remote control operator means a locomotive engineer, as defined in § 240.7 of this chapter, certified by a railroad to operate remote control locomotives pursuant to § 240.107 of this chapter.

Remote control zone means one or more tracks within defined limits designated in the timetable special instructions, or other railroad publication, within which remote control locomotives, under certain circumstances specified in this part, may be operated without an employee assigned to protect the pull-out end of the remote control movement, i.e., the end on which the locomotive is located.

Roadway maintenance activity means any work limited to the duties prescribed for a roadway worker by definition in this section, including movement of on-track maintenance-of-way equipment other than locomotives.

Roadway worker means any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a track, and flagmen and watchmen/lookouts as defined in § 214.7 of this chapter.

Roadway worker in charge means a roadway worker who is qualified in accordance with § 214.353 of this chapter for the purpose of establishing on-track safety for roadway work groups.

Siding means an auxiliary track, adjacent and connected to a main track, used for meeting or passing trains.

Signaled siding means a siding within traffic control system (TCS) territory or within interlocking limits where a signal indication authorizes the siding's use.

Switchtender means a qualified employee assigned to handle switches at a specific location.

Track is clear means:

(1) The portion of the track to be used for the intended movement is unoccupied by rolling equipment, on-track maintenance-of-way equipment, and conflicting on-track movements;

(2) Intervening public highway-rail grade crossings, private highway-rail grade crossings outside the physical confines of a railroad yard, pedestrian crossings outside of the physical confines of a railroad yard, and yard access crossings are protected as follows:

(i) Crossing gates are in the fully lowered position, and are not known to be malfunctioning; or

(ii) A designated and qualified employee is stationed at the crossing and has the ability to communicate with trains; or

(iii) At crossings equipped only with flashing lights or passive warning devices, when it is clearly seen that no traffic is approaching or stopped at the crossing and the leading end of the movement over the crossing does not exceed 15 miles per hour;

(3) Intervening switches and fixed derails are properly lined for the intended movement; and

(4) The portion of the track to be used for the intended movement has sufficient room to contain the rolling equipment being shoved or pushed.

Yard access crossing means a private highway-rail grade crossing that is located within the physical confines of a railroad yard and is either:

(1) Open to unrestricted public access; or

(2) Open to persons other than railroad employees going about their normal duties, e.g., business guests or family members.

§ 218.95 Instruction, training, and examination.

(a) *Program.* Effective July 1, 2008, each railroad shall maintain a written program of instruction, training, and examination of employees for compliance with operating rules implementing the requirements of this subpart to the extent these requirements are pertinent to the employee's duties. If all requirements of this subpart are satisfied, a railroad may consolidate any portion of the instruction, training or examination required by this subpart with the program of instruction required under § 217.11 of this chapter. An employee who successfully completes all instruction, training, and examination required by this written program shall be considered qualified.

(1) The written program of instruction, training, and examination shall address the requirements of this subpart, as well as consequences of noncompliance.

(2) The written program of instruction, training, and examination shall include procedures addressing how the railroad qualifies employees in any technology necessary to accomplish work subject to the requirements of this subpart. Such procedures shall include, but are not limited to, those which explain:

(i) The purpose for using the technology;

(ii) How an employee will be expected to use the technology;

(iii) How to detect malfunctioning equipment or deviations from proper procedures;

(iv) How to respond when equipment malfunctions or deviations from proper procedures are detected; and

(v) How to prevent unintentional interference with the proper functioning of the technology.

(3) *Implementation schedule for employees, generally.* Each employee performing duties subject to the requirements in this subpart shall be initially qualified prior to January 1, 2009. Employees hired between April 14, 2008 and January 1, 2009, and all employees thereafter required to perform duties subject to the requirements in this subpart shall be qualified before performing duties subject to the requirements in this subpart.

(4) After January 1, 2009, no employee shall perform work requiring compliance with the operating rules implementing the requirements of this subpart unless qualified on these rules within the previous three years.

(5) The records of successful completion of instruction, examination and training required by this section shall document qualification of employees under this subpart.

(b) Written records documenting successful completion of instruction, training, and examination of each employee required by this subpart shall be retained at its system headquarters and at the division headquarters for each division where the employee is assigned for three calendar years after the end of the calendar year to which they relate and made available to representatives of the FRA for inspection and copying during normal business hours. Each railroad to which this part applies is authorized to retain a program, or any records maintained to prove compliance with such a program, by electronic recordkeeping in accordance with §§ 217.9(g) and 217.11(c) of this chapter.

(c) Upon review of the program of instruction, training, and examination required by this section, the Associate Administrator for Safety may, for cause stated, disapprove the program. Notification of such disapproval shall be made in writing and specify the basis for the disapproval decision. If the Associate Administrator for Safety disapproves the program,

(1) The railroad has 35 days from the date of the written notification of such disapproval to:

(i) Amend its program and submit it to the Associate Administrator for Safety for approval; or

(ii) Provide a written response in support of the program to the Associate Administrator for Safety, who informs the railroad of FRA's final decision in writing; and

(2) A failure to submit the program with the necessary revisions to the Associate Administrator for Safety in accordance with this paragraph will be considered a failure to implement a program under this part.

§ 218.97 Good faith challenge procedures.

(a) *Employee Responsibility.* An employee shall inform the railroad or employer whenever the employee makes a good faith determination that the employee has been directed to either take actions that would violate FRA regulations regarding the handling of equipment, switches, and fixed derails as required by this subpart, or to take actions that would violate the railroad's operating rules implementing the requirements of this subpart.

(b) *General procedures.* Each railroad or employer is responsible for the training of and compliance by its employees with the requirements of this subpart.

(1) Each railroad or employer shall adopt and implement written procedures which guarantee each employee the right to challenge in good faith whether the procedures that will be used to accomplish a specific task comply with the requirements of this subpart or any operating rule relied upon to fulfill the requirements of this subpart. Each railroad or employer's written procedures shall provide for prompt and equitable resolution of challenges made in accordance with this subpart.

(2) The written procedures required by this section shall indicate that the good faith challenge described in paragraph (b)(1) of this section is not intended to abridge any rights or remedies available to the employee under a collective bargaining agreement, or any Federal law including, but not limited to, 29 U.S.C. 651 *et seq.*, 6 U.S.C. 1142, or 49 U.S.C. 20109.

(3) Each affected employee shall be instructed on the written procedures required by this paragraph as part of the training prescribed by § 217.11 of this chapter.

(4) A copy of the current written procedures shall be provided to each affected employee and made available for inspection and copying by representatives of the FRA during normal business hours.

(c) The written procedures shall—

(1) Grant each employee the right to challenge any directive which, based on the employee's good faith determination, would cause the employee to violate any requirement of this subpart or any operating rule relied upon to fulfill the requirements of this subpart;

(2) Provide that the railroad or employer shall not require the challenging employee to comply with the directive until the challenge resulting from the good faith determination is resolved;

(3) Provide that the railroad or employer may require the challenging employee to perform tasks unrelated to the challenge until the challenge is resolved;

(4) Provide that the railroad or employer may direct an employee, other than the challenging employee, to perform the challenged task prior to the challenge being resolved as long as this other employee is informed of the challenge and does not also make a good faith determination that the challenged task would violate FRA regulations regarding the handling of equipment, switches, and fixed derails as required in this subpart, or a railroad's operating rules implementing the requirements of this subpart;

(5) Provide that a challenge may be resolved by:

(i) A railroad or employer officer's acceptance of the employee's request;

(ii) An employee's acceptance of the directive;

(iii) An employee's agreement to a compromise solution acceptable to the person issuing the directive; or

(iv) As further determined under paragraph (d) of this section.

(d) In the event that the challenge cannot be resolved because the person issuing the directive determines that the employee's challenge has not been made in good faith or there is no reasonable alternative to the direct order, the written procedures shall:

(1) Provide for immediate review by at least one officer of the railroad or employer, except for each railroad with less than 400,000 total employee work hours annually. This immediate review shall:

(i) Not be conducted by the person issuing the challenged directive, or that person's subordinate; and

(ii) Provide that a challenge may be resolved by using the same options available for resolving the challenge as the initial officer as well as the option described in paragraph (d)(2) of this section, except that the reviewing officer's decision shall not be subject to further immediate review, unless provided for in the railroad's or employer's written procedures;

(2) Provide that if the officer making the railroad's or employer's final decision concludes that the challenged directive would not cause the employee to violate any requirement of this subpart or the railroad's or employer's operating rule relied upon to fulfill the requirements of this subpart and directs the employee to perform the challenged directive, the officer shall further explain to the employee that Federal law may protect the employee from retaliation if the employee refuses to do the work and if the employee's refusal is a lawful, good faith act;

(3) Provide that the employee be afforded an opportunity to document electronically or in writing any protest to the railroad or employer's final decision before the tour of duty is complete. The employee shall be afforded the opportunity to retain a copy of the protest;

(4) Provide that the employee, upon written request, has a right to further review by a designated railroad or employer officer, within 30 days after the expiration of the month during which the challenge occurred, for the purpose of verifying the proper application of the regulation, law, procedure or rule in question. The verification decision shall be made in writing to the employee.

(e) *Recordkeeping and record retention.* (1) A copy of the written procedures required by this section shall be retained at the employer or railroad's system headquarters and at each division headquarters, and made available to representatives of the FRA for inspection and copying during normal business hours.

(2) A copy of any written good faith challenge verification decision, made in accordance with paragraph (d)(4) of this section, shall be retained at the employer or railroad's system headquarters and at the division headquarters to which the employee was working when the challenge was initiated, and made available to representatives of the FRA for inspection and copying during normal business hours for at least one calendar year after expiration of the year during which the decision was issued.

(3) Each employer or railroad to which this subpart applies is authorized to retain by electronic recordkeeping the information prescribed in this subpart in accordance with the electronic recordkeeping standards set forth in § 217.9(g)(1) through (5) of this chapter.

§ 218.99 Shoving or pushing movements.

(a)(1) Each railroad shall adopt and comply with an operating rule which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(2) The following requirements for shoving or pushing movements do not apply to rolling equipment intentionally shoved or pushed to permit the rolling equipment to roll without power attached, i.e., free rolling equipment, during switching activities known as kicking, humping, or dropping cars.

(b) *General movement requirements.*—(1) *Job briefing.* Rolling equipment shall not be shoved or pushed until the locomotive engineer participating in the move has been briefed by the employee who will direct the move. The job briefing shall include the means of communication to be used between the locomotive engineer and the employee directing the move and how point protection will be provided.

(2) *No unrelated tasks.* During the shoving or pushing movement, the employee directing the movement shall not engage in any task unrelated to the oversight of the shoving or pushing movement.

(3) *Point protection.* When rolling equipment or a lite locomotive consist is shoved or pushed, point protection shall be provided by a crewmember or other qualified employee by:

(i) Visually determining that the track is clear. The determination that the track is clear may be made with the aid of monitored cameras or other technological means, provided that it and the procedures for use provide an equivalent level of protection to that of a direct visual determination by a crewmember or other qualified employee properly positioned to make the observation as prescribed in this section and appendix D to this part; and

(ii) Giving signals or instructions necessary to control the movement.

(c) *Additional requirements for remote control movements.* All remote control movements are considered shoving or pushing movements, except when the remote control operator controlling the movement is riding the leading end of the leading locomotive in a position to visually determine conditions in the direction of movement. In addition to the other requirements of this section,

(1) When initiating a remote control shoving or pushing movement:

(i) The remote control operator shall visually determine the direction the equipment moves; or

(ii) A member of the crew shall visually determine the direction the equipment moves and confirm the direction with the remote control operator. If no confirmation is received, the movement shall be immediately stopped; and

(2) If technology is relied upon, whether primarily or as a safeguard, to provide pull-out protection by preventing the movement from exceeding the limits of a remote control zone, the technology shall be demonstrated

(i) To be failsafe; or

(ii) To provide suitable redundancy to prevent unsafe failure.

(d) *Remote control zone, exception to track is clear requirements.* After an

initial track is clear determination has been made in an activated remote control zone, it is not necessary to make a new determination prior to each subsequent shoving or pushing movement provided that:

(1) The controlling locomotive of the remote control movement is on the leading end in the direction of movement, i.e., the movement occurs on the pull-out end;

(2) The remote control zone is not jointly occupied; and

(3) The initial determination was made by a crewmember of either:

(i) The remote control crew;

(ii) A relieved remote control crew who has transferred the remote control zone directly to the relieving crew; or

(iii) The last jointly occupying crew who directly communicates, i.e., not through a third party, to a remote control crewmember that the remote control zone is no longer jointly occupied and meets the requirements for track is clear.

(e) *Operational exceptions.* A railroad does not need to comply with paragraphs (b) through (d) of this section in the following circumstances:

(1) Push-pull operations when operated from the leading end in the direction of movement, i.e., push mode;

(2) Shoving or pushing operations with manned helper locomotives or distributed power locomotives assisting a train when the train is being operated from the leading end in the direction of movement;

(3) During the performance of roadway maintenance activity under the direct control of a roadway worker performing work in accordance with railroad operating rules specific to roadway workers; or

(4) When the leading end of a shoving movement is on a main track or signaled siding, under the following conditions:

(i) The train dispatcher gives authority or permission to make the movement and verifies that:

(A) Another movement or work authority is not in effect within the same or overlapping limits unless conflicting movements are protected; and

(B) A main track is not removed from service by a work authority within the same or overlapping limits;

(ii) Movement is limited to the train's authority;

(iii) Movement shall not be made into or within yard limits, restricted limits, drawbridges, or work authority limits;

(iv) Movement shall not enter or foul a highway-rail grade crossing or pedestrian crossing except when:

(A) Crossing gates are in the fully lowered position; or

(B) A designated and qualified employee is stationed at the crossing and has the ability to communicate with trains; or

(C) At crossings equipped only with flashing lights or passive warning devices, when it is clearly seen that no traffic is approaching or stopped at the crossing and the leading end of the movement over the crossing does not exceed 15 miles per hour; and

(v) Movement shall not be made into or within interlocking limits or controlled point limits unless the following conditions are met:

(A) The signal governing movement is more favorable than restricting aspect;

(B) Each signal governing movement into and through interlocking limits or controlled point limits shall be continuously observed by a member of that crew who is in a position to determine that the train's movement has occupied the circuit controlling that signal as evidenced by that signal assuming its most restrictive aspect; and

(C) The movement does not exceed the train's length.

§ 218.101 Leaving rolling and on-track maintenance-of-way equipment in the clear.

(a) Each railroad shall adopt and comply with an operating rule which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Rolling and on-track maintenance-of-way equipment shall not be left where it will foul a connecting track unless:

(1) The equipment is standing on a main track and a siding track switch that the equipment is fouling is lined for the main track on which the equipment is standing; or

(2) The equipment is standing on a siding and a main track switch that the equipment is fouling is lined for the siding on which the equipment is standing; or

(3) The equipment is standing on a yard switching lead track, and the yard track switch that the equipment is fouling is lined for the yard switching lead track on which the equipment is standing; or

(4) The equipment is on an industry track beyond the clearance point of the switch leading to the industry.

(c) Each railroad shall implement procedures that enable employees to identify clearance points and a means to identify locations where clearance points will not permit a person to safely ride on the side of a car.

§ 218.103 Hand-operated switches, including crossover switches.

(a)(1) Each railroad shall adopt and comply with an operating rule which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(2) Each railroad shall specify minimum requirements necessary for an adequate job briefing.

(b) *General.* Employees operating or verifying the position of a hand-operated switch shall:

(1) Conduct job briefings, before work is begun, each time a work plan is changed, and at completion of the work;

(2) Be qualified on the railroad's operating rules relating to the operation of the switch;

(3) Be individually responsible for the position of the switch in use;

(4) Visually determine that switches are properly lined for the intended route and that no equipment is fouling the switches;

(5) Visually determine that the points fit properly and the target, if so equipped, corresponds with the switch's position;

(6) After operating a switch and before making movements in either direction over the switch, ensure that the switch is secured from unintentional movement of the switch points;

(7) Ensure that a switch is not operated while rolling and on-track maintenance-of-way equipment is fouling the switch, or standing or moving over the switch; and

(8) After operating a switch, ensure that when not in use, each switch is locked, hooked, or latched, if so equipped.

(c) Rolling and on-track maintenance-of-way equipment shall not foul a track until all hand-operated switches connected with the movement are properly lined, or in the case of hand-operated switches designed and permitted to be trailed through, until the intended route is seen to be clear or the train has been granted movement authority. When a conflicting movement is approaching a hand-operated switch, the track shall not be fouled or the switch operated.

(d) When rolling and on-track maintenance-of-way equipment has entered a track, the hand-operated switch to that track shall not be lined

away from the track until the equipment has passed the clearance point of the track.

§ 218.105 Additional operational requirements for hand-operated main track switches.

(a) Each railroad shall adopt and comply with an operating rule which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) *Designating switch position.* The normal position of a hand-operated main track switch shall be designated by the railroad in writing and the switch shall be lined and locked in that position when not in use except when:

(1) The train dispatcher directs otherwise with respect to the position of a hand-operated main track switch and the necessary protection is provided; or

(2) The hand-operated switch is left in the charge of a crewmember of another train, a switchtender, or a roadway worker in charge.

(c) *Additional job briefing requirements for hand-operated main track switches.*

(1) Before a train or a train crew leaves the location where any hand-operated main track switch was operated, all crewmembers shall have verbal communication to confirm the position of the switch.

(2) In the case of exclusive track occupancy authority established under § 214.321, foul time under § 214.323, or train coordination under § 214.325, when a roadway worker qualified to operate hand-operated main track switches is granted permission by the roadway worker in charge to occupy or otherwise use the limits of the exclusive track occupancy, such employee receiving permission to occupy the working limits shall report the position of any such switches operated upon expiration of the authority limits to the roadway worker in charge or to a designated intermediary employee who shall convey the switch position to the roadway worker in charge.

(d) *Releasing Authority Limits.* In non-signaled territory, before an employee releases the limits of a main track authority and a hand-operated switch is used to clear the main track, and, prior to departing the switch's location, the following conditions are required:

(1) The employee releasing the limits, after conducting a job briefing in accordance with this subpart, shall report to the train dispatcher that the hand-operated main track switch has been restored to its normal position and locked, unless the train dispatcher directs that the hand-operated main track switch be left lined and locked in the reverse position and the necessary protection is provided;

(2) If the report of the switch position is correct, the train dispatcher shall repeat the reported switch position information to the employee releasing the limits and ask whether that is correct; and

(3) The employee releasing the limits shall then confirm to the train dispatcher that this information is correct.

§ 218.107 Additional operational requirements for hand-operated crossover switches.

(a) Each railroad shall adopt and comply with an operating rule which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) *Hand-operated crossover switches, generally.* Both hand-operated switches of a crossover shall be properly lined before rolling and on-track maintenance-of-way equipment begins a crossover movement. A crossover movement shall be completed before either hand-operated crossover switch is restored to normal position.

(c) *Correspondence of hand-operated crossover switches.* Hand-operated crossover switches shall be left in corresponding position except when:

(1) Used to provide blue signal protection under § 218.27 of this part; or

(2) Used for inaccessible track protection under § 214.327 of this chapter; or

(3) Performing maintenance, testing or inspection of crossover switches in traffic control system (TCS) territory; or

(4) One crew is using both tracks connected by the crossover during continuous switching operations.

§ 218.109 Hand-operated fixed derails.

(a)(1) Each railroad shall adopt and comply with an operating rule which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of an operating rule which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(2) Each railroad shall specify minimum requirements necessary for an adequate job briefing.

(b) *General.* (1) The normal position of fixed derails is in the derailing position except as provided in part 218, subpart B of this chapter, or the railroad's operating rules or special instructions.

(2) Fixed derails shall be kept in the derailing position whether or not any rolling and on-track maintenance-of-way equipment is on the tracks they protect, except as provided in paragraph (b)(1) of this section or when changed to permit movement.

(3) Movement must not be made over a fixed derail in the derailing position.

(c) Employees operating or verifying the position of a fixed derail shall:

(1) Conduct job briefings, before work is begun, each time a work plan is changed, and at completion of the work;

(2) Be qualified on the railroad's operating rules relating to the operation of the derail;

(3) Be individually responsible for the position of the derail in use;

(4) Determine that the target, if so equipped, corresponds with the derail's position;

(5) Determine that the derail is secured by:

(i) Placing the throw lever in the latch stand, if so equipped;

(ii) Placing the lock or hook in the hasp, if so equipped; and

(iii) Testing such latches, locks or hooks; and

(6) Ensure that when not in use, derails are locked, hooked, or latched in the normal position if so equipped.

■ 12. Appendix A to part 218 is amended by adding entries for subpart F, consisting of §§ 218.95, 218.97, 218.99, 218.101, 218.103, 218.105, 218.107 and 218.109, to read as follows:

APPENDIX A TO PART 218—SCHEDULE OF CIVIL PENALTIES

Section	Violation	Willful violation
* * * * * * *		
Subpart F—Handling Equipment, Switches and Derails: 218.95 Instruction, Training, and Examination:		
(a) Program	9,500–12,500	13,000–16,000
(b) Records	7,500	11,000
(c) Failure to timely or appropriately amend program after disapproval	9,500–12,500	13,000–16,000
218.97 Good Faith Challenge Procedures:		
(a) Employee Responsibility Failure	.....	5,000
(b) through (d) Failure to adopt or implement procedures	7,500	.....
218.99 Shoving or Pushing Movements:		
(a) Failure to implement required operating rule	9,500	.....
(b) Failure to conduct job briefing, use a qualified employee, or establish proper protection	7,500–9,500	11,000–13,000
(c) Failure to observe equipment direction	9,500	13,000
(d) Failure to properly establish point protection within a remote control zone	9,500	13,000
(e) Failure to abide by operational exception requirements	9,500	13,000
218.101 Leaving Equipment in the Clear:		
(a) Failure to implement required operating rule	9,500	.....
(b) Equipment left improperly fouling	9,500	13,000
(c) Failure to implement procedures for identifying clearance points	9,500	13,000
218.103 Hand-operated switches, including crossover switches:		
(a) Failure to implement required operating rule	9,500	.....
(b) through (d) Railroad and employee failures	7,500	.....
218.105 Additional operational requirements for hand-operated main track switches:		
(a) Failure to implement required operating rule	9,500	.....
(b) and (c) Railroad and employee failures	7,500	11,000
(d) Failure to properly release authority limits	12,500	.....
218.107 Additional operational requirements for hand-operated crossover switches:		
(a) Failure to implement required operating rule	9,500	.....
(b) and (c) Railroad and employee failures	7,500	11,000
218.109 Hand-operated fixed derails:		
(a) Failure to implement required operating rule	9,500	13,000
(b) and (c) Railroad and employee failures	7,500	11,000

■ 13. Appendix D to Part 218 is added to read as follows:

Appendix D to Part 218—Requirements and Considerations for Implementing Technology Aided Point Protection

Introduction

This appendix provides further explanation and requirements for exercising the option to provide point protection with the aid of technology as permitted in § 218.99(b)(3)(i). The regulation permits the visual determination necessary to provide point protection, i.e., a determination that the track is clear, for a shoving or pushing movement to ''be made with the aid of monitored cameras or other technological means, provided that it and the procedures for use provide an equivalent level of protection to that of a direct visual determination by a crewmember or other qualified employee properly positioned to make the observation as prescribed in this section and appendix D to this part.'' This appendix addresses the general requirements and considerations for all technology aided point protection as well as specific additional requirements for those operations involving remote control operations at public highway-rail grade crossings, private highway-rail grade crossings outside the physical confines of a railroad yard, pedestrian crossings outside the physical confines of a railroad yard, and yard Access Crossings.

I. General Requirements and Considerations

A. Although railroading is now one of the nation's older forms of mechanized transportation, equipment, components and operations all have evolved through new and improved technologies. Installing cameras in yards so that a location could be remotely monitored from somewhere else has become a railroading reality as cameras have become smaller, less expensive, and have increased resolution. It is possible to set up these cameras and monitors so that they provide at least an equivalent level of safety to that of an employee protecting the point. Part 218, subpart F permits such an operation to substitute for an employee's direct visual determination where the technology provides an equivalent level of protection to that of a direct visual determination. *See* § 218.99(b)(3)(i). Of course, to provide an equivalent level of protection, an employee needs to be properly qualified (*see* § 218.95(a)(2)) and the technology must work as intended. Most malfunctions of the technology should be detectable, and result in abandoning the use of the technology for determining point protection until the malfunction can be corrected.

B. The substitution of such technology for a direct visual determination is dependent on many factors. Each situation will have its own particular factual circumstances that shall require consideration in determining whether an equivalent level of safety can be achieved. For instance, with regard to the basic camera setup, a railroad shall consider whether an operator must see in color (largely a necessity if viewing signals), the width of the angle of view, the size and location of the monitor, whether the technology is for day-time use only, and whether its use should be limited to fair weather conditions. However, under all circumstances, the monitor shall display sufficient information to enable the viewer to make a determination that the track ahead of the shoving or pushing move is clear pursuant to the definition of ''track is clear'' in § 218.93.

C. Each railroad that chooses to implement such camera/monitor setups shall implement attendant procedures and qualify each employee who will be utilizing the technology. Railroads shall ensure that any monitored camera has sufficient resolution and real time coverage to provide protection equal to a direct visual determination. *See* § 218.99(b)(3)(i). Concerning attendant procedures, one such procedure may be for an employee viewing a monitor to communicate updates to the locomotive engineer or controlling crewmember at appropriate intervals. FRA equates the employee monitoring the camera to the employee controlling the movement who must not engage in any task unrelated to the oversight of the movement; thus, each railroad utilizing such cameras shall implement attendant procedures limiting any of the monitoring employee's ancillary duties that might distract from the employee's ability to visually determine that the track is clear and provide continuous communication to the employee controlling the movement.

D. There is also the consideration of whether the person viewing the monitor is

the locomotive engineer, remote control operator, other crewmember or other qualified person, such as a yardmaster. If the monitor is not being viewed by the operator who is controlling the movement, then, there shall be a clear understanding and channel of communication between the operator and the employee who is viewing the monitor—as the latter would be protecting the movement. Providing an equivalent level of protection to that of a direct visual determination requires a thorough job briefing in which there is an understanding of who is observing the movement, what is the observer's range of vision, at what locomotive speed can the observation be made and how information will be conveyed to the operator/engineer, if that person is not the one viewing the monitor.

E. There may be occasions when a railroad finds it advantageous to use a non-crewmember, e.g., a yardmaster, to provide point protection, line switches, or check the status of a derail for a remote control crew; however, several potential problems may result when non-crewmembers are used to carry out some crewmember functions. Of foremost concern is the great potential for an error in communication or a misunderstanding between the non-crewmember and the crewmembers regarding the activity or status of equipment. A yardmaster who is occupied with his or her other responsibilities might not give the task the attention it deserves, or could be distracted and give an incorrect answer to a question by a crewmember (e.g., ''is the move lined?''). The result could be that the task does not get completed or there is an error in task execution. Further, the crewmembers might not have any alternative way of determining that there is a problem with the point protection provided by the non-crewmember until it is too late. Consequently, to the extent they will be called upon to perform these duties, each railroad shall include yardmasters and other non-crewmembers in any operating rule promulgated in accordance with § 218.99(b)(2).

II. Additional Requirements for Remote Control Locomotive Operations at Highway-Rail Grade Crossings, Pedestrian Crossings, and Yard Access Crossings

A. In addition to the general requirements and considerations for all technology aided point protection in lieu of direct visual determinations, additional requirements are necessary to address concerns specific to the use of camera/monitor setups for remote control locomotive operations to protect the point at highway-rail grade crossings, pedestrian crossings, and yard access crossings. Railroad operating rules currently permit a movement to travel over a crossing without the physical presence of a crewmember if a crossing is equipped with gates, if it can be determined that the gates are in the fully lowered position, and if the crossing is clear of vehicles and pedestrians. Remote control movements at highway-rail grade crossings, pedestrian crossings, and yard access crossings that utilize camera/monitor setups pose a greater direct risk to members of the general public than yard movements utilizing camera/monitor setups to check whether a track is clear. In addition, such setups can rapidly develop problems with motor vehicles and pedestrians unaccustomed to railroad operating rules and procedures. For these reasons, additional safeguards are necessary.

B. In consideration of the dangers posed by the use of camera/monitor setups for remote control locomotive operations at highway-rail grade crossings, pedestrian crossings, and yard access crossings, the following procedures shall be complied with in order to establish an equivalent means of safety in accordance with § 218.99(b)(3)(i):

1. Before camera-assisted remote control locomotive operations are permitted at highway-rail grade crossings, pedestrian crossings, and yard access crossings, a Crossing Diagnostic Team shall evaluate the crossing. The diagnostic team shall have representatives from the railroad, FRA, the State department of transportation (or another State agency having jurisdiction over the highway-rail grade crossing, pedestrian crossing, or yard access crossing), and local government authorities. The diagnostic team shall evaluate the suitability of each crossing for remote camera operations. Among the factors it shall consider are the following: the average annual daily traffic counts; the number of highway lanes; highway speed limits; the presence of adjacent signalized highway intersections; the number of railroad tracks; the angle of the roadway intersection; the volume of school bus, transit bus, emergency vehicle, commercial motor vehicle, and hazardous materials traffic over the crossing; the minimum remote control locomotive operator sight distances of roadway approaches to the crossing; and other relevant factors that could affect the safety of the crossing. The diagnostic team shall also consider the appropriate number of cameras and appropriate camera angles needed to provide for the remote operation of remote control locomotives over the crossing. The diagnostic team shall agree to a written diagnostic evaluation summary of the factors considered and shall provide the railroad with agreed upon parameters by which the camera-assisted remote control operation may continue in operation if the factors required for suitability change; thus, any change in the factors considered by the diagnostic team outside of the acceptable parameters shall require the railroad to receive a revised evaluation approval from a diagnostic team before continuing any such operation. In addition, any of the Federal, State, or local governmental authorities may trigger review of a prior evaluation approval at any time there is a question of the suitability of the operation. It is possible that, of the requirements listed below, requirements numbered 2, 4, 5, and 6 would be unnecessary at highway-rail grade crossings or yard access crossings equipped with approved supplemental safety devices (*see* 49 CFR part 222, app. A) that prevent motorists from driving around lowered gates; under such circumstances, the diagnostic team shall make such determinations. If a Crossing Diagnostic Team, as described in this paragraph, evaluated a crossing for the factors described herein, prior to April 14, 2008, another diagnostic team evaluation is not required to comply with this rule; however, the requirements listed below shall still apply to any such remotely controlled movements over that crossing.

2. Camera-assisted remote control locomotive operations shall only be permitted at crossings equipped with flashing lights, gates, and constant warning time train detection systems where appropriate, based on train speeds.

3. A crewmember or other qualified employee shall not view the monitor in place of the remote control operator, as is permitted for other shoving or pushing movements. *See* § 218.99(b)(3). For purposes of remote control locomotive operations with camera/monitor setups to protect the point at highway-rail grade crossings, pedestrian crossings, and yard access crossings, the remote control operator controlling the movement shall view the monitor during such operations.

4. The cameras shall be arranged to give the remote control locomotive operator controlling the movement a view of the rail approaches to the crossing from each direction so that the operator can accurately judge the end of the movement's proximity to the crossing.

5. The cameras shall be arranged to give the remote control locomotive operator a clear view to determine the speed and driver behavior (e.g., driving erratically) of any approaching motor vehicles.

6. Either the camera resolution shall be sufficient to determine whether the flashing lights and gates are working as intended or the crossing shall be equipped with a remote health monitoring system that is capable of notifying the remote control locomotive operator immediately if the flashing lights and gates are not working as intended.

7. The railroad shall notify the Associate Administrator for Safety in writing when this type of protection has been installed and activated at a crossing.

III. Conclusion

The technology used to aid point protection will undoubtedly develop and improve over time. FRA encourages the use and development of this technology as is evidenced by the option in this rule to utilize such technology. Meanwhile, as a regulating body, FRA cannot determine whether a new technology to aid point protection provides an equivalent level of protection to that of a direct visual determination unless we are made aware of the new technology. Consequently, aside from the camera/monitor setups described in this appendix, each railroad that intends to implement a technology used to aid point protection shall notify the Associate Administrator for Safety in writing of the technology to be used prior to implementation.

Issued in Washington, DC, on January 29, 2008.

Joseph H. Boardman,

Administrator.

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Federal Register

Wednesday,
February 13, 2008

Part IV

Nuclear Regulatory Commission

10 CFR Parts 170 and 171
Revision of Fee Schedules; Fee Recovery for FY 2008; Proposed Rule

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

RIN 3150–AI28

Revision of Fee Schedules; Fee Recovery for FY 2008

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend the licensing, inspection, and annual fees charged to its applicants and licensees. The proposed amendments are necessary to implement the Omnibus Budget Reconciliation Act of 1990 (OBRA–90), as amended, which requires that the NRC recover approximately 90 percent of its budget authority in fiscal year (FY) 2008, less the amounts appropriated from the Nuclear Waste Fund (NWF), amounts appropriated for Waste Incidental to Reprocessing (WIR), and amounts appropriated for generic homeland security activities. Based on the Consolidated Appropriations Act, 2008 (Pub. L. 110–161), signed by the President on December 26, 2007, the NRC's required fee recovery amount for the FY 2008 budget is approximately $779.1 million. After accounting for carryover and billing adjustments, the total amount to be billed as fees is approximately $760.7 million.

DATES: The comment period expires March 14, 2008. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure only that comments received on or before this date will be considered. Because OBRA–90 requires that the NRC collect the FY 2008 fees by September 30, 2008, requests for extensions of the comment period will not be granted.

ADDRESSES: You may submit comments by any one of the following methods. Please include number RIN 3150–AI28 in the subject line of your comments. Comments on rulemakings submitted in writing or in electronic form will be made available to the public in their entirety on the NRC rulemaking Web site. Personal information will not be removed from your comments.

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

E-mail comments to: Rulemaking.Comments@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at (301) 415–1677. You may also submit comments via the Federal eRulemaking Portal at *http://www.regulations.gov*. Address questions about this Web site to Ms. Carol Gallagher, 301–415–5905; e-mail *CAG@nrc.gov*.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. Federal workdays. (Telephone 301–415–1677.)

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), Room 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 *http://www.regulations.gov*.

To obtain additional information on the NRC's FY 2008 budget request, commenters and others may review NUREG–1100, Volume 23, ''Performance Budget: Fiscal Year 2008'' (February 2007), which describes the NRC's budget for FY 2008, including the activities to be performed in each program. This document is available on the NRC's public Web site at *http://www.nrc.gov/reading-rm.html*. Note, however, that NUREG–1100, Volume 23, is based on the NRC's FY 2008 budget request to Congress, and that the fees in this rulemaking are based on the NRC appropriation in the Consolidated Appropriations Act, 2008 (Pub. L. 110–161) which includes an additional approximately $9.5 million above the NRC's budget request. The allocation of the Public Law 110–161 budget to planned activities within each program, and to each fee class and surcharge category, is included in the publicly available work papers supporting this rulemaking.

Publicly available documents created or received at the NRC after November 1, 1999, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html*. From this site, the public can gain entry into the NRC's Agencywide Documents 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 PDR Reference staff at 1–800–397–4209; 301–415–4737 or by e-mail at *pdr@nrc.gov*.

FOR FURTHER INFORMATION CONTACT: Renu Suri, telephone 301–415–0161; Office of the Chief Financial Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Background
II. Proposed Action
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VI. Paperwork Reduction Act Statement
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I. Background

The NRC is required each year, under OBRA–90, as amended, (42 U.S.C. 2214) to recover approximately 90 percent of its budget authority, less the amounts appropriated from the NWF, amounts appropriated for WIR, and amounts appropriated for generic homeland security activities (''non-fee items''), through fees to NRC licensees and applicants. The NRC receives from the general fund each year, 10 percent of its budget authority (less non-fee items) to pay for the cost of agency activities that do not provide a direct benefit to NRC licensees, such as international assistance and Agreement State activities under section 274 of the Atomic Energy Act of 1954, as amended.

The NRC assesses two types of fees to meet the requirements of OBRA–90, as amended. First, license and inspection fees, established in 10 CFR part 170 under the authority of the Independent Offices Appropriation Act of 1952 (IOAA), 31 U.S.C. 9701, recover the NRC's cost of providing special benefits to identifiable applicants and licensees. Examples of the services provided by the NRC for which these fees are assessed include the review of applications for new licenses and the review of renewal applications, the review of license amendment requests, and inspections. Second, annual fees established in 10 CFR part 171 under the authority of OBRA–90, as amended, recover generic and other regulatory costs not otherwise recovered through 10 CFR part 170 fees.

Based on Public Law 110–161, the NRC's required fee recovery amount for the FY 2008 budget is approximately $779.1 million, which is decreased by approximately $18.4 million to account for billing adjustments (i.e. carryover from prior year, expected unpaid invoices, payments for prior year invoices), resulting in a total of

approximately $760.7 million to be billed as fees in FY 2008.

In accordance with OBRA–90, as amended, $29.4 million of the budgeted resources associated with generic homeland security activities are excluded from the NRC's fee base in FY 2008. This legislative provision was discussed in the NRC's FY 2006 proposed and final fee rules (71 FR 7349, February 10, 2006; 71 FR 30721, May 30, 2006). These funds cover generic activities that support an entire license fee class or classes of licensees such as rulemakings and guidance development. Under the authority of the IOAA, the NRC will continue to bill under part 170 for all licensee-specific homeland security-related services provided, including security inspections and security plan reviews.

The amount of the NRC's required fee collections is set by law, and is therefore outside the scope of this rulemaking. In FY 2008, the NRC's total fee recovery amount increased by $109.8 million from FY 2007, mostly in response to increased workload for new reactor licensing activities. The FY 2008 budget was allocated to the fee classes that the budgeted activities support. As such, the proposed annual fees for reactor licensees increased. The proposed annual fees for most other licensees decreased due to reductions in budgeted resources allocated to the fee classes. Another factor affecting the amount of annual fees for each fee class is the estimated collection under part 170, discussed in the Proposed Action section of this document.

II. Proposed Action

The NRC is proposing to amend its licensing, inspection, and annual fees to recover approximately 90 percent of its FY 2008 budget authority less the appropriations for non-fee items. The NRC's total budget authority for FY 2008 is $926.1 million. The non-fee items include approximately $29 million appropriated from the NWF, $2 million for WIR activities, and $29.4 million for generic homeland security activities. Based on the 90 percent fee-recovery requirement, the NRC must recover approximately $779.1 million in FY 2008 through part 170 licensing and inspection fees and part 171 annual fees. The amount required by law to be recovered through fees for FY 2008 is $109.8 million more than the amount estimated for recovery in FY 2007, an increase of approximately 16.4 percent.

The FY 2008 fee recovery amount decreased by $5 million to account for billing adjustments (i.e., for FY 2008 invoices that the NRC estimates will not be paid during the fiscal year, less payments received in FY 2008 for FY 2007 invoices). The FY 2008 fee recovery amount is also reduced by approximately $13.3 million carryover from additional collections in FY 2007 that were unanticipated when the final FY 2007 fee rule was published. This leaves approximately $760.7 million to be billed as fees in FY 2008 through part 170 licensing and inspection fees and part 171 annual fees.

Table I summarizes the budget and fee recovery amounts for FY 2008 (Individual values may not sum to totals due to rounding.)

TABLE I.—BUDGET AND FEE RECOVERY AMOUNTS FOR FY 2008

[Dollars in millions]

Total Budget Authority	$926.1
Less non-fee items	−60.4
Balance	$865.7
Fee Recovery Rate for FY 2008	× 90.0%
Total Amount to be Recovered for FY 2008	$779.1
Less Carryover from FY 2007	−13.3
Less Part 171 Billing Adjustments:	
Unpaid FY 2008 Invoices (estimated)	2.7
Less Payments Received in FY 2008 for Prior Year Invoices (estimated)	−7.8
Subtotal	−18.4
Amount to be Recovered Through Parts 170 and 171 Fees	$760.7
Less Estimated Part 170 Fees	−283.5
Part 171 Fee Collections Required	$477.2

Approximately 76 percent of the $13.3 million carryover amount was for unpredicted FY 2007 part 170 revenues for licensing and inspection services. At the time the FY 2007 final fee rule was published, NRC estimated the part 170 revenues based on billings for the prior four quarters. The rate of actual billings and revenues for the remainder of FY 2007 was higher than expected. Some of the factors contributing to the greater than estimated part 170 revenue collections were higher billings for review of design certifications and pre-application interactions related to new reactors, and materials licensing reviews billed to government agencies for the first time. In August 2007, NRC began billing government agencies in accordance with the Energy Policy Act of 2005 (also see 71 FR 30731; May 30, 2006, for more discussion). The remainder of the $13.3 million carryover amount resulted from higher annual fees collected in FY 2007. Some of the factors for the higher collections were timing of the effective date of the FY 2007 fee rule, and collections for prior years. The FY 2007 fee rule went into effect August 6, 2007 with reduced fee amounts for most of the materials licensees. A majority of these licensees paid their fees on their anniversary month during FY 2007, based on the FY 2006 fee schedule (which had higher fees). This resulted in higher fee collections in FY 2007. NRC also collected greater than expected annual fees due to billings for prior years which were identified in FY 2007.

For FY 2008, the $13.3 million carryover amount will offset the fees statutorily required to be collected resulting in reductions in the annual fee for all fee classes. In addition, part 170 revenue estimates have been adjusted to reflect the current rate of billings to licensees.

The NRC estimates that in FY 2008 approximately $283.5 million will be recovered from part 170 fees. This

represents an increase of approximately 33 percent as compared to the actual part 170 collections of $213.7 million for FY 2007. The NRC derived the FY 2008 estimate of part 170 fee collections based on the previous four quarters of billing data for each license fee class, with adjustments to account for changes in the NRC's FY 2008 budget, as appropriate. The remaining $477.2 million will be recovered through the part 171 annual fees in FY 2008, compared to $465.3 million for FY 2007, an increase of approximately 2.6 percent.

The FY 2008 final fee rule will be a ''major rule'' as defined by the Congressional Review Act of 1996, 5 U.S.C. 801–808. Therefore, the NRC's fee schedules for FY 2008 will become effective 60 days after publication of the final rule in the **Federal Register**. The NRC will send an invoice for the amount of the annual fee to reactors, part 72 licensees, major fuel cycle facilities, and other licensees with annual fees of $100,000 or more, upon publication of the FY 2008 final rule. For these licensees, payment is due on the effective date of the FY 2008 final rule. Because these licensees are billed quarterly, the payment due is the amount of the total FY 2008 annual fee, less payments made in the first three quarters of the fiscal year.

Materials licensees with annual fees of less than $100,000 are billed annually. Those materials licensees whose license anniversary date during FY 2008 falls before the effective date of the FY 2008 final rule will be billed for the annual fee during the anniversary month of the license at the FY 2007 annual fee rate. Those materials licensees whose license anniversary date falls on or after the effective date of the FY 2008 final rule will be billed for the annual fee at the FY 2008 annual fee rate during the anniversary month of the license, and payment will be due on the date of the invoice.

As a matter of courtesy, the NRC plans to continue mailing the proposed fee rule to all licensees, although, as a cost saving measure, in accordance with its FY 1998 announcement, the NRC has discontinued mailing the final fee rule to all licensees. Accordingly, the NRC does not plan to routinely mail the FY 2008 final fee rule or future final fee rules to licensees.

The NRC will send the final rule to any licensee or other person upon specific request. To request a copy, contact the License Fee Team, Division of Financial Management, Office of the Chief Financial Officer, at 301–415–7554, or e-mail *fees@nrc.gov*. The NRC plans to publish the final fee rule no later than June 2008. In addition to publication in the **Federal Register**, the final rule will be available on the Internet at *regulations.gov*.

The NRC is proposing to amend 10 CFR parts 170 and 171 as discussed in Sections II.A and II.B of this document.

A. Amendments to 10 CFR Part 170: Fees for Facilities, Materials, Import and Export Licenses, and Other Regulatory Services Under the Atomic Energy Act of 1954, as Amended

The NRC FY 2007 fee rule established one hourly rate to recover the full cost of activities under part 170, and to use this rate to calculate ''flat'' application fees. The change from using two hourly rates to one hourly rate was discussed in the NRC's FY 2007 proposed and final fee rules (72 FR 5110, February 2, 2007; 72 FR 31405, June 6, 2007).

The NRC is proposing the following changes:

1. Hourly Rate

The NRC's hourly rate is used in assessing full cost fees for specific services provided, as well as flat fees for certain application reviews. The NRC is proposing to change the FY 2008 hourly rate to $238. This rate would be applicable to all activities for which fees are assessed under § § 170.21 and 170.31. The FY 2008 proposed hourly rate is lower than the hourly rate of $258 in the FY 2007 final fee rule primarily due to the revised higher estimate of direct hours per FTE used in the hourly calculation. The hourly rate calculation is described in further detail in the following paragraphs.

The NRC's single hourly rate is derived by dividing the sum of recoverable budgeted resources for (1) mission direct program salaries and benefits; (2) mission indirect salaries and benefits and contract activity; and (3) agency management and support and IG, by mission direct FTE hours. The only budgeted resources excluded from the hourly rate are those for mission direct contract activities. Although the numerator, i.e. net recoverable budget excluding contract activities, increased by 11 percent as compared with FY 2007, it is lower than the rate of increase in the denominator, i.e. mission direct FTE hours, which increased by 21 percent. This resulted in a lower hourly rate for FY 2008 as compared with FY 2007. The increase in the mission direct FTE hours in FY 2008 compared with FY 2007 is due to the revised higher estimate of direct hours per FTE (1,371 hours vs. 1,287 hours) and increase in direct FTEs (2,079 FTE vs. 1,835 FTE).

The NRC has reviewed data from its time and labor system to determine if the direct hours worked annually per direct FTE estimate requires updating for the FY 2008 fee rule. Based on this review of the most recent data available, the NRC determined that 1,371 hours is the best estimate of direct hours worked annually per direct FTE. This estimate excludes all non-mission direct hours, such as training, general administration, and leave. Because the NRC's hourly rates are calculated by dividing net recoverable budget (excluding contract activities) by the product of budgeted mission direct FTE and annual direct hours per FTE, the higher the number of direct hours per FTE used in the calculation, the lower the hourly rates.

The NRC is proposing to update its hourly rate calculation to reflect its latest estimate of direct hours per FTE to more accurately reflect the NRC's cost of providing part 170 services, which would allow the NRC to more fully recover the cost of these services through part 170 fees. The NRC believes that this is consistent with guidance provided in the Office of Management and Budget Circular A–25 on recovering the full cost of services provided to identifiable recipients. The resulting lower hourly rate would result in both decreased full cost fees for licensing and inspection activities, and decreased materials flat fees for license applications.

Table II shows the results of the hourly rate calculation methodology. (Individual values may not sum to totals due to rounding.)

TABLE II.—FY 2008 HOURLY RATE CALCULATION

Mission Direct Program Salaries & Benefits	$292.6M
Mission Indirect Salaries & Benefits, and Contract Activity	120.7M
Agency Management and Support, and IG	266.2M
Subtotal	$679.5M
Less Offsetting Receipts	−0.0M
Total Budget Included in Hourly Rate	$679.5M
Mission Direct FTEs	2,079
Professional Hourly Rate (Total Budget Included in Hourly Rate divided by Mission Direct FTE times 1,371 hours)	$238

As shown in Table II, dividing the $679.5 million budgeted amount (rounded) included in the hourly rate by total mission direct hours (2,079 FTE times 1,371 hours) results in an hourly rate of $238. The hourly rate is rounded to the nearest whole dollar.

2. ''Flat'' Application Fee Changes

The NRC is proposing to adjust the current flat application fees in §§ 170.21 and 170.31 to reflect the revised hourly rate of $238. These flat fees are calculated by multiplying the average professional staff hours needed to process the licensing actions by the proposed professional hourly rate for FY 2008. The agency estimates the average professional staff hours needed to process licensing actions every other year as part of its biennial review of fees performed in compliance with the Chief Financial Officers Act of 1990. This review was last performed as part of the FY 2007 fee rulemaking. The lower hourly rate of $238 is the main reason for the reduction in the application fees.

The amounts of the materials licensing flat fees are rounded so that the fees would be convenient to the user and the effects of rounding would be ''*de minimis*.'' Fees under $1,000 are rounded to the nearest $10, fees that are greater than $1,000 but less than $100,000 are rounded to the nearest $100, and fees that are greater than $100,000 are rounded to the nearest $1,000.

The proposed licensing flat fees are applicable for fee categories K.1. through K.5. of § 170.21, and fee categories 1.C., 1.D., 2.B., 2.C., 3.A. through 3.S., 4.B. through 9.D., 10.B, 15.A. through 15.R., 16, and 17 of § 170.31. Applications filed on or after the effective date of the FY 2008 final fee rule would be subject to the revised fees in the final rule.

3. Administrative Amendments

The NRC is adding program codes next to the materials users fee categories in § 170.31. When NRC receives a materials users license application, a five-digit program code number is assigned by the agency to each license to designate the major activity or principal use authorized in the license. More than one code may apply to a given license. The fee amount for the license under the 10 CFR parts 170 and 171 is determined by the fee category which is also based on the authorized usage described on the license. To reduce the risk of misinterpretation of material uses authorized in the license while establishing a fee category, the NRC is implementing a process that links a program code directly to a fee category. Once a program code is assigned to the license, it will assist the licensee to correctly identify the fee amount(s) by looking up the program code(s) in § 170.31.

In summary, the NRC is proposing to make the following changes to 10 CFR part 170:

1. Establish revised professional hourly rate to use in assessing fees for specific services;

2. Revise the license application fees to reflect the proposed FY 2008 hourly rate; and

3. Make certain administrative changes for purposes of clarification.

B. Amendments to 10 CFR Part 171: Annual Fees for Reactor Licenses and Fuel Cycle Licenses and Materials Licenses, Including Holders of Certificates of Compliance, Registrations, and Quality Assurance Program Approvals and Government Agencies Licensed by the NRC

The NRC proposes to use its fee relief to reduce all licensees' annual fees and make changes to the number of NRC licensees. This rulemaking also proposes to establish rebaselined annual fees based on the NRC's FY 2008 budget in Public Law 110–161. The proposed amendments are described as follows:

1. Application of ''Fee Relief''

The NRC is proposing to use its fee relief to reduce all licensees' annual fees, based on their percent of the budget.

The NRC applies the 10 percent of its budget that is excluded from fee recovery under OBRA–90, as amended (fee relief), to offset the cost of activities which do not directly benefit current NRC licensees. The cost of these ''surcharge'' activities are totaled, and then reduced by the amount of the NRC's fee relief. Historically, any remaining surcharge cost was allocated to all licensees' annual fees, based on their percent of the budget (i.e., over 80 percent was allocated to power reactors each year).

In FY 2008, the NRC's fee relief exceeds the total surcharge cost by approximately $7.5 million. In FY 2007, this fee relief exceeded the total cost by approximately $9.8 million. The fee relief in FY 2008 is lower compared with FY 2007 primarily due to higher FY 2008 surcharge cost which includes funding of $15 million for scholarships and fellowships. The scholarships and fellowships funding, to be administered by the NRC, is to enable students to pursue education in fields of study that constitute critical skills areas needed to sustain NRC's regulatory mission and benefit the nuclear sector. This $15 million funding for scholarships and fellowships does not directly benefit the existing NRC licensees. Therefore, the NRC has classified it as a surcharge activity to be offset by the fee relief.

As in FY 2007, the NRC is using the $7.5 million fee relief to reduce all licensees' annual fees, based on their percent of the fee recoverable budget authority. This is consistent with the existing fee methodology, in that the benefits of the NRC's fee relief are allocated to licensees in the same manner as cost was allocated when the NRC did not receive enough fee relief to pay for surcharge activities. In FY 2008, the power reactors class of licensees will receive approximately 90 percent of the fee relief based on their share of the NRC fee recoverable budget authority.

The total budgeted resources for the NRC's surcharge activities in FY 2008 are $79.1 million. The NRC's total fee relief in FY 2008 is $86.6 million, leaving $7.5 million in fee relief to be used to reduce all licensees' annual fees. These values are shown in Table III (Individual values may not sum to totals due to rounding.)

TABLE III.—SURCHARGE COSTS

[Dollars in millions]

Category of costs	FY 2008 budgeted costs
1. Activities not attributable to an existing NRC licensee or class of licensee:	
a. International activities	$12.9
b. Agreement State oversight	8.8
c. Scholarships and Fellowships	15.0
2. Activities not assessed part 170 licensing and inspection fees or part 171 annual fees based on existing law or Commission policy:	
a. Fee exemption for nonprofit educational institutions	10.9
b. Costs not recovered from small entities under 10 CFR 171.16(c)	3.8
3. Activities supporting NRC operating licensees and others:	
a. Regulatory support to Agreement States	9.9
b. Generic decommissioning/reclamation (not related to the power reactor and spent fuel storage fee classes)	14.7
c. ISL rulemaking and unregistered general licensees	3.1
Total surcharge costs	79.1
Less 10 percent of NRC's FY 2008 total budget (less NWF, WIR, and generic homeland security activities)	−86.6
Fee Relief to be Allocated to All Licensees' Annual Fees	−7.5

Table IV shows how the NRC is allocating the $7.5 million in fee relief to each license fee class (Individual amounts may not sum to totals due to rounding.) As explained previously, the NRC is allocating this fee relief to each license fee class based on the percent of the budget for that fee class compared to the NRC's total budget. The fee relief is used to partially offset the required annual fee recovery from each fee class. Sections 171.15(d)(1) and 171.16(e) clarify that the surcharge allocated to annual fees may be negative (*i.e.,* an annual fee reduction).

Separately, the NRC has continued to allocate the low level waste (LLW) surcharge costs based on the volume of LLW disposal of certain classes of licenses. Table IV also shows the allocation of the LLW surcharge. Because LLW activities support NRC licensees, the costs of these activities are not offset by the NRC's fee relief. For FY 2008, the LLW surcharge cost is $2.8 million. The annual fee for the materials users fee class includes a surcharge because the LLW surcharge allocated to the fee class is greater than its allocated fee relief.

TABLE IV.—ALLOCATION OF FEE RELIEF AND LLW SURCHARGE

	LLW surcharge		Non-LLW surcharge (fee reduction)		Total
	Percent	$M	Percent	$M	$M
Operating Power Reactors	74	2.1	89.7	−6.7	−4.6
Spent Fuel Storage/Reactor Decommissioning	.....	.....	2.9	−0.2	−0.2
Test and Research Reactors	.....	.....	0.1	0.0	0.0
Fuel Facilities	8	0.2	4.1	−0.3	−0.1
Materials Users	18	0.5	2.6	−0.2	0.3
Transportation	.....	.....	0.3	0.0	0.0
Rare Earth Facilities	.....	.....	0.0	0.0	0.0
Uranium Recovery	.....	.....	0.3	0.0	0.0
Total Surcharge	100	2.8	100.0	−7.5	−4.7

2. Agreement State Activities

By letter dated November 9, 2006, Governor Edward Rendell of the Commonwealth of Pennsylvania requested that the NRC enter into an Agreement with the State as authorized by Section 274 of the Atomic Energy Act of 1954, as amended. The final Agreement package is before the Commission for approval and the Agreement is expected to take effect by March 31, 2008. This will result in the transfer of approximately 650 licenses from the NRC to the Commonwealth of Pennsylvania.

Note that the continuing costs of Agreement State regulatory support and oversight for the Commonwealth of Pennsylvania, as for any other Agreement State, are recovered through the surcharge (as reduced by the 10 percent of its budget that the NRC receives in appropriations each year for these types of activities), consistent with existing policy. The budgeted resources for the regulatory infrastructure to support these types of licensees are prorated to the surcharge based on the percent of total licensees in Agreement States. The NRC proposes to update the allocation percentage in its fee calculation to make sure that resources are allocated equitably between the NRC materials users fee class and the Agreement States surcharge category. Accordingly, in anticipation of the Commonwealth of Pennsylvania becoming an Agreement State, the NRC has increased the percentage of materials users regulatory infrastructure costs prorated to the surcharge category from 80 percent in FY 2007 to 82 percent in FY 2008. However, some resources associated with the materials users fee class are not prorated to the surcharge (e.g., resources for licensing and inspection activities), because these

resources are for the purpose of supporting NRC licensees only.

The number of NRC materials users licensees also has been updated to reflect the transfer of licensees to the Commonwealth of Pennsylvania that is expected to take place effective March 31, 2008. Because of the effective date of March 31, 2008, the approximately 650 licensees transferring to the Commonwealth of Pennsylvania will be subject to one-half of their annual fee for FY 2008. The number of materials users licensees were revised to reflect that NRC will still collect one-half of the annual fee from these licensees. Also, the single NRC rare earth licensee under fee category 2.A.(2)(c) will transfer to the Commonwealth of Pennsylvania. Because no other rare earth facility application is expected for FY 2008, an annual fee was not computed for fee category 2.A.(2)(c). As with other licensees transferring to the Commonwealth of Pennsylvania, in FY 2008, this rare earth facility will pay one-half of the annual fee in effect on its anniversary date in January 2008.

This is not a substantive policy change, but rather a calculation change that will result in a more accurate estimate of the actual costs of Agreement State oversight activities. If the Commonwealth of Pennsylvania does not become an Agreement State by the publication of the final fee rule, the NRC will adjust the calculation of the FY 2008 annual fees based on the latest information available at that time. Any changes will be discussed in the final fee rule.

3. Revised Annual Fees

The NRC is proposing to revise its annual fees in §§ 171.15 and 171.16 for FY 2008 to recover approximately 90 percent of the NRC's FY 2008 budget authority less the non-fee amounts and the estimated amount to be recovered through part 170 fees. The part 170 estimate for this proposed rule increased by $78.4 million from the FY 2007 fee rule based on the latest invoice data available. The total amount to be recovered through annual fees for FY 2008 is $477.2 million. The required annual fee collection in FY 2007 was $465.3 million.

The NRC uses one of two methods to determine the amounts of the annual fees, for each type of licensee, established in its fee rule each year. One method is ''rebaselining,'' for which the NRC's budget is analyzed in detail and budgeted resources are allocated to fee classes and categories of licensees. The second method is the ''percent change'' method, for which fees are revised based on the percent change in the total budget, taking into account other adjustments such as the number of licensees and the projected revenue to be received from part 170 fees.

As explained in the FY 2006 final fee rule (71 FR 30733; May 30, 2006), the Commission has determined that the agency should proceed with a presumption in favor of rebaselining in calculating annual fees each year, and that the percent change method should be used infrequently. This is because the Commission expects that most years there will be budget and other changes that warrant the use of the rebaselining method.

Rebaselining fees results in increased annual fees compared with FY 2007 for two classes of licensees (*power reactors* and *non-power reactors*), and decreased annual fees for four classes of licensees (*spent fuel storage/reactor decommissioning, fuel facilities, materials users,* and *transportation*). Within the uranium recovery fee class, annual fees for the all the non DOE licensees decrease, while annual fee for the DOE increases slightly. There is no annual fee for the rare earth fee class because this NRC fee class will no longer exist in FY 2008. As discussed in Section II.B.2 of this document, ''Agreement State Activities'', NRC's only rare earth facility will transfer to the Commonwealth of Pennsylvania when it becomes an Agreement State, expected to be effective March 31, 2008. In FY 2008, this rare earth facility will pay one-half of the annual fee in effect on its anniversary date.

The significant factors affecting the changes to the annual fee amounts as compared with FY 2007 are the increase in budgeted resources for new reactor activities, higher part 170 revenue estimate, and adjustment for higher prior year fee collections. The NRC's total fee recoverable budget, as mandated by law, is approximately $109.8 million larger in FY 2008 as compared with FY 2007. Because much of this increase is for the additional workload demand in the area of new reactor licensing, this increase mainly affects the operating power reactors' annual fees. Other factors affecting all annual fees include the distribution of budgeted costs to the different classes of licenses (based on the specific activities NRC will perform in FY 2008), the estimated part 170 collections for the various classes of licenses, and allocation of the fee relief to all fee classes. The percentage of the NRC's budget not subject to fee recovery remained unchanged at 10 percent from FY 2007 to FY 2008.

Table V shows the rebaselined annual fees for FY 2008 for a representative list of categories of licenses. The FY 2007 fee is also shown for comparative purposes.

TABLE V.—REBASELINED ANNUAL FEES FOR FY 2008

Class/category of licenses	FY 2007 annual fee	FY 2008 annual fee
Operating Power Reactors (including Spent Fuel Storage/Reactor Decommissioning annual fee)	$4,043,000	$4,237,000
Spent Fuel Storage/Reactor Decommissioning	159,000	140,000
Test and Research Reactors (Non-power Reactors)	76,300	77,400
High Enriched Uranium Fuel Facility	4,096,000	3,082,000
Low Enriched Uranium Fuel Facility	1,237,000	921,000
UF_6 Conversion Facility	811,000	604,000
Conventional Mills	18,700	10,900
Typical Materials Users:		
Radiographers	14,100	11,200
Well Loggers	4,400	3,400
Gauge Users (Category 3P)	2,700	2,100
Broad Scope Medical	29,000	23,000

The budgeted costs allocated to each class of licenses and the calculations of the rebaselined fees are described in paragraphs a. through h. of this Section. The work papers which support this proposed rule show in detail the

allocation of NRC's budgeted resources for each class of licenses and how the fees are calculated. The reports included in these work papers summarize the FY 2008 budgeted FTE and contract dollars allocated to each fee class and surcharge category at the planned activity and program level, and compare these allocations to those used to develop final FY 2007 fees. In FY 2008, NRC has also revised the format of the work papers to make it easier for stakeholders to find the information supporting this proposed fee rule. The sequence of the information in the work papers now matches the sequence in the proposed fee rule. In addition, a brief overview of each of the tabs in the work papers has been added for the reader's convenience. The work papers are available electronically at the NRC's Electronic Reading Room on the Internet at Web site address *http://www.nrc.gov/reading-rm/adams.html*. The work papers may also be examined at the NRC PDR located at One White Flint North, Room O–1F22, 11555 Rockville Pike, Rockville, Maryland.

a. Fuel Facilities.

The FY 2008 budgeted cost to be recovered in the annual fees assessment to the fuel facility class of licenses [which includes licensees in fee categories 1.A.(1)(a), 1.A.(1)(b), 1.A.(2)(a), 1.A.(2)(b), 1.A.(2)(c), 1.E., and 2.A.(1), under § 171.16] is approximately $14.2 million. This value is based on the full cost of budgeted resources associated with all activities that support this fee class, which is reduced by estimated part 170 collections and adjusted to reflect the net allocated fee relief (negative surcharge), allocated generic transportation resources, and carryover. The summary calculations used to derive this value are presented in Table VI for FY 2008, with FY 2007 values shown for comparison (Individual values may not sum to totals due to rounding.)

TABLE VI.—ANNUAL FEE SUMMARY CALCULATIONS FOR FUEL FACILITIES

[Dollars in millions]

Summary fee calculations	FY 2007 final	FY 2008 proposed
Total budgeted resources	$32.2	$31.5
Less estimated part 170 receipts	−13.6	−17.0
Net part 171 resources	18.6	14.5
Allocated generic transportation	+ 0.5	+ 0.6
Allocated surcharge	−0.2	−0.1
Billing adjustments (including carryover)	+ 0.1	−0.8
Total required annual fee recovery	18.9	14.2

The decrease in fuel facilities FY 2008 total budgeted resources allocated to this fee class compared with FY 2007 is due to lower fuel facility resources for licensing activities, higher part 170 revenue estimate, and adjustment for higher carryover. The part 170 revenue estimate for FY 2008 increased by 25 percent compared with FY 2007 due to increased billing for fuel facilities. This results in lower FY 2008 annual fees for fuel facilities in this fee rule.

The total required annual fee recovery amount is allocated to the individual fuel facility licensees based on the effort/fee determination matrix developed for the FY 1999 final fee rule (64 FR 31447; June 10, 1999). In the matrix included in the NRC publicly available work papers, licensees are grouped into categories according to their licensed activities (*i.e.,* nuclear material enrichment, processing operations, and material form) and according to the level, scope, depth of coverage, and rigor of generic regulatory programmatic effort applicable to each category from a safety and safeguards perspective. This methodology can be applied to determine fees for new licensees, current licensees, licensees in unique license situations, and certificate holders.

This methodology is adaptable to changes in the number of licensees or certificate holders, licensed or certified material and/or activities, and total programmatic resources to be recovered through annual fees. When a license or certificate is modified, it may result in a change of category for a particular fuel facility licensee as a result of the methodology used in the fuel facility effort/fee matrix. Consequently, this change may also have an effect on the fees assessed to other fuel facility licensees and certificate holders. For example, if a fuel facility licensee amends its license/certificate (*e.g.,* decommissioning or license termination) that results in it not being subject to part 171 costs applicable to the fee class, then the budgeted costs for the safety and/or safeguards components will be spread among the remaining fuel facility licensees/certificate holders.

The methodology is applied as follows. First, a fee category is assigned based on the nuclear material and activity authorized by license or certificate. Although a licensee/certificate holder may elect not to fully use a license/certificate, the license/certificate is still used as the source for determining authorized nuclear material possession and use/activity. Second, the category and license/certificate information are used to determine where the licensee/certificate holder fits into the matrix. The matrix depicts the categorization of licensees/certificate holders by authorized material types and use/activities.

Once the structure of the matrix is established, the NRC's fuel facility project managers and regulatory analysts determine the level of effort associated with regulating each of these facilities. This is done by assigning, for each fuel facility, separate effort factors for the safety and safeguards activities associated with each type of regulatory activity. The matrix includes ten types of regulatory activities, including enrichment and scrap/waste related activities (see the work papers for the complete list). Effort factors are assigned as follows: one (low regulatory effort), five (moderate regulatory effort), and ten (high regulatory effort). These effort factors are then totaled for each fee category, so that each fee category has a total effort factor for safety activities and a total effort factor for safeguards activities.

The effort factors for the various fuel facility fee categories are summarized in Table VII. The value of the effort factors shown, as well as the percent of the total effort factor for all fuel facilities,

reflects the total regulatory effort for each fee category (not per facility). Note that the effort factors for the High Enriched Uranium Fuel fee category have changed from FY 2007. The safety and safeguards factors increased in FY 2008 to reflect NRC's review of an amendment request by a licensee to handle liquid UF_6 workload. Taking into account both of these changes, the total safety and safeguards effort factor change is relatively small.

TABLE VII.—EFFORT FACTORS FOR FUEL FACILITIES

Facility type (fee category)	Number of facilities	Effort factors (percent of total)	
		Safety	Safeguards
High Enriched Uranium Fuel	2	92 (35.8)	102 (53.7)
Uranium Enrichment	2	70 (27.2)	40 (21.1)
Low Enriched Uranium Fuel	3	66 (25.7)	21 (11.1)
UF_6 Conversion	1	12 (4.7)	7 (3.7)
Limited Operations	1	8 (3.1)	3 (1.6)
Gas Centrifuge Enrichment Demonstration	1	3 (1.2)	15 (7.9)
Hot Cell	1	6 (2.3)	2 (1.1)

The budgeted resources for safety activities ($8,211,592) are allocated to each fee category based on its percent of the total regulatory effort for safety activities. For example, if the total effort factor for safety activities for all fuel facilities is 100, and the total effort factor for safety activities for a given fee category is 10, that fee category will be allocated 10 percent of the total budgeted resources for safety activities. Similarly, the budgeted resources for safeguards activities ($6,070,827) are allocated to each fee category based on its percent of the total regulatory effort for safeguards activities. The fuel facility fee class' portion of the fee relief (negative surcharge of $81,517) and the billing adjustment (a fee reduction in FY 2008 of $755,676) is allocated to each fee category based on its percent of the total regulatory effort for both safety and safeguards activities. The annual fee per licensee is then calculated by dividing the total allocated budgeted resources for the fee category by the number of licensees in that fee category as summarized in Table VIII.

TABLE VIII.—ANNUAL FEES FOR FUEL FACILITIES

Facility type (fee category)	FY 2008 annual fee
High Enriched Uranium Fuel	$3,082,000
Uranium Enrichment	1,747,000
Low Enriched Uranium	921,000
UF_6 Conversion	604,000
Gas Centrifuge Enrichment Demonstration	572,000
Limited Operations Facility	349,000
Hot Cell (and others)	254,000

The NRC does not expect to authorize operation of any new uranium enrichment facility in FY 2008. The annual fee applicable to any type of new uranium enrichment facility is the annual fee in § 171.16, fee category 1.E., Uranium Enrichment, unless the NRC establishes a new fee category for the facility in a subsequent rulemaking.

b. Uranium Recovery Facilities

The total FY 2008 budgeted cost to be recovered through annual fees assessed to the uranium recovery class [which includes licensees in fee categories 2.A.(2)(a), 2.A.(2)(b), 2.A.(3), 2.A.(4), 2.A.(5) and 18.B., under § 171.16], is approximately $0.66 million. The derivation of this value is shown in Table IX, with FY 2007 values shown for comparison purposes. (Individual values may not sum to totals due to rounding.)

TABLE IX.—ANNUAL FEE SUMMARY CALCULATIONS FOR URANIUM RECOVERY FACILITIES

[Dollars in millions]

Summary fee calculations	FY 2007 final	FY 2008 proposed
Total budgeted resources	$1.32	$1.65
Less estimated part 170 receipts	−0.61	−0.94
Net part 171 resources	0.71	0.71
Allocated generic transportation	+ N/A	+ N/A
Allocated surcharge	−0.02	−0.02
Billing adjustments (including carryover)	+0.00	−0.04
Total required annual fee recovery	0.69	0.66

The decrease in the total required annual fee recovery is mainly due to higher part 170 revenue estimates compared with FY 2007 partially offset by an increase in uranium recovery licensing and inspection resources. The budget resources increased to support licensing work for new uranium recovery facilities and to improve regulatory framework for in-situ leach (ISL) facilities. In FY 2008, more of the total resources, surcharge, and the billing for this fee class were allocated to the non-Department of Energy (DOE) licensees, as discussed further in this document. This change in the distribution of uranium recovery fee class resources between non-DOE uranium recovery facilities and DOE resulted in an increase in annual fee for the DOE compared to the decrease in annual fee for non-DOE facilities.

Of the required annual fee collections, $596,000 (rounded) is assessed to DOE's Uranium Mill Tailings Radiation Control Act (UMTRCA) under fee category 18.B. The remaining $61,000 (rounded) will be recovered through annual fees assessed to the other licensees in this fee class (i.e., conventional mills, in-situ leach solution mining facilities), 11e.(2) mill tailings disposal facilities (incidental to existing tailings sites), and a uranium water treatment facility.

In the FY 2002 final fee rule (67 FR 42611; June 24, 2002), the NRC developed a fee recovery methodology for the uranium recovery fee class that would allocate the total annual fee amount for this fee class, less the amounts specifically budgeted for Title I activities, equally between DOE (for its UMTRCA Title I and Title II licensees) and the other licensees in this fee class. In the FY 2007 final rule (72 FR 31414; June 6, 2007), the NRC changed this methodology to allocate 45 percent of the total annual fee amount, less the amounts specifically budgeted for Title I activities, to DOE's UMTRCA annual fee and 55 percent to the other licensees in this fee class. Based on updated information, NRC is changing this allocation percentage in FY 2008. In FY 2008, 40 percent of the total annual fee amount of $672,970, less $555,546 specifically budgeted for Title I activities, is allocated to DOE's UMTRCA facilities. The remaining 60 percent of the total annual fee (less the amounts specifically budgeted for Title I activities) is allocated to other licensees. The reduction in resources for licensing the DOE is based on the reduced effort expended for DOE UMTRCA.

This results in an annual fee being assessed to DOE to recover the costs specifically budgeted for NRC's Title I activities plus 40 percent of the remaining annual fee amount, including the surcharge and generic/other costs, for the uranium recovery class. The remaining 60 percent of the surcharge and generic/other costs are assessed to the other NRC licensees in this fee class that are subject to annual fees. The costs to be recovered through annual fees assessed to the uranium recovery class are shown in Table X.

TABLE X.—COSTS RECOVERED THROUGH ANNUAL FEES; URANIUM RECOVERY FEE CLASS

DOE Annual Fee Amount UMTRCA) Title I and Title II general licenses:	
UMTRCA Title I budgeted costs	$555,546
40 percent of generic/other uranium recovery budgeted costs	46,970
40 percent of uranium recovery surcharge	−6,280
Total Annual Fee Amount for DOE (rounded)	$596,000
Annual Fee Amount for Other Uranium Recovery Licenses:	
60 percent of generic/other uranium recovery budgeted costs less the amounts specifically budgeted for Title I activities	70,454
60 percent of uranium recovery surcharge	−9,420
Total Annual Fee Amount for Other Uranium Recovery Licenses	61,034

The NRC will continue to use a matrix (which is included in the supporting work papers) to determine the level of effort associated with regulating the different (non-DOE) licensees in this fee class. The weights derived in this matrix are used to allocate the approximately $61,000 annual fee amount to these licensees. The use of this uranium recovery annual fee matrix was established in the FY 1995 final fee rule (60 FR 32217; June 20, 1995). The FY 2008 matrix is described as follows.

First, the methodology identifies the categories of licenses included in this fee class (besides DOE). In FY 2008, these categories are conventional uranium mills (Class I facilities), uranium solution mining facilities (Class II facilities), mill tailings disposal facilities (11e.(2) disposal facilities), and uranium water treatment facilities. The uranium water treatment facility fee category in the uranium recovery fee class was created in FY 2007 (72 FR 31413; June 6, 2007).

Second, the matrix identifies the types of operating activities that support these licensees. In FY 2008, the activities related to generic decommissioning/reclamation are not included in the matrix, because generic decommissioning/reclamation activities are included in the surcharge, and therefore need not be a factor in determining annual fees. The activities included in the FY 2008 matrix are 'operations,' 'waste operations,' and 'groundwater remediation.' The relative weight of each type of activity is then determined, based on the regulatory resources associated with each activity. The 'operations,' 'waste operations,' and 'groundwater remediation' activities have weights of 10, 5, and 10, respectively, in the FY 2008 matrix.

Once the structure of the matrix is established, the NRC's uranium recovery project managers and regulatory analysts determine the level of effort associated with regulating each of these facilities. This is done by assigning, for each fee category, separate effort factors for each type of regulatory activity in the matrix. Effort factors are assigned as follows: one (low regulatory effort), five (moderate regulatory effort), and ten (high regulatory effort). These effort factors are first multiplied by the relative weight assigned to each activity (described previously). Total effort factors by fee category, and per licensee in each fee category, are then calculated. These effort factors thus reflect the relative regulatory effort associated with each licensee and fee category.

The effort factors per licensee and per fee category, for each of the non-DOE fee categories included in the uranium recovery fee class, are as follows:

TABLE XI.—EFFORT FACTORS FOR URANIUM RECOVERY LICENSES

Fee Category	Number of licensees	Effort factor per licensee	Total effort factor	
			Value	Percent total
Class I (conventional mills)	1	75	75	18
Class II (solution mining)	3	75	225	54
11e.(2) disposal incidental to existing tailings sites	1	75	75	18
Uranium water treatment	1	45	45	11

The annual fee per licensee is calculated by dividing the total allocated budgeted resources for the fee category by the number of licensees in that fee category as summarized in Table XII. Applying these factors to the approximately $61,000 in budgeted costs to be recovered from non-DOE uranium recovery licensees results in the following annual fees for FY 2008:

TABLE XII.—ANNUAL FEES FOR URANIUM RECOVERY LICENSEES

[Other than DOE]

Facility type	FY 2008 annual fee
Class I (conventional mills)	$10,900
Class II (solution mining)	10,900
11e.(2) disposal	N/A
11e.(2) disposal incidental to existing tailings sites	10,900
Uranium water treatment	6,500

Note because there are no longer any 11e.(2) disposal facilities under the NRC's regulatory jurisdiction, the NRC has not allocated any budgeted resources for these facilities, and therefore has not established an annual fee for this fee category. If NRC issues a license for this fee category in the future, then the Commission will establish the appropriate annual fee.

c. Operating Power Reactors

The approximately $426.1 million in budgeted costs to be recovered through FY 2008 annual fees assessed to the power reactor class was calculated as shown in Table XIII. FY 2007 values are shown for comparison. (Individual values may not sum to totals due to rounding.)

TABLE XIII.—ANNUAL FEE SUMMARY CALCULATIONS FOR OPERATING POWER REACTORS

[Dollars in millions]

Total budgeted resources	$588.6	$698.8
Less estimated part 170 receipts	−180.7	−252.7
Net part 171 resources	407.9	446.1
Allocated generic transportation	+1.0	+1.1
Allocated surcharge	−6.0	−4.6
Billing adjustments (including carryover)	+1.1	−16.5
Total required annual fee recovery	404.0	426.1

The budgeted costs to be recovered through annual fees to power reactors are divided equally among the 104 power reactors licensed to operate. This results in a FY 2008 annual fee of $4,097,000 per reactor. Additionally, each power reactor licensed to operate would be assessed the FY 2008 spent fuel storage/reactor decommissioning annual fee of $140,000. This results in a total FY 2008 annual fee of $4,237,000 for each power reactor licensed to operate.

The annual fee for power reactors increases in FY 2008 compared to FY 2007 due to an increase in budgeted resources for a number of activities, including regulatory infrastructure for new reactor licensing activities related to combined license applications and design certifications. This increase is partially offset by the higher estimated part 170 collections, and adjustment for higher carryover compared with FY 2007. In FY 2008, the NRC estimates an increase in part 170 collections of about 40 percent for this fee. These collections offset the required annual fee recovery amount by a total of approximately $252.7 million. The annual fees for power reactors are presented in § 171.15.

d. Spent Fuel Storage/Reactor Decommissioning

For FY 2008, budgeted costs of approximately $17.3 million for spent fuel storage/reactor decommissioning are to be recovered through annual fees assessed to part 50 power reactors, and to part 72 licensees who do not hold a part 50 license. Those reactor licensees that have ceased operations and have no fuel onsite are not subject to these annual fees. Table XIV shows the calculation of this annual fee amount. FY 2007 values are shown for comparison. (Individual values may not sum to totals due to rounding.)

TABLE XIV.—ANNUAL FEE SUMMARY CALCULATIONS FOR THE SPENT FUEL STORAGE/REACTOR DECOMMISSIONING FEE CLASS

[Dollars in millions]

Summary fee calculations	FY 2007 final	FY 2008 proposed
Total budgeted resources	$23.9	$22.4
Less estimated part 170 receipts	−4.2	−4.7
Net part 171 resources	19.7	17.7
Allocated generic transportation	+0.3	+0.3
Allocated surcharge	−0.4	−0.2
Billing adjustments (including carryover)	+0.0	−0.5
Total required annual fee recovery	19.6	17.3

The required annual fee recovery amount is divided equally among 123 licensees, resulting in a FY 2008 annual fee of $140,000 per licensee. The value of total budgeted resources for this fee class decreased in FY 2008 compared to FY 2007 due to a decrease in the budgeted resources for decommissioning, higher estimated part 170 collections, and adjustment for higher carryover.

e. Test and Research Reactors (Non-power Reactors)

Approximately $310,000 in budgeted costs is to be recovered through annual fees assessed to the test and research reactor class of licenses for FY 2008. Table XV summarizes the annual fee calculation for test and research reactors for FY 2008. FY 2007 values are shown for comparison. (Individual values may not sum to totals due to rounding.)

TABLE XV.—ANNUAL FEE SUMMARY CALCULATIONS FOR TEST AND RESEARCH REACTORS

[Dollars in millions]

Total budgeted resources	$0.85	$0.99
Less estimated part 170 receipts	−0.55	−0.66
Net part 171 resources	0.30	0.33
Allocated generic transportation	+0.01	+0.01
Allocated surcharge	−0.01	−0.01
Billing adjustments (including carryover)	+0.00	−0.02
Total required annual fee recovery	0.31	0.31

This required annual fee recovery amount is divided equally among the 4 test and research reactors subject to annual fees, and results in a FY 2008 annual fee of $77,400 for each licensee. The slight increase in annual fees from FY 2007 to FY 2008 is due to an increase in budget resources partially offset by higher part 170 revenue estimate for test and research reactors class, and adjustment for higher prior year collections. The part 170 revenue estimates for FY 2008 increased by approximately 20 percent compared with FY 2007 due to increased billing for test and research reactors, including federal facilities. The Energy Policy Act of 2005 authorized the NRC to bill federal facilities for part 170 services.

f. Rare Earth Facilities

As discussed previously in Section II.B.2, ''Agreement State Activities'', NRC will no longer regulate any licensees under the Rare Earth fee class. The one licensee who has a specific license for receipt and processing of source material will be transferring to the Agreement State, Commonwealth of Pennsylvania, to be effective March 31, 2008. In FY 2008, this rare earth facility will pay one-half of the annual fee in effect on its anniversary date in January 2008.

Because the agency does not anticipate receiving an application for a rare earth facility this fiscal year, no budget resources were allocated to this fee class. NRC will not publish an annual fee for the fee category 2.A.(2)(c) in FY 2008.

g. Materials Users

Table XVI shows the calculation of the FY 2008 annual fee amount for materials users licensees. FY 2007 values are shown for comparison. (Individual values may not sum to totals due to rounding.) Note the following fee categories under § 171.16 are included in this fee class: 1.C., 1.D., 2.B., 2.C., 3.A. through 3.S., 4.A. through 4.C., 5.A., 5.B., 6.A., 7.A. through 7.C., 8.A., 9.A. through 9.D., 16, and 17.

TABLE XVI.—ANNUAL FEE SUMMARY CALCULATIONS FOR MATERIALS USERS

[Dollars in millions]

Summary fee calculations	FY 2007 final	FY 2008 proposed
Total budgeted resources	$25.8	$22.8
Less estimated part 170 receipts	−1.2	−2.0
Net part 171 resources	24.6	20.8
Allocated generic transportation	+0.9	+1.0
Allocated surcharge	+0.3	+0.3
Billing adjustments (including carryover)	+0.0	−0.5
Total required annual fee recovery	25.9	21.6

The total required annual fees to be recovered from materials licensees decreased in FY 2008 mainly because of decreases in the budgeted resources allocated to this fee class for licensing activities, and adjustment for higher carryover. Annual fees for all fee categories within the materials users fee class decreased. The number of licensees also decreased because of the transfer of licensees to the Commonwealth of Pennsylvania. Because the agreement with the Commonwealth of Pennsylvania is expected to be effective March 31, 2008, the licensees transferring to the Commonwealth of Pennsylvania will be subject to one-half of the annual fees.

To equitably and fairly allocate the $21.6 million in FY 2008 budgeted costs to be recovered in annual fees assessed to the approximately 4,400 diverse materials users licensees, the NRC will continue to base the annual fees for each fee category within this class on the part 170 application fees and estimated inspection costs for each fee category. Because the application fees and inspection costs are indicative of the complexity of the license, this approach continues to provide a proxy for allocating the generic and other regulatory costs to the diverse categories of licenses based on NRC's cost to regulate each category. This fee calculation also continues to consider the inspection frequency (priority), which is indicative of the safety risk and resulting regulatory costs associated with the categories of licenses.

The annual fee for these categories of materials users licenses is developed as follows:

Annual fee = Constant × [Application Fee + (Average Inspection Cost divided by Inspection Priority)] + Inspection Multiplier × (Average Inspection Cost divided by Inspection Priority) + Unique Category Costs.

The constant is the multiple necessary to recover approximately $14.9 million in general costs (including allocated generic transportation costs) and is 0.77 for FY 2008. The average inspection cost is the average inspection hours for each fee category multiplied by the hourly rate of $238. The inspection priority is the interval between routine inspections, expressed in years. The inspection multiplier is the multiple necessary to recover approximately $6.3 million in inspection costs, and is 1.39 for FY 2008. The unique category costs are any special costs that the NRC has budgeted for a specific category of licenses. For FY 2008, approximately $103,000 in budgeted costs for the implementation of revised 10 CFR part 35, Medical Use of Byproduct Material (unique costs), has been allocated to holders of NRC human use licenses.

The annual fee to be assessed to each licensee also includes a share of the $192,000 in fee relief allocated to the materials users fee class (see Section II.B.1., ''Application of 'Fee Relief' '', of this document), and for certain categories of these licensees, a share of the approximately $509,000 in LLW surcharge costs allocated to the fee class. The annual fee for each fee category is shown in § 171.16(d).

h. Transportation

Table XVII shows the calculation of the FY 2008 generic transportation budgeted resources to be recovered through annual fees. FY 2007 values are shown for comparison. (Individual values may not sum to totals due to rounding.)

TABLE XVII.—ANNUAL FEE SUMMARY CALCULATIONS FOR TRANSPORTATION

[Dollars in millions]

Summary fee calculations	FY 2007 final	FY 2008 proposed
Total budgeted resources	$5.0	$5.7
Less estimated part 170 receipts	−1.2	−1.7
Net part 171 resources	3.8	4.0

The total FY 2008 budgeted resources for generic transportation activities, including those to support DOE Certificates of Compliance (CoCs), are $4.0 million. The budgeted resources for these activities in FY 2008 increased by 6 percent compared with FY 2007, mostly due to increased budgeted resources for licensing activities. Generic transportation resources associated with fee-exempt entities are not included in this total. These costs are included in the appropriate surcharge category (e.g., the surcharge category for nonprofit educational institutions).

Consistent with the policy established in the NRC's FY 2006 final fee rule (71 FR 30734; May 30, 2006), the NRC will recover generic transportation costs unrelated to DOE as part of existing annual fees for license fee classes. NRC will continue to assess a separate annual fee under § 171.16, fee category 18.A., for DOE transportation activities. The CoCs for DOE decreased in FY 2008 compared to FY 2007 resulting in a

lower annual fee for DOE under fee category 18.A.

These resources are distributed to DOE (to be included in its annual fee under fee category 18.A. of § 171.16) and each license fee class based on the CoCs used by DOE and each fee class, as a proxy for the generic resources expended for each fee class. As such, the amount of the generic resources allocated is calculated by multiplying the percentage of total CoCs used by each fee class (and DOE) by the total generic transportation resources to be recovered. In FY 2008, the generic transportation cost allocated to the other fee classes increased compared to FY 2007 due to the increase in total budgeted resources for transportation.

The distribution of these resources to the license fee classes and DOE is shown in Table XVIII. (Individual values may not sum to totals due to rounding.) The distribution is adjusted to account for the licensees in each fee class that are fee exempt. For example, if 3 CoCs benefit the entire test and research reactor class, but only 4 of 30 test and research reactors are subject to annual fees, the number of CoCs used to determine the proportion of generic transportation resources allocated to test and research reactor annual fees equals ((4/30)*3), or 0.4 CoCs.

TABLE XVIII.—DISTRIBUTION OF GENERIC TRANSPORTATION RESOURCES, FY 2008

[Dollars in millions]

License fee class/DOE	Number CoCs benefiting fee class (or DOE)	Percentage of total CoCs (percent)	Allocated generic transportation resources
Total	128.0	100.0	$4.00
DOE	31.0	24.2	1.00
Operating Power Reactors	37.0	28.9	1.15
Spent Fuel Storage/Reactor Decommissioning	9.0	7.0	0.28
Test and Research Reactors	0.4	0.3	0.01
Fuel Facilities	18.0	14.1	0.56
Materials Users	32.6	25.4	1.02

The NRC is proposing to continue to assess DOE an annual fee based on the part 71 CoCs it holds, and not allocate these DOE-related resources to other licensees' annual fees, because these resources specifically support DOE. Note that DOE's proposed annual fee includes a reduction for the fee relief (see Section II.B.1, ''Application of 'Fee Relief' '', of this document), resulting in a total annual fee of $880,000 for FY 2008. This fee decrease from last year is primarily due to a decrease in the number of DOE CoCs.

4. Administrative Amendments

The NRC is adding program codes next to the materials users fee categories in § 171.16. When NRC receives a materials users license application, a five-digit program code number is assigned by the agency to each license to designate the major activity or principal use authorized in the license. More than one code may apply to a given license. The fee amount for the license under the 10 CFR parts 170 and 171 is determined by the fee category which is also based on the authorized usage described on the license. To reduce the risk of misinterpretation of material uses authorized in the license while establishing a fee category, the NRC is implementing a process that links a program code directly to a fee category. Once a program code is assigned to the license, it will assist the licensee to correctly identify the fee amount(s) by looking up the program code(s) in § 171.16.

The NRC is modifying the second sentence of footnote 1 in § 171.16 to clarify that the annual fee waiver will be granted if the licensed activities have permanently ceased before the beginning of the fiscal year. The reference to the last day of the prior year as the date for cessation of licensed activities has been deleted. This will improve the clarity of the sentence.

In summary, the NRC is—

1. Using the NRC's fee relief to reduce all licensees' annual fees, based on their percent of the NRC budget;

2. Revising the number of NRC licensees to reflect the expectation that Commonwealth of Pennsylvania will become an Agreement State on March 31, 2008;

3. Establishing rebaselined annual fees for FY 2008; and

4. Making certain administrative changes for purposes of clarification and consistency.

III. 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. This memorandum was published on June 10, 1998 (63 FR 31883). The 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 **ADDRESSES** heading.

IV. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, 15 U.S.C. 3701, requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless using these standards is inconsistent with applicable law or is otherwise impractical. The NRC is proposing to amend the licensing, inspection, and annual fees charged to its licensees and applicants as necessary to recover approximately 90 percent of its budget authority in FY 2008, as required by the Omnibus Budget Reconciliation Act of 1990, as amended. This action does not constitute the establishment of a standard that contains generally applicable requirements.

V. Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental assessment nor an environmental impact statement has been prepared for the proposed rule. By its very nature, this regulatory action does not affect the environment and, therefore, no environmental justice issues are raised.

VI. Paperwork Reduction Act Statement

This proposed rule does not contain information collection requirements and, therefore, is not subject to the

requirements of the Paperwork Reduction Act of 1995 44 U.S.C. 3501 *et seq.*

VII. Regulatory Analysis

With respect to 10 CFR part 170, this proposed rule was developed under Title V of the IOAA (31 U.S.C. 9701) and the Commission's fee guidelines. When developing these guidelines the Commission took into account guidance provided by the U.S. Supreme Court on March 4, 1974, in *National Cable Television Association, Inc.* v. *United States,* 415 U.S. 36 (1974) and *Federal Power Commission* v. *New England Power Company,* 415 U.S. 345 (1974). In these decisions, the Court held that the IOAA authorizes an agency to charge fees for special benefits rendered to identifiable persons measured by the ''value to the recipient'' of the agency service. The meaning of the IOAA was further clarified on December 16, 1976, by four decisions of the U.S. Court of Appeals for the District of Columbia: *National Cable Television Association* v. *Federal Communications Commission,* 554 F.2d 1094 (D.C. Cir. 1976); *National Association of Broadcasters* v. *Federal Communications Commission,* 554 F.2d 1118 (D.C. Cir. 1976); *Electronic Industries Association* v. *Federal Communications Commission,* 554 F.2d 1109 (D.C. Cir. 1976); and *Capital Cities Communication, Inc.* v. *Federal Communications Commission,* 554 F.2d 1135 (D.C. Cir. 1976). The Commission's fee guidelines were developed based on these legal decisions.

The Commission's fee guidelines were upheld on August 24, 1979, by the U.S. Court of Appeals for the Fifth Circuit in *Mississippi Power and Light Co.* v. *U.S. Nuclear Regulatory Commission,* 601 F.2d 223 (5th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980). This court held that—

(1) The NRC had the authority to recover the full cost of providing services to identifiable beneficiaries;

(2) The NRC could properly assess a fee for the costs of providing routine inspections necessary to ensure a licensee's compliance with the Atomic Energy Act of 1954 and with applicable regulations;

(3) The NRC could charge for costs incurred in conducting environmental reviews required by the National Environmental Policy Act, 42 U.S.C. 4321;

(4) The NRC properly included the costs of uncontested hearings and of administrative and technical support services in the fee schedule;

(5) The NRC could assess a fee for renewing a license to operate a low-level radioactive waste burial site; and

(6) The NRC's fees were not arbitrary or capricious.

With respect to 10 CFR part 171, on November 5, 1990, the Congress passed OBRA–90, which required that, for FYs 1991 through 1995, approximately 100 percent of the NRC budget authority be recovered through the assessment of fees. OBRA–90 was subsequently amended to extend the 100 percent fee recovery requirement through FY 2000. The FY 2001 Energy and Water Development Appropriation Act (EWDAA) amended OBRA–90 to decrease the NRC's fee recovery amount by 2 percent per year beginning in FY 2001, until the fee recovery amount was 90 percent in FY 2005. The FY 2007 EWDAA extended this 90 percent fee recovery requirement for FY 2007. Section 637 of the Energy Policy Act of 2005 made the 90 percent fee recovery requirement permanent beginning in FY 2007. As a result, the NRC is required to recover approximately 90 percent of its FY 2008 budget authority, less the amounts appropriated from the NWF, WIR, and generic homeland security activities through fees. To comply with this statutory requirement and in accordance with § 171.13, the NRC is publishing the amount of the FY 2008 annual fees for reactor licensees, fuel cycle licensees, materials licensees, and holders of Certificates of Compliance, registrations of sealed source and devices, and Government agencies. OBRA–90, consistent with the accompanying Conference Committee Report, and the amendments to OBRA–90, provides that—

(1) The annual fees be based on approximately 90 percent of the Commission's FY 2008 budget of $926.1 million less the funds directly appropriated from the NWF to cover the NRC's high-level waste program and for WIR, generic homeland security activities, and less the amount of funds collected from part 170 fees;

(2) The annual fees shall, to the maximum extent practicable, have a reasonable relationship to the cost of regulatory services provided by the Commission; and

(3) The annual fees be assessed to those licensees the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment.

10 CFR part 171, which established annual fees for operating power reactors effective October 20, 1986 (51 FR 33224; September 18, 1986), was challenged and upheld in its entirety in *Florida Power and Light Company* v. *United States,* 846 F.2d 765 (D.C. Cir. 1988), *cert. denied,* 490 U.S. 1045 (1989). Further, the NRC's FY 1991 annual fee rule methodology was upheld by the D.C. Circuit Court of Appeals in *Allied Signal* v. *NRC,* 988 F.2d 146 (D.C. Cir. 1993).

VIII. Regulatory Flexibility Analysis

The NRC is required by the Omnibus Budget Reconciliation Act of 1990, as amended, to recover approximately 90 percent of its FY 2008 budget authority through the assessment of user fees. This Act further requires that the NRC establish a schedule of charges that fairly and equitably allocates the aggregate amount of these charges among licensees.

This proposed rule would establish the schedules of fees that are necessary to implement the Congressional mandate for FY 2008. This rule would result in increases in the annual fees charged to certain licensees and holders of certificates, registrations, and approvals, and decreases in annual fees for others. Licensees affected by the annual fee increases and decreases include those that qualify as a small entity under NRC's size standards in 10 CFR 2.810. The Regulatory Flexibility Analysis, prepared in accordance with 5 U.S.C. 604, is included as Appendix A to this proposed rule.

The Congressional Review Act of 1996 requires all Federal agencies to prepare a written compliance guide for each rule for which the agency is required by 5 U.S.C. 604 to prepare a regulatory flexibility analysis. Therefore, in compliance with the law, Attachment 1 to the Regulatory Flexibility Analysis is the small entity compliance guide for FY 2008.

IX. Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule and that a backfit analysis is not required for this proposed rule. The backfit analysis is not required because these amendments do not require the modification of, or additions to systems, structures, components, or the design of a facility, or the design approval or manufacturing license for a facility, or the procedures or organization required to design, construct, or operate a facility.

List of Subjects

10 CFR Part 170

Byproduct material, Import and export licenses, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, Source material, Special nuclear material.

10 CFR Part 171

Annual charges, Byproduct material, Holders of certificates, Registrations, Approvals, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, 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 170 and 171.

PART 170—FEES FOR FACILITIES, MATERIALS, IMPORT AND EXPORT LICENSES, AND OTHER REGULATORY SERVICES UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

1. The authority citation for part 170 continues to read as follows:

Authority: Section 9701, Pub. L. 97–258, 96 Stat. 1051 (31 U.S.C. 9701); § 301, Pub. L. 92–314, 86 Stat. 227 (42 U.S.C. 2201w); sec. 201, Pub. L. 93–438, 88 Stat. 1242, as amended (42 U.S.C. 5841); § 205a, Pub. L. 101–576, 104 Stat. 2842, as amended (31 U.S.C. 901–902); § 1704, 112 Stat. 2750 (44 U.S.C. 3504 note), sec. 623, Pub. L. 109–58, 119 Stat. 783, (42 U.S.C. 2201(w)); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021(b), 2111).

2. Section 170.20 is revised to read as follows:

§ 170.20 Average cost per professional staff-hour.

* * * * *

Fees for permits, licenses, amendments, renewals, special projects, 10 CFR part 55 re-qualification and replacement examinations and tests, other required reviews, approvals, and inspections under §§ 170.21 and 170.31 will be calculated using the professional staff-hour rate of $238 per hour.

3. In § 170.21, in the table, fee category K is revised to read as follows:

§ 170.21 Schedule of fees for production and utilization facilities, review of standard referenced design approvals, special projects, inspections and import and export licenses.

* * * * *

SCHEDULE OF FACILITY FEES

[See footnotes at end of table]

Facility categories and type of fees	Fees [1] [2]
* * * * * * *	
K. Import and export licenses:	
Licenses for the import and export only of production and utilization facilities or the export only of components for production and utilization facilities issued under 10 CFR Part 110.	
1. Application for import or export of production and utilization facilities [4] (including reactors and other facilities) and exports of components requiring Commission and Executive Branch review, for example, actions under 10 CFR 110.40(b).	
Application—new license, or amendment; or license exemption request	$15,500
2. Application for export of reactor and other components requiring Executive Branch review only, for example, those actions under 10 CFR 110.41(a)(1)–(8).	
Application—new license, or amendment; or license exemption request	9,100
3. Application for export of components requiring the assistance of the Executive Branch to obtain foreign government assurances.	
Application—new license, or amendment; or license exemption request	3,800
4. Application for export of facility components and equipment (examples provided in 10 CFR part 110, Appendix A, Items (5) through (9)) not requiring Commission or Executive Branch review, or obtaining foreign government assurances.	
Application—new license, or amendment; or license exemption request	2,400
5. Minor amendment of any active export or import license, for example, to extend the expiration date, change domestic information, or make other revisions which do not involve any substantive changes to license terms or conditions or to the type of facility or component authorized for export and therefore, do not require in-depth analysis or review or consultation with the Executive Branch, U.S. host state, or foreign government authorities.	
Minor amendment to license	720

[1] Fees will not be charged for orders related to civil penalties or other civil sanctions issued by the Commission under § 2.202 of this chapter or for amendments resulting specifically from the requirements of these orders. For orders unrelated to civil penalties or other civil sanctions, fees will be charged for any resulting licensee-specific activities not otherwise exempted from fees under this chapter. Fees will be charged for approvals issued under a specific exemption provision of the Commission's regulations under Title 10 of the Code of Federal Regulations (e.g., 10 CFR 50.12, 73.5) and any other sections in effect now or in the future, regardless of whether the approval is in the form of a license amendment, letter of approval, safety evaluation report, or other form.

[2] Full cost fees will be determined based on the professional staff time and appropriate contractual support services expended. For applications currently on file and for which fees are determined based on the full cost expended for the review, the professional staff hours expended for the review of the application up to the effective date of the final rule will be determined at the professional rates in effect at the time the service was provided. For those applications currently on file for which review costs have reached an applicable fee ceiling established by the June 20, 1984, and July 2, 1990, rules, but are still pending completion of the review, the cost incurred after any applicable ceiling was reached through January 29, 1989, will not be billed to the applicant. Any professional staff-hours expended above those ceilings on or after January 30, 1989, will be assessed at the applicable rates established by § 170.20, as appropriate, except for topical reports whose costs exceed $50,000. Costs which exceed $50,000 for any topical report, amendment, revision or supplement to a topical report completed or under review from January 30, 1989, through August 8, 1991, will not be billed to the applicant. Any professional hours expended on or after August 9, 1991, will be assessed at the applicable rate established in § 170.20.

* * * * * * *

[4] Imports only of major components for end-use at NRC-licensed reactors are now authorized under NRC general import license.

4. In § 170.31, the table is revised to read as follows:

§ 170.31 Schedule of fees for materials licenses and other regulatory services, including inspections, and import and export licenses.

* * * * *

SCHEDULE OF MATERIALS FEES

[See footnotes at end of table]

Category of materials licenses and type of fees [1]	Fee [2] [3]
1. Special nuclear material:	
A. (1) Licenses for possession and use of U–235 or plutonium for fuel fabrication activities.	
(a) Strategic Special Nuclear Material (High Enriched Uranium) [Program Code(s): 21130]	Full Cost
(b) Low Enriched Uranium in Dispersible Form Used for Fabrication of Power Reactor Fuel [Program Code(s): 21210]	Full Cost
(2) All other special nuclear materials licenses not included in Category 1.A.(1) which are licensed for fuel cycle activities.	
(a) Facilities with limited operations [Program Code(s): 21310, 21320]	Full Cost
(b) Gas centrifuge enrichment demonstration facilities	Full Cost
(c) Others, including hot cell facilities	Full Cost
B. Licenses for receipt and storage of spent fuel and reactor-related Greater than Class C (GTCC) waste at an independent spent fuel storage installation (ISFSI)	
[Program Code(s): 23200]	Full Cost
C. Licenses for possession and use of special nuclear material in sealed sources contained in devices used in industrial measuring systems, including x-ray fluorescence analyzers. [4]	
Application [Program Code(s): 22140]	$1,100
D. All other special nuclear material licenses, except licenses authorizing special nuclear material in unsealed form in combination that would constitute a critical quantity, as defined in § 150.11 of this chapter, for which the licensee shall pay the same fees as those under Category 1.A. [4]	
Application [Program Code(s): 22110, 22111, 22120, 22131, 22136, 22150, 22151, 22161, 22163, 22170, 23100, 23300, 23310]	2,200
E. Licenses or certificates for construction and operation of a uranium enrichment facility [Program Code(s): 21200]	Full Cost
2. Source material:	
A. (1) Licenses for possession and use of source material for refining uranium mill concentrates to uranium hexafluoride [Program Code(s): 11400]	Full Cost
(2) Licenses for possession and use of source material in recovery operations such as milling, in-situ leaching, heap-leaching, ore buying stations, ion exchange facilities and in processing of ores containing source material for extraction of metals other than uranium or thorium, including licenses authorizing the possession of byproduct waste material (tailings) from source material recovery operations, as well as licenses authorizing the possession and maintenance of a facility in a standby mode.	
(a) Class I facilities [Program Code(s): 11100]	Full Cost
(b) Class II facilities [Program Code(s): 11500]	Full Cost
(c) Other facilities [Program Code(s): 11700]	Full Cost
(3) Licenses that authorize the receipt of byproduct material, as defined in § 11e.(2) of the Atomic Energy Act, from other persons for possession and disposal, except those licenses subject to the fees in Category 2.A.(2) or Category 2.A.(4) [Program Code(s): 11600]	Full Cost
(4) Licenses that authorize the receipt of byproduct material, as defined in § 11e.(2) of the Atomic Energy Act, from other persons for possession and disposal incidental to the disposal of the uranium waste tailings generated by the licensee's milling operations, except those licenses subject to the fees in Category 2.A.(2).	Full Cost
(5) Licenses that authorize the possession of source material related to removal of contaminants (source material) from drinking water.	Full Cost
B. Licenses which authorize the possession, use, and/or installation of source material for shielding.	
Application [Program Code(s): 11210]	260
C. All other source material licenses.	
Application [Program Code(s): 11200, 11220, 11221, 11230, 11300, 11800, 11810]	9,400
3. Byproduct material:	
A. Licenses of broad scope for the possession and use of byproduct material issued under parts 30 and 33 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution.	
Application [Program Code(s): 03211, 03212, 03213]	11,200
B. Other licenses for possession and use of byproduct material issued under Part 30 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution.	
Application [Program Code(s): 03214, 03215, 22135, 22162]	4,200
C. Licenses issued under §§ 32.72 and/or 32.74 of this chapter that authorize the processing or manufacturing and distribution or redistribution of radiopharmaceuticals, generators, reagent kits, and/or sources and devices containing byproduct material. This category does not apply to licenses issued to nonprofit educational institutions whose processing or manufacturing is exempt under § 170.11(a)(4). These licenses are covered by fee Category 3.D.	
Application [Program Code(s): 02500, 02511, 02513]	7,400
D. Licenses and approvals issued under §§ 32.72 and/or 32.74 of this chapter authorizing distribution or redistribution of radiopharmaceuticals, generators, reagent kits, and/or sources or devices not involving processing of byproduct material. This category includes licenses issued under §§ 32.72 and/or 32.74 of this chapter to nonprofit educational institutions whose processing or manufacturing is exempt under § 170.11(a)(4).	
Application [Program Code(s): 02512, 02514]	4,100
E. Licenses for possession and use of byproduct material in sealed sources for irradiation of materials in which the source is not removed from its shield (self-shielded units).	
Application [Program Code(s): 03510, 03520]	2,700

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees [1]	Fee [2] [3]
F. Licenses for possession and use of less than 10,000 curies of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes. This category also includes underwater irradiators for irradiation of materials where the source is not exposed for irradiation purposes.	
Application [Program Code(s): 03511]	5,600
G. Licenses for possession and use of 10,000 curies or more of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes. This category also includes underwater irradiators for irradiation of materials where the source is not exposed for irradiation purposes.	
Application [Program Code(s): 03521]	13,300
H. Licenses issued under Subpart A of part 32 of this chapter to distribute items containing byproduct material that require device review to persons exempt from the licensing requirements of part 30 of this chapter. The category does not include specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of part 30 of this chapter.	
Application [Program Code(s): 03255]	9,700
I. Licenses issued under Subpart A of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require device evaluation to persons exempt from the licensing requirements of part 30 of this chapter. This category does not include specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of part 30 of this chapter.	
Application [Program Code(s): 03250, 03251, 03252, 03253, 03254, 03256]	9,700
J. Licenses issued under Subpart B of part 32 of this chapter to distribute items containing byproduct material that require sealed source and/or device review to persons generally licensed under part 31 of this chapter. This category does not include specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under part 31 of this chapter.	
Application [Program Code(s): 03240, 03241, 03243]	1,700
K. Licenses issued under Subpart B of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require sealed source and/or device review to persons generally licensed under part 31 of this chapter. This category does not include specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under part 31 of this chapter.	
Application [Program Code(s): 03242, 03244]	1,000
L. Licenses of broad scope for possession and use of byproduct material issued under parts 30 and 33 of this chapter for research and development that do not authorize commercial distribution.	
Application [Program Code(s): 01100, 01110, 01120, 03610, 03611, 03612, 03613]	9,400
M. Other licenses for possession and use of byproduct material issued under part 30 of this chapter for research and development that do not authorize commercial distribution.	
Application [Program Code(s): 03620]	3,300
N. Licenses that authorize services for other licensees, except:	
(1) Licenses that authorize only calibration and/or leak testing services are subject to the fees specified in fee Category 3P; and	
(2) Licenses that authorize waste disposal services are subject to the fees specified in fee Categories 4.A., 4.B., and 4.C.	
Application [Program Code(s): 03219, 03225, 03226]	6,100
O. Licenses for possession and use of byproduct material issued under part 34 of this chapter for industrial radiography operations.	
Application [Program Code(s): 03310, 03320]	4,500
P. All other specific byproduct material licenses, except those in Categories 4.A. through 9.D.	
Application [Program Code(s): 02400, 02410, 03120, 03121, 03122, 03123, 03124, 03220, 03221, 03222, 03800, 03810, 22130]	1,300
Q. Registration of a device(s) generally licensed under part 31 of this chapter.	
Registration	270
R. Possession of items or products containing radium-226 identified in 10 CFR 31.12 which exceed the number of items or limits specified in that section. [6]	
1. Possession of quantities exceeding the number of items or limits in 10 CFR 31.12(a)(4), or (5) but less than or equal to 10 times the number of items or limits specified.	
Application [Program Code(s): 02700]	550
2. Possession of quantities exceeding 10 times the number of items or limits specified in 10 CFR 31.12(a)(4), or (5).C.	
Application [Program Code(s): 02710]	1,300
S. Licenses for production of accelerator-produced radionuclides.	
Application [Program Code(s): 03210]	7,400
4. Waste disposal and processing:	
A. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of contingency storage or commercial land disposal by the licensee; or licenses authorizing contingency storage of low-level radioactive waste at the site of nuclear power reactors; or licenses for receipt of waste from other persons for incineration or other treatment, packaging of resulting waste and residues, and transfer of packages to another person authorized to receive or dispose of waste material.	
[Program Code(s): 03231, 03233, 03235, 03236, 06100, 06101]	Full Cost
B. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of packaging or repackaging the material. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material.	
Application [Program Code(s): 03234]	2,900

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees [1]	Fee [2] [3]
C. Licenses specifically authorizing the receipt of prepackaged waste byproduct material, source material, or special nuclear material from other persons. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material.	
Application [Program Code(s): 03232]	4,300
5. Well logging:	
A. Licenses for possession and use of byproduct material, source material, and/or special nuclear material for well logging, well surveys, and tracer studies other than field flooding tracer studies.	
Application [Program Code(s): 03110, 03111, 03112]	1,600
B. Licenses for possession and use of byproduct material for field flooding tracer studies.	
Licensing [Program Code(s): 03113]	Full Cost
6. Nuclear laundries:	
A. Licenses for commercial collection and laundry of items contaminated with byproduct material, source material, or special nuclear material.	
Application [Program Code(s): 03218]	19,000
7. Medical licenses:	
A. Licenses issued under parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices.	
Application [Program Code(s): 02300, 02310]	10,400
B. Licenses of broad scope issued to medical institutions or two or more physicians under parts 30, 33, 35, 40, and 70 of this chapter authorizing research and development, including human use of byproduct material, except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices. This category also includes the possession and use of source material for shielding when authorized on the same license.	
Application [Program Code(s): 02110]	7,400
C. Other licenses issued under parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, and/or special nuclear material, except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices.	
Application [Program Code(s): 02120, 02121, 02200, 02201, 02210, 02220, 02230, 02231, 02240, 22160]	2,300
8. Civil defense:	
A. Licenses for possession and use of byproduct material, source material, or special nuclear material for civil defense activities.	
Application [Program Code(s): 03710]	550
9. Device, product, or sealed source safety evaluation:	
A. Safety evaluation of devices or products containing byproduct material, source material, or special nuclear material, except reactor fuel devices, for commercial distribution.	
Application—each device	19,500
B. Safety evaluation of devices or products containing byproduct material, source material, or special nuclear material manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel devices.	
Application—each device	19,500
C. Safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, except reactor fuel, for commercial distribution.	
Application—each source	2,700
D. Safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel.	
Application—each source	910
10. Transportation of radioactive material:	
A. Evaluation of casks, packages, and shipping containers.	
1. Spent Fuel, High-Level Waste, and plutonium air packages	Full Cost
2. Other Casks	Full Cost
B. Quality assurance program approvals issued under part 71 of this chapter.	
1. Users and Fabricators.	
Application	4,400
Inspections	Full Cost
2. Users.	
Application	4,400
Inspections	Full Cost
C. Evaluation of security plans, route approvals, route surveys, and transportation security devices (including immobilization devices)	Full Cost
11. Review of standardized spent fuel facilities	Full Cost
12. Special projects:	
Including approvals, preapplication/licensing activities, and inspections	Full Cost
13. A. Spent fuel storage cask Certificate of Compliance	Full Cost
B. Inspections related to storage of spent fuel under 72.210 of this chapter	Full Cost
14. A. Byproduct, source, or special nuclear material licenses and other approvals authorizing decommissioning, decontamination, reclamation, or site restoration activities under parts 30, 40, 70, 72, and 76 of this chapter	Full Cost
B. Site-specific decommissioning activities associated with unlicensed sites, regardless of whether or not the sites have been previously licensed. Part 170 fees for these activities will not be charged until July 25, 2007	Full Cost

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees [1]	Fee [2] [3]
15. Import and Export licenses:	
Licenses issued under part 110 of this chapter for the import and export only of special nuclear material, source material, tritium and other byproduct material, and the export only of heavy water, or nuclear grade graphite (fee categories 15.A. through 15.E).	
A. Application for export or import of nuclear materials, including radioactive waste requiring Commission and Executive Branch review, for example, those actions under 10 CFR 110.40(b).	
Application—new license, or amendment; or license exemption request	15,500
B. Application for export or import of nuclear material, including radioactive waste, requiring Executive Branch review, but not Commission review. This category includes applications for the export and import of radioactive waste and requires NRC to consult with domestic host state authorities, Low-Level Radioactive Waste Compact Commission, the U.S. Environmental Protection Agency, etc.	
Application—new license, or amendment; or license exemption request	9,100
C. Application for export of nuclear material, for example, routine reloads of low enriched uranium reactor fuel and/or natural uranium source material requiring the assistance of the Executive Branch to obtain foreign government assurances.	
Application—new license, or amendment; or license exemption request	3,800
D. Application for export or import of nuclear material, including radioactive waste, not requiring Commission or Executive Branch review, or obtaining foreign government assurances. This category includes applications for export or import of radioactive waste where the NRC has previously authorized the export or import of the same form of waste to or from the same or similar parties located in the same country, requiring only confirmation from the receiving facility and licensing authorities that the shipments may proceed according to previously agreed understandings and procedures.	
Application—new license, or amendment; or license exemption request	2,400
E. Minor amendment of any active export or import license, for example, to extend the expiration date, change domestic information, or make other revisions which do not involve any substantive changes to license terms and conditions or to the type/quantity/chemical composition of the material authorized for export and therefore, do not require in-depth analysis, review, or consultations with other Executive Branch, U.S. host state, or foreign government authorities.	
Minor amendment	720
Licenses issued under part 110 of this chapter for the import and export only of Category 1 and Category 2 quantities of radioactive material listed in Appendix P to part 110 of this chapter (fee categories 15.F. through 15.R.). [5]	
Category 1 Exports:	
F. Application for export of Category 1 materials involving an exceptional circumstances review under 10 CFR 110.42(e)(4).	
Application—new license, or amendment; or license exemption request	15,500
G. Application for export of Category 1 materials requiring Executive Branch review, Commission review, and/or government-to-government consent.	
Application—new license, or amendment; or license exemption request	9,100
H. Application for export of Category 1 materials requiring Commission review and government-to-government consent.	
Application—new license, or amendment; or license exemption request	5,700
I. Application for export of Category 1 material requiring government-to-government consent.	
Application—new license, or amendment; or license exemption request	4,800
Category 2 Exports:	
J. Application for export of Category 2 materials involving an exceptional circumstances review under 10 CFR 110.42(e)(4).	
Application—new license, or amendment; or license exemption request	15,500
K. Applications for export of Category 2 materials requiring Executive Branch review and/or Commission review.	
Application—new license, or amendment; or license exemption request	9,100
L. Application for the export of Category 2 materials.	
Application—new license, or amendment; or license exemption request	4,300
Category 1 Imports:	
M. Application for the import of Category 1 material requiring Commission review.	
Application—new license, or amendment; or license exemption request	4,500
N. Application for the import of Category 1 material.	
Application—new license, or amendment; or license exemption request	3,800
Category 2 Imports:	
O. Application for the import of Category 2 material.	
Application—new license, or amendment; or license exemption request	3,300
Category 1 Imports with Agent and Multiple Licensees:	
P. Application for the import of Category 1 material with agent and multiple licensees requiring Commission review.	
Application—new license, or amendment; or license exemption request	5,200
Q. Application for the import of Category 1 material with agent and multiple licensees.	
Application—new license, or amendment; or license exemption request	4,300
Minor Amendments (Category 1 and 2 Export and Imports):	
R. Minor amendment of any active export or import license, for example, to extend the expiration date, change domestic information, or make other revisions which do not involve any substantive changes to license terms and conditions or to the type/quantity/chemical composition of the material authorized for export and therefore, do not require in-depth analysis, review, or consultations with other Executive Branch, U.S. host state, or foreign authorities.	
Minor amendment	720
16. Reciprocity:	
Agreement State licensees who conduct activities under the reciprocity provisions of 10 CFR 150.20.	
Application	1,400
17. Master materials licenses of broad scope issued to Government agencies:	
Application	22,000

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees [1]	Fee [2] [3]
18. Department of Energy:	
A. Certificates of Compliance. Evaluation of casks, packages, and shipping containers (including spent fuel, high-level waste, and other casks, and plutonium air packages)	Full Cost
B. Uranium Mill Tailings Radiation Control Act (UMTRCA) activities	Full Cost

[1] *Types of fees*—Separate charges, as shown in the schedule, will be assessed for pre-application consultations and reviews; applications for new licenses, approvals, or license terminations; possession only licenses; issuance of new licenses and approvals; certain amendments and renewals to existing licenses and approvals; safety evaluations of sealed sources and devices; generally licensed device registrations; and certain inspections. The following guidelines apply to these charges:

(a) *Application and registration fees.* Applications for new materials licenses and export and import licenses; applications to reinstate expired, terminated, or inactive licenses except those subject to fees assessed at full costs; applications filed by Agreement State licensees to register under the general license provisions of 10 CFR 150.20; and applications for amendments to materials licenses that would place the license in a higher fee category or add a new fee category must be accompanied by the prescribed application fee for each category.

(1) Applications for licenses covering more than one fee category of special nuclear material or source material must be accompanied by the prescribed application fee for the highest fee category.

(2) Applications for new licenses that cover both byproduct material and special nuclear material in sealed sources for use in gauging devices will pay the appropriate application fee for fee Category 1.C. only.

(b) *Licensing fees.* Fees for reviews of applications for new licenses and for renewals and amendments to existing licenses, pre-application consultations and reviews of other documents submitted to NRC for review, and project manager time for fee categories subject to full cost fees, are due upon notification by the Commission in accordance with § 170.12(b).

(c) *Amendment fees.* Applications for amendments to export and import licenses must be accompanied by the prescribed amendment fee for each license affected. An application for an amendment to an export or import license or approval classified in more than one fee category must be accompanied by the prescribed amendment fee for the category affected by the amendment unless the amendment is applicable to two or more fee categories, in which case the amendment fee for the highest fee category would apply.

(d) *Inspection fees.* Inspections resulting from investigations conducted by the Office of Investigations and non-routine inspections that result from third-party allegations are not subject to fees. Inspection fees are due upon notification by the Commission in accordance with § 170.12(c).

(e) *Generally licensed device registrations under 10 CFR 31.5.* Submittals of registration information must be accompanied by the prescribed fee.

[2] Fees will not be charged for orders related to civil penalties or other civil sanctions issued by the Commission under 10 CFR 2.202 or for amendments resulting specifically from the requirements of these orders. For orders unrelated to civil penalties or other civil sanctions, fees will be charged for any resulting licensee-specific activities not otherwise exempted from fees under this chapter. Fees will be charged for approvals issued under a specific exemption provision of the Commission's regulations under Title 10 of the Code of Federal Regulations (e.g., 10 CFR 30.11, 40.14, 70.14, 73.5, and any other sections in effect now or in the future), regardless of whether the approval is in the form of a license amendment, letter of approval, safety evaluation report, or other form. In addition to the fee shown, an applicant may be assessed an additional fee for sealed source and device evaluations as shown in Categories 9.A. through 9.D.

[3] Full cost fees will be determined based on the professional staff time multiplied by the appropriate professional hourly rate established in § 170.20 in effect at the time the service is provided, and the appropriate contractual support services expended. For applications currently on file for which review costs have reached an applicable fee ceiling established by the June 20, 1984, and July 2, 1990, rules, but are still pending completion of the review, the cost incurred after any applicable ceiling was reached through January 29, 1989, will not be billed to the applicant. Any professional staff-hours expended above those ceilings on or after January 30, 1989, will be assessed at the applicable rates established by § 170.20, as appropriate, except for topical reports whose costs exceed $50,000. Costs which exceed $50,000 for each topical report, amendment, revision, or supplement to a topical report completed or under review from January 30, 1989, through August 8, 1991, will not be billed to the applicant. Any professional hours expended on or after August 9, 1991, will be assessed at the applicable rate established in § 170.20.

[4] Licensees paying fees under Categories 1.A., 1.B., and 1.E. are not subject to fees under Categories 1.C. and 1.D. for sealed sources authorized in the same license except for an application that deals only with the sealed sources authorized by the license.

[5] For a combined import and export license application for material listed in Appendix P to part 110 of this chapter, only the higher of the two applicable fee amounts must be paid.

[6] Persons who possess radium sources that are used for operational purposes in another fee category are not also subject to the fees in this category. (This exception does not apply if the radium sources are possessed for storage only.)

PART 171—ANNUAL FEES FOR REACTOR LICENSES AND FUEL CYCLE LICENSES AND MATERIALS LICENSES, INCLUDING HOLDERS OF CERTIFICATES OF COMPLIANCE, REGISTRATIONS, AND QUALITY ASSURANCE PROGRAM APPROVALS AND GOVERNMENT AGENCIES LICENSED BY THE NRC

5. The authority citation for part 171 continues to read as follows:

Authority: Section 7601, Pub. L. 99–272, 100 Stat. 146, as amended by § 5601, Pub. L. 100–203, 101 Stat. 1330, as amended by § 3201, Pub. L. 101–239, 103 Stat. 2132, as amended by § 6101, Pub. L. 101–508, 104 Stat. 1388, as amended by § 2903a, Pub. L. 102–486, 106 Stat. 3125 (42 U.S.C. 2213–2214), and as amended by Title IV, Pub. L. 109–103, 119 Stat. 2283 (42 U.S.C. 2214); § 301, Pub. L. 92–314, 86 Stat. 227 (42 U.S.C. 2201w); § 201, Pub. L. 93–438, 88 Stat. 1242, as amended (42 U.S.C. 5841); § 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021(b), 2111).

6. In § 171.15, paragraph (b)(1), the introductory text of paragraph (b)(2), paragraph (c)(1), the introductory text of paragraphs (c)(2) and (d)(1), and paragraphs (d)(2), (d)(3), and (e), are revised to read as follows:

§ 171.15 Annual fees: Reactor licenses and independent spent fuel storage licenses.

* * * * *

(b)(1) The FY 2008 annual fee for each operating power reactor which must be collected by September 30, 2008, is $4,097,000.

(2) The FY 2008 annual fee is comprised of a base annual fee for power reactors licensed to operate, a base spent fuel storage/reactor decommissioning annual fee, and associated additional charges (surcharges). The activities comprising the FY 2008 spent storage/reactor decommissioning base annual fee are shown in paragraphs (c)(2)(i) and (ii) of this section. The activities comprising the FY 2008 surcharge are shown in paragraph (d)(1) of this section. The activities comprising the FY 2008 base annual fee for operating power reactors are as follows:

* * * * *

(c)(1) The FY 2008 annual fee for each power reactor holding a 10 CFR part 50 license that is in a decommissioning or possession only status and has spent fuel onsite, and each independent spent fuel storage 10 CFR part 72 licensee who does not hold a 10 CFR part 50 license is $140,000.

(2) The FY 2008 annual fee is comprised of a base spent fuel storage/reactor decommissioning annual fee (which is also included in the operating power reactor annual fee shown in paragraph (b) of this section), and an additional charge (surcharge). The activities comprising the FY 2008 surcharge are shown in paragraph (d)(1) of this section. The activities comprising the FY 2008 spent fuel storage/reactor decommissioning rebaselined annual fee are:

* * * * *

(d)(1) The surcharge allocated to annual fees includes the budgeted resources for the activities listed in paragraph (d)(1)(i) of this section, plus the total budgeted resources for the activities included in paragraphs (d)(1)(ii) and (d)(1)(iii) of this section as reduced by the appropriations NRC receives for these types of activities. If the NRC's appropriations for these types of activities are greater than the budgeted resources for the activities included in paragraphs (d)(1)(ii) and (d)(1)(iii) of this section for a given FY, a negative surcharge (or annual fee reduction) will be allocated to annual fees. The activities comprising the FY 2008 surcharge are as follows:

* * * * *

(2) The total FY 2008 surcharge allocated to the operating power reactor class of licenses is −$4.6 million, not including the amount allocated to the spent fuel storage/reactor decommissioning class. The FY 2008 operating power reactor surcharge to be assessed to each operating power reactor is approximately −$44,000. This amount is calculated by dividing the total operating power reactor surcharge (−$4.6 million) by the number of operating power reactors (104).

(3) The FY 2008 surcharge allocated to the spent fuel storage/reactor decommissioning class of licenses is −$218,000. The FY 2008 spent fuel storage/reactor decommissioning surcharge to be assessed to each operating power reactor, each power reactor in decommissioning or possession only status that has spent fuel onsite, and to each independent spent fuel storage 10 CFR part 72 licensee who does not hold a 10 CFR part 50 license is approximately −$1,775. This amount is calculated by dividing the total surcharge costs allocated to this class by the total number of power reactor licenses, except those that permanently ceased operations and have no fuel onsite, and 10 CFR part 72 licensees who do not hold a 10 CFR part 50 license.

(e) The FY 2008 annual fees for licensees authorized to operate a test and research (non-power) reactor licensed under part 50 of this chapter, unless the reactor is exempted from fees under § 171.11(a), are as follows:

Research reactor	$77,400
Test reactor	77,400

7. In § 171.16, paragraphs (c), (d), and the introductory text of paragraph (e) are revised to read as follows:

§ 171.16 Annual fees: Materials licensees, holders of certificates of compliance, holders of sealed source and device registrations, holders of quality assurance program approvals, and government agencies licensed by the NRC.

* * * * *

(c) A licensee who is required to pay an annual fee under this section may qualify as a small entity. If a licensee qualifies as a small entity and provides the Commission with the proper certification along with its annual fee payment, the licensee may pay reduced annual fees as shown in the following table. Failure to file a small entity certification in a timely manner could result in the denial of any refund that might otherwise be due. The small entity fees are as follows:

	Maximum annual fee per licensed category
Small Businesses Not Engaged in Manufacturing (Average gross receipts over last 3 completed fiscal years):	
$350,000 to $6.5 million	$2,300
Less than $350,000	500
Small Not-For-Profit Organizations (Annual Gross Receipts):	
$350,000 to $6.5 million	2,300
Less than $350,000	500
Manufacturing entities that have an average of 500 employees or fewer:	
35 to 500 employees	2,300
Fewer than 35 employees	500
Small Governmental Jurisdictions (Including publicly supported educational institutions) (Population):	
20,000 to 50,000	2,300
Fewer than 20,000	500
Educational Institutions that are not State or Publicly Supported, and have 500 Employees or Fewer:	
35 to 500 employees	2,300
Fewer than 35 employees	500

(d) The FY 2008 annual fees are comprised of a base annual fee and an additional charge (surcharge). The activities comprising the FY 2008 surcharge are shown for convenience in paragraph (e) of this section. The FY 2008 annual fees for materials licensees and holders of certificates, registrations or approvals subject to fees under this section are shown in the following table:

SCHEDULE OF MATERIALS ANNUAL FEES AND FEES FOR GOVERNMENT AGENCIES LICENSED BY NRC

[See footnotes at end of table]

Category of materials licenses	Annual fees [1] [2] [3]
1. Special nuclear material:	
A. (1) Licenses for possession and use of U–235 or plutonium for fuel fabrication activities.	
(a) Strategic Special Nuclear Material (High Enriched Uranium) [Program Code(s): 21130]	$3,082,000

SCHEDULE OF MATERIALS ANNUAL FEES AND FEES FOR GOVERNMENT AGENCIES LICENSED BY NRC—Continued

[See footnotes at end of table]

Category of materials licenses	Annual fees [1] [2] [3]
(b) Low Enriched Uranium in Dispersible Form Used for Fabrication of Power Reactor Fuel [Program Code(s): 21210]	921,000
(2) All other special nuclear materials licenses not included in Category 1.A.(1) which are licensed for fuel cycle activities.	
(a) Facilities with limited operations [Program Code(s): 21310, 21320]	349,000
(b) Gas centrifuge enrichment demonstration facilities	572,000
(c) Others, including hot cell facilities	254,000
B. Licenses for receipt and storage of spent fuel and reactor-related Greater than Class C (GTCC) waste at an independent spent fuel storage installation (ISFSI) [Program Code(s): 23200]	[11] N/A
C. Licenses for possession and use of special nuclear material in sealed sources contained in devices used in industrial measuring systems, including x-ray fluorescence analyzers [Program Code(s): 22140]	1,600
D. All other special nuclear material licenses, except licenses authorizing special nuclear material in unsealed form in combination that would constitute a critical quantity, as defined in § 150.11 of this chapter, for which the licensee shall pay the same fees as those for Category 1.A.(2) [Program Code(s): 22110, 22111, 22120, 22131, 22136, 22150, 22151, 22161, 22163, 22170, 23100, 23300, 23310]	4,500
E. Licenses or certificates for the operation of a uranium enrichment facility [Program Code(s): 21200]	1,747,000
2. Source material:	
A. (1) Licenses for possession and use of source material for refining uranium mill concentrates to uranium hexafluoride [Program Code(s): 11400]	604,000
(2) Licenses for possession and use of source material in recovery operations such as milling, in-situ leaching, heap-leaching, ore buying stations, ion exchange facilities and in-processing of ores containing source material for extraction of metals other than uranium or thorium, including licenses authorizing the possession of byproduct waste material (tailings) from source material recovery operations, as well as licenses authorizing the possession and maintenance of a facility in a standby mode.	
(a) Class I facilities [4] [Program Code(s): 11100]	10,900
(b) Class II facilities [4] [Program Code(s): 11500]	10,900
(c) Other facilities [4] [Program Code(s): 11700]	[5] N/A
(3) Licenses that authorize the receipt of byproduct material, as defined in § 11e.(2) of the Atomic Energy Act, from other persons for possession and disposal, except those licenses subject to the fees in Category 2.A.(2) or Category 2.A.(4) [Program Code(s): 11600]	[5] N/A
(4) Licenses that authorize the receipt of byproduct material, as defined in § 11e.(2) of the Atomic Energy Act, from other persons for possession and disposal incidental to the disposal of the uranium waste tailings generated by the licensee's milling operations, except those licenses subject to the fees in Category 2.A.(2)	10,900
(5) Licenses that authorize the possession of source material related to removal of contaminants (source material) from drinking water	6,500
B. Licenses that authorize only the possession, use and/or installation of source material for shielding [Program Code(s): 11210]	600
C. All other source material licenses [Program Code(s): 11200, 11220, 11221, 11230, 11300, 11800, 11810]	10,30
3. Byproduct material:	
A. Licenses of broad scope for possession and use of byproduct material issued under parts 30 and 33 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution [Program Code(s): 03211, 03212, 03213]	23,100
B. Other licenses for possession and use of byproduct material issued under part 30 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution [Program Code(s): 03214, 03215, 22135, 22162]	6,500
C. Licenses issued under §§ 32.72 and/or 32.74 of this chapter authorizing the processing or manufacturing and distribution or redistribution of radiopharmaceuticals, generators, reagent kits and/or sources and devices containing byproduct material. This category also includes the possession and use of source material for shielding authorized under part 40 of this chapter when included on the same license. This category does not apply to licenses issued to nonprofit educational institutions whose processing or manufacturing is exempt under § 171.11(a)(1). These licenses are covered by fee under Category 3.D. [Program Code(s): 02500, 02511, 02513]	9,200
D. Licenses and approvals issued under §§ 32.72 and/or 32.74 of this chapter authorizing distribution or redistribution of radiopharmaceuticals, generators, reagent kits and/or sources or devices not involving processing of byproduct material. This category includes licenses issued under §§ 32.72 and 32.74 of this chapter to nonprofit educational institutions whose processing or manufacturing is exempt under § 171.11(a)(1). This category also includes the possession and use of source material for shielding authorized under part 40 of this chapter when included on the same license [Program Code(s): 02512, 02514]	5,300
E. Licenses for possession and use of byproduct material in sealed sources for irradiation of materials in which the source is not removed from its shield (self-shielded units) [Program Code(s): 03510, 03520]	3,100
F. Licenses for possession and use of less than 10,000 curies of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes. This category also includes underwater irradiators for irradiation of materials in which the source is not exposed for irradiation purposes [Program Code(s): 03511]	6,100
G. Licenses for possession and use of 10,000 curies or more of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes. This category also includes underwater irradiators for irradiation of materials in which the source is not exposed for irradiation purposes [Program Code(s): 03521]	24,600
H. Licenses issued under Subpart A of part 32 of this chapter to distribute items containing byproduct material that require device review to persons exempt from the licensing requirements of part 30 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of part 30 of this chapter [Program Code(s): 03255]	8,800

SCHEDULE OF MATERIALS ANNUAL FEES AND FEES FOR GOVERNMENT AGENCIES LICENSED BY NRC—Continued

[See footnotes at end of table]

Category of materials licenses	Annual fees [1] [2] [3]
I. Licenses issued under Subpart A of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require device evaluation to persons exempt from the licensing requirements of part 30 of this chapter, except for specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of part 30 of this chapter [Program Code(s): 03250, 03251, 03252, 03253, 03254, 03256]	8,200
J. Licenses issued under Subpart B of part 32 of this chapter to distribute items containing byproduct material that require sealed source and/or device review to persons generally licensed under part 31 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under part 31 of this chapter [Program Code(s): 03240, 03241, 03243]	1,900
K. Licenses issued under Subpart B of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require sealed source and/or device review to persons generally licensed under part 31 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under part 31 of this chapter [Program Code(s): 03242, 03244]	1,500
L. Licenses of broad scope for possession and use of byproduct material issued under parts 30 and 33 of this chapter for research and development that do not authorize commercial distribution [Program Code(s): 01100, 01110, 01120, 03610, 03611, 03612, 03613]	11,700
M. Other licenses for possession and use of byproduct material issued under part 30 of this chapter for research and development that do not authorize commercial distribution [Program Code(s): 03620]	4,300
N. Licenses that authorize services for other licensees, except: (1) Licenses that authorize only calibration and/or leak testing services are subject to the fees specified in fee Category 3.P.; and (2) Licenses that authorize waste disposal services are subject to the fees specified in fee categories 4.A., 4.B., and 4.C. [Program Code(s): 03219, 03225, 03226]	6,600
O. Licenses for possession and use of byproduct material issued under part 34 of this chapter for industrial radiography operations. This category also includes the possession and use of source material for shielding authorized under part 40 of this chapter when authorized on the same license [Program Code(s): 03310, 03320]	11,200
P. All other specific byproduct material licenses, except those in Categories 4.A. through 9.D. [Program Code(s): 02400, 02410, 03120, 03121, 03122, 03123, 03124, 03220, 03221, 03222, 03800, 03810, 22130]	2,100
Q. Registration of devices generally licensed under part 31 of this chapter	[13] N/A
R. Possession of items or products containing radium-226 identified in 10 CFR 31.12 which exceed the number of items or limits specified in that section:[14]	
1. Possession of quantities exceeding the number of items or limits in 10 CFR 31.12(a)(4), or (5) but less than or equal to 10 times the number of items or limits specified [Program Code(s): 02700]	1,700
2. Possession of quantities exceeding 10 times the number of items or limits specified in 10 CFR 31.12(a)(4), or (5) [Program Code(s): 02710]	2,100
S. Licenses for production of accelerator-produced radionuclides [Program Code(s): 03210]	8,500
4. Waste disposal and processing:	
A. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of contingency storage or commercial land disposal by the licensee; or licenses authorizing contingency storage of low-level radioactive waste at the site of nuclear power reactors; or licenses for receipt of waste from other persons for incineration or other treatment, packaging of resulting waste and residues, and transfer of packages to another person authorized to receive or dispose of waste material [Program Code(s): 03231, 03233, 03235, 03236, 06100, 06101]	[5] N/A
B. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of packaging or repackaging the material. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material [Program Code(s): 03234]	9,400
C. Licenses specifically authorizing the receipt of prepackaged waste byproduct material, source material, or special nuclear material from other persons. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material [Program Code(s): 03232]	7,200
5. Well logging:	
A. Licenses for possession and use of byproduct material, source material, and/or special nuclear material for well logging, well surveys, and tracer studies other than field flooding tracer studies [Program Code(s): 03110, 03111, 03112]	3,400
B. Licenses for possession and use of byproduct material for field flooding tracer studies [Program Code(s): 03113]	[5] N/A
6. Nuclear laundries:	
A. Licenses for commercial collection and laundry of items contaminated with byproduct material, source material, or special nuclear material [Program Code(s): 03218]	20,800
7. Medical licenses:	
A. Licenses issued under parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices. This category also includes the possession and use of source material for shielding when authorized on the same license [Program Code(s): 02300, 02310]	10,600
B. Licenses of broad scope issued to medical institutions or two or more physicians under parts 30, 33, 35, 40, and 70 of this chapter authorizing research and development, including human use of byproduct material except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices. This category also includes the possession and use of source material for shielding when authorized on the same license.[9] [Program Code(s): 02110]	23,000
C. Other licenses issued under parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, and/or special nuclear material except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices. This category also includes the possession and use of source material for shielding when authorized on the same license.[9] [Program Code(s): 02120, 02121, 02200, 02201, 02210, 02220, 02230, 02231, 02240, 22160]	3,900

SCHEDULE OF MATERIALS ANNUAL FEES AND FEES FOR GOVERNMENT AGENCIES LICENSED BY NRC—Continued

[See footnotes at end of table]

Category of materials licenses	Annual fees [1] [2] [3]
8. Civil defense:	
A. Licenses for possession and use of byproduct material, source material, or special nuclear material for civil defense activities [Program Code(s): 03710]	1,700
9. Device, product, or sealed source safety evaluation:	
A. Registrations issued for the safety evaluation of devices or products containing byproduct material, source material, or special nuclear material, except reactor fuel devices, for commercial distribution	14,900
B. Registrations issued for the safety evaluation of devices or products containing byproduct material, source material, or special nuclear material manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel devices	14,900
C. Registrations issued for the safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, except reactor fuel, for commercial distribution	2,100
D. Registrations issued for the safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel	700
10. Transportation of radioactive material:	
A. Certificates of Compliance or other package approvals issued for design of casks, packages, and shipping containers.	
1. Spent Fuel, High-Level Waste, and plutonium air packages	[6] N/A
2. Other Casks	[6] N/A
B. Quality assurance program approvals issued under part 71 of this chapter:	
1. Users and Fabricators	[6] N/A
2. Users	[6] N/A
C. Evaluation of security plans, route approvals, route surveys, and transportation security devices (including immobilization devices)	[6] N/A
11. Standardized spent fuel facilities	[6] N/A
12. Special Projects	[6] N/A
13. A. Spent fuel storage cask Certificate of Compliance	[6] N/A
B. General licenses for storage of spent fuel under 10 CFR 72.210	[12] N/A
14. Decommissioning/Reclamation:	
A. Byproduct, source, or special nuclear material licenses and other approvals authorizing decommissioning, decontamination, reclamation, or site restoration activities under parts 30, 40, 70, 72, and 76 of this chapter	[7] N/A
B. Site-specific decommissioning activities associated with unlicensed sites, whether or not the sites have been previously licensed	[7] N/A
15. Import and Export licenses	[8] N/A
16. Reciprocity	[8] N/A
17. Master materials licenses of broad scope issued to Government agencies	227,000
18. Department of Energy:	
A. Certificates of Compliance	[10] 880,000
B. Uranium Mill Tailings Radiation Control Act (UMTRCA) activities	596,000

[1] Annual fees will be assessed based on whether a licensee held a valid license with the NRC authorizing possession and use of radioactive material during the current FY. The annual fee is waived for those materials licenses and holders of certificates, registrations, and approvals who either filed for termination of their licenses or approvals or filed for possession only/storage licenses before October 1, 2007, and permanently ceased licensed activities entirely before this date. Annual fees for licensees who filed for termination of a license, downgrade of a license, or for a possession only license during the FY and for new licenses issued during the FY will be prorated in accordance with the provisions of § 171.17. If a person holds more than one license, certificate, registration, or approval, the annual fee(s) will be assessed for each license, certificate, registration, or approval held by that person. For licenses that authorize more than one activity on a single license (e.g., human use and irradiator activities), annual fees will be assessed for each category applicable to the license. Licensees paying annual fees under Category 1.A.(1) are not subject to the annual fees for Categories 1.C. and 1.D. for sealed sources authorized in the license.

[2] Payment of the prescribed annual fee does not automatically renew the license, certificate, registration, or approval for which the fee is paid. Renewal applications must be filed in accordance with the requirements of parts 30, 40, 70, 71, 72, or 76 of this chapter.

[3] Each FY, fees for these materials licenses will be calculated and assessed in accordance with § 171.13 and will be published in the **Federal Register** for notice and comment.

[4] A Class I license includes mill licenses issued for the extraction of uranium from uranium ore. A Class II license includes solution mining licenses (in-situ and heap leach) issued for the extraction of uranium from uranium ores including research and development licenses. An ''other'' license includes licenses for extraction of metals, heavy metals, and rare earths.

[5] There are no existing NRC licenses in these fee categories. If NRC issues a license for these categories, the Commission will consider establishing an annual fee for this type of license.

[6] Standardized spent fuel facilities, 10 CFR parts 71 and 72 Certificates of Compliance and related Quality Assurance program approvals, and special reviews, such as topical reports, are not assessed an annual fee because the generic costs of regulating these activities are primarily attributable to users of the designs, certificates, and topical reports.

[7] Licensees in this category are not assessed an annual fee because they are charged an annual fee in other categories while they are licensed to operate.

[8] No annual fee is charged because it is not practical to administer due to the relatively short life or temporary nature of the license.

[9] Separate annual fees will not be assessed for pacemaker licenses issued to medical institutions that also hold nuclear medicine licenses under Categories 7.B. or 7.C.

[10] This includes Certificates of Compliance issued to DOE that are not under the Nuclear Waste Fund.

[11] See § 171.15(c).

[12] See § 171.15(c).

[13] No annual fee is charged for this category because the cost of the general license registration program applicable to licenses in this category will be recovered through 10 CFR part 170 fees.

[14] Persons who possess radium sources that are used for operational purposes in another fee category are not also subject to the fees in this category. (This exception does not apply if the radium sources are possessed for storage only.)

(e) The surcharge allocated to annual fees includes the budgeted resources for the activities listed in paragraph (e)(1) of this section, plus the total budgeted resources for the activities included in paragraphs (e)(2) and (e)(3) of this section as reduced by the appropriations NRC receives for these types of activities. If the NRC's appropriations for these types of activities are greater than the budgeted resources for the activities included in paragraphs (e)(2) and (e)(3) of this section for a given FY, a negative surcharge (or annual fee reduction) will be allocated to annual fees. The activities comprising the FY 2008 surcharge are as follows:

* * * * *

Dated at Rockville, Maryland, this 28th day of January, 2008.

For the Nuclear Regulatory Commission.

William M. McCabe,

Chief Financial Officer.

NOTE: This Appendix will not appear in the Code of Federal Regulations.

Appendix A to This Proposed Rule—Regulatory Flexibility Analysis for the Proposed Amendments to 10 CFR Part 170 (License Fees) and 10 CFR Part 171 (Annual Fees)

I. Background

The Regulatory Flexibility Act (RFA), as amended 5 U.S.C. 601 *et seq.*, requires that agencies consider the impact of their rulemakings on small entities and, consistent with applicable statutes, consider alternatives to minimize these impacts on the businesses, organizations, and government jurisdictions to which they apply.

The NRC has established standards for determining which NRC licensees qualify as small entities (10 CFR 2.810). These size standards were established based on the Small Business Administration's most common receipts-based size standards and include a size standard for business concerns that are manufacturing entities. The NRC uses the size standards to reduce the impact of annual fees on small entities by establishing a licensee's eligibility to qualify for a maximum small entity fee. The small entity fee categories in § 171.16(c) of this proposed rule are based on the NRC's size standards.

The NRC is required each year, under OBRA–90, as amended, to recover approximately 90 percent of its budget authority (less amounts appropriated from the NWF and for other activities specifically removed from the fee base), through fees to NRC licensees and applicants. In total, the NRC is required to bill approximately $760.7 million in fees for FY 2008.

OBRA–90 requires that the schedule of charges established by rulemaking should fairly and equitably allocate the total amount to be recovered from the NRC's licensees and be assessed under the principle that licensees who require the greatest expenditure of agency resources pay the greatest annual charges. Since FY 1991, the NRC has complied with OBRA–90 by issuing a final rule that amends its fee regulations. These final rules have established the methodology used by the NRC in identifying and determining the fees to be assessed and collected in any given FY.

The Commission is proposing to rebaseline its part 171 annual fees in FY 2008. Rebaselining fees results in increased annual fees compared to FY 2007 for the power reactors and non-power reactors, and decreased annual fees for four classes of licenses (spent fuel storage/reactor decommissioning, fuel facilities, transportation, and materials users). Within the uranium recovery fee class, annual fees for the all the non DOE licensees decrease, while annual fee for the DOE increases slightly. There is no annual fee for the rare earth fee class because this NRC fee class will no longer exist in FY 2008. As discussed in Section II.B.2., ''Agreement State Activities'', of this document, NRC's only rare earth facility will transfer to the Commonwealth of Pennsylvania when it becomes an Agreement State.

The Congressional Review Act of 1996 provides Congress with the opportunity to review agency rules before they go into effect. Under this legislation, the NRC annual fee rule is considered a ''major'' rule and must be reviewed by Congress and the Comptroller General before the rule becomes effective.

The Congressional Review Act also requires that an agency prepare a guide to assist small entities in complying with each rule for which a final RFA is prepared. This analysis and the small entity compliance guide (Attachment 1) have been prepared for the FY 2008 fee rule as required by law.

II. Impact on Small Entities

The fee rule results in substantial fees being charged to those individuals, organizations, and companies licensed by the NRC, including those licensed under the NRC materials program. The comments received on previous proposed fee rules and the small entity certifications received in response to previous final fee rules indicate that NRC licensees qualifying as small entities under the NRC's size standards are primarily materials licensees. Therefore, this analysis will focus on the economic impact of the fees on materials licensees. In FY 2007, about 32 percent of these licensees (approximately 1,400 licensees) qualified as small entities.

The commenters on previous fee rulemakings consistently indicated that the following results would occur if the proposed annual fees were not modified:

1. Large firms would gain an unfair competitive advantage over small entities. Commenters noted that small and very small companies (''Mom and Pop'' operations) would find it more difficult to absorb the annual fee than a large corporation or a high-volume type of operation. In competitive markets, such as soil testing, annual fees would put small licensees at an extreme competitive disadvantage with their much larger competitors because the proposed fees would be the same for a two-person licensee as for a large firm with thousands of employees.

2. Some firms would be forced to cancel their licenses. A licensee with receipts of less than $500,000 per year stated that the proposed rule would, in effect, force it to relinquish its soil density gauge and license, thereby reducing its ability to do its work effectively. Other licensees, especially well-loggers, noted that the increased fees would force small businesses to get rid of the materials license altogether. Commenters stated that the proposed rule would result in about 10 percent of the well-logging licensees terminating their licenses immediately and approximately 25 percent terminating their licenses before the next annual assessment.

3. Some companies would go out of business.

4. Some companies would have budget problems. Many medical licensees noted that, along with reduced reimbursements, the proposed increase of the existing fees and the introduction of additional fees would significantly affect their budgets. Others noted that, in view of the cuts by Medicare and other third party carriers, the fees would produce a hardship and some facilities would experience a great deal of difficulty in meeting this additional burden.

Over 3,000 licenses, approvals, and registration terminations have been requested since the NRC first established annual fees for materials licenses. Although some of these terminations were requested because the license was no longer needed or licenses or registrations could be combined, indications are that other termination requests were due to the economic impact of the fees.

To alleviate the significant impact of the annual fees on a substantial number of small entities, the NRC considered the following alternatives in accordance with the RFA in developing each of its fee rules since FY 1991.

1. Base fees on some measure of the amount of radioactivity possessed by the licensee (e.g., number of sources).

2. Base fees on the frequency of use of the licensed radioactive material (e.g., volume of patients).

3. Base fees on the NRC size standards for small entities.

The NRC has reexamined its previous evaluations of these alternatives and continues to believe that establishment of a maximum fee for small entities is the most appropriate and effective option for reducing the impact of its fees on small entities.

III. Maximum Fee

The RFA and its implementing guidance do not provide specific guidelines on what constitutes a significant economic impact on a small entity; therefore, the NRC has no benchmark to assist it in determining the amount or the percent of gross receipts that should be charged to a small entity. In developing the maximum small entity annual fee in FY 1991, the NRC examined its 10 CFR part 170 licensing and inspection fees and Agreement State fees for those fee categories which were expected to have a substantial number of small entities. Six Agreement States (Washington, Texas, Illinois, Nebraska, New York, and Utah), were used as benchmarks in the establishment of the

maximum small entity annual fee in FY 1991.

The NRC maximum small entity fee was established as an annual fee only. In addition to the annual fee, NRC small entity licensees were required to pay amendment, renewal and inspection fees. In setting the small entity annual fee, NRC ensured that the total amount small entities paid annually would not exceed the maximum paid in the six benchmark Agreement States.

Of the six benchmark states, the maximum Agreement State fee of $3,800 in Washington was used as the ceiling for the total fees. Thus the NRC's small entity fee was developed to ensure that the total fees paid by NRC small entities would not exceed $3,800. Given the NRC's FY 1991 fee structure for inspections, amendments, and renewals, a small entity annual fee established at $1,800 allowed the total fee (small entity annual fee plus yearly average for inspections, amendments and renewal fees) for all categories to fall under the $3,800 ceiling.

In FY 1992, the NRC introduced a second, lower tier to the small entity fee in response to concerns that the $1,800 fee, when added to the license and inspection fees, still imposed a significant impact on small entities with relatively low gross annual receipts. For purposes of the annual fee, each small entity size standard was divided into an upper and lower tier. Small entity licensees in the upper tier continued to pay an annual fee of $1,800 while those in the lower tier paid an annual fee of $400.

Based on the changes that had occurred since FY 1991, the NRC re-analyzed its maximum small entity annual fees in FY 2000, and determined that the small entity fees should be increased by 25 percent to reflect the increase in the average fees paid by other materials licensees since FY 1991, as well as changes in the fee structure for materials licensees. The structure of the fees that NRC charged to its materials licensees changed during the period between 1991 and 1999. Costs for materials license inspections, renewals, and amendments, which were previously recovered through part 170 fees for services, are now included in the part 171 annual fees assessed to materials licensees. As a result, the maximum small entity annual fee increased from $1,800 to $2,300 in FY 2000. By increasing the maximum annual fee for small entities from $1,800 to $2,300, the annual fee for many small entities was reduced. At the same time materials licensees, including small entities, would pay for most of the costs attributable to them. The costs not recovered from small entities are allocated to other materials licensees and to power reactors.

While reducing the impact on many small entities, the NRC determined that the maximum annual fee of $2,300 for small entities may continue to have a significant impact on materials licensees with annual gross receipts in the thousands of dollars range. Therefore, the NRC continued to provide a lower-tier small entity annual fee for small entities with relatively low gross annual receipts, and for manufacturing concerns and educational institutions not State or publicly supported, with fewer than 35 employees. The NRC also increased the lower tier small entity fee by the same percentage increase to the maximum small entity annual fee. This 25 percent increase resulted in the lower tier small entity fee increasing from $400 to $500 in FY 2000.

The NRC stated in the RFA for the FY 2001 final fee rule that it would re-examine the small entity fees every two years, in the same years in which it conducts the biennial review of fees as required by the Chief Financial Officer's Act. Accordingly, the NRC examined the small entity fees again in FY 2003 (68 FR 36714; June 18, 2003), and determined that a change was not warranted to the small entity fees established in FY 2001. The NRC performed a similar review, and reached the same conclusion, in FY 2005.

The NRC re-examined its small entity fees for the FY 2007 fee rulemaking, and did not believe that a change to the small entity fees was warranted. Unlike the annual fees assessed to other licensees, the small entity fees are not designed to recover the entire agency costs associated with particular licensees. Instead, the reduced fees for small entities are designed to provide some fee relief for qualifying small entity licensees while at the same time recovering from them some of the agency's costs for activities that benefit them. The costs not recovered from small entities for activities that benefit them must be recovered from other licensees. Given the reduction in annual fees from FY 2000 to FY 2007, on average, for those categories of materials licensees that contain a number of small entities, the NRC determined that the current small entity fees of $500 and $2,300 continued to meet the objective of providing relief to many small entities while recovering from them some of the costs that benefit them.

As part of the small entity review in FY 2007, the NRC also considered whether it should establish reduced fees for small entities under part 170. The NRC received one comment requesting that such small entity fees be considered for certain export licenses, particularly in light of the recent increases to part 170 fees for these licenses. Because the NRC's part 170 fees are not assessed to a licensee or applicant on a regular basis (i.e., they are only assessed when a licensee or applicant requests a specific service from the NRC), the NRC does not believe that the impact of its part 170 fees warrants a fee reduction for small entities under part 170, in addition to the part 171 small entity fee reduction. Regarding export licenses, in particular, the NRC notes that interested parties can submit a single application for a broad scope, multi-year license that permits exports to multiple countries. Because the NRC's fees are charged per application, this streamlining process minimizes the fees for export applicants. Because a single NRC fee can cover numerous exports, and because there are a limited number of entities who apply for these licenses, the NRC does not anticipate that the part 170 export fees will have a significant impact on a substantial number of small entities.

Therefore, the NRC retained the $2,300 small entity annual fee and the $500 lower tier small entity annual fee for FY 2007, and is not proposing changes to these fees in FY 2008. The NRC plans to re-examine the small entity fees again in FY 2009.

IV. Summary

The NRC has determined that the 10 CFR part 171 annual fees significantly impact a substantial number of small entities. A maximum fee for small entities strikes a balance between the requirement to recover 90 percent of the NRC budget and the requirement to consider means of reducing the impact of the fee on small entities. Based on its regulatory flexibility analysis, the NRC concludes that a maximum annual fee of $2,300 for small entities and a lower-tier small entity annual fee of $500 for small businesses and not-for-profit organizations with gross annual receipts of less than $350,000, small governmental jurisdictions with a population of fewer than 20,000, small manufacturing entities that have fewer than 35 employees, and educational institutions that are not State or publicly supported and have fewer than 35 employees reduces the impact on small entities. At the same time, these reduced annual fees are consistent with the objectives of OBRA–90. Thus, the fees for small entities maintain a balance between the objectives of OBRA–90 and the RFA. Therefore, the analysis and conclusions previously established remain valid for FY 2008.

ATTACHMENT 1 TO APPENDIX A—U.S. Nuclear Regulatory Commission Small Entity Compliance Guide; Fiscal Year 2008

Contents

Introduction
NRC Definition of Small Entity
NRC Small Entity Fees
Instructions for Completing NRC Form 526

Introduction

The Congressional Review Act requires all Federal agencies to prepare a written guide for each ''major'' final rule, as defined by the Act. The NRC's fee rule, published annually to comply with the Omnibus Budget Reconciliation Act of 1990 (OBRA–90), as amended, is considered a ''major'' rule under the Congressional Review Act. Therefore, in compliance with the law, this guide has been prepared to assist NRC materials licensees in complying with the FY 2008 fee rule.

Licensees may use this guide to determine whether they qualify as a small entity under NRC regulations and are eligible to pay reduced FY 2008 annual fees assessed under 10 CFR part 171. The NRC has established two tiers of annual fees for those materials licensees who qualify as small entities under the NRC's size standards.

Licensees who meet the NRC's size standards for a small entity (listed in 10 CFR 2.810) must submit a completed NRC Form 526 ''Certification of Small Entity Status for the Purposes of Annual Fees Imposed under 10 CFR Part 171'' to qualify for the reduced annual fee. This form can be accessed on the NRC's Web site at *http://www.nrc.gov*. The form can then be accessed by selecting ''Who We Are,'' then ''License Fees'' and under ''Forms'' selecting NRC Form 526. For licensees who cannot access the NRC's Web

site, NRC Form 526 may be obtained through the local point of contact listed in the NRC's ''Materials Annual Fee Billing Handbook,'' NUREG/BR–0238, which is enclosed with each annual fee billing. Alternatively, the form may be obtained by calling the fee staff at 301–415–7554, or by e-mailing the fee staff at *fees@nrc.gov.* The completed form, the appropriate small entity fee, and the payment copy of the invoice should be mailed to the U.S. Nuclear Regulatory Commission, License Fee Team, at the address indicated on the invoice. Failure to file the NRC small entity certification Form 526 in a timely manner may result in the denial of any refund that might otherwise be due.

NRC Definition of Small Entity

For purposes of compliance with its regulations (10 CFR 2.810), the NRC has defined a small entity as follows:

(1) *Small business*—a for-profit concern that provides a service, or a concern that is not engaged in manufacturing, with average gross receipts of $6.5 million or less over its last 3 completed fiscal years;

(2) *Manufacturing industry*—a manufacturing concern with an average of 500 or fewer employees based on employment during each pay period for the preceding 12 calendar months;

(3) *Small organizations*—a not-for-profit organization that is independently owned and operated and has annual gross receipts of $6.5 million or less;

(4) *Small governmental jurisdiction*—a government of a city, county, town, township, village, school district or special district, with a population of fewer than 50,000;

(5) *Small educational institution*—an educational institution supported by a qualifying small governmental jurisdiction, or one that is not State or publicly supported and has 500 or fewer employees.[1]

To further assist licensees in determining if they qualify as a small entity, the following guidelines are provided, which are based on the Small Business Administration's regulations (13 CFR part 121).

(1) A small business concern is an independently owned and operated entity which is not considered dominant in its field of operations.

(2) The number of employees means the total number of employees in the parent company, any subsidiaries and/or affiliates, including both foreign and domestic locations (i.e., not solely the number of employees working for the licensee or conducting NRC licensed activities for the company).

(3) Gross annual receipts includes all revenue received or accrued from any source, including receipts of the parent company, any subsidiaries and/or affiliates, and account for both foreign and domestic locations. Receipts include all revenues from sales of products and services, interest, rent, fees, and commissions, from whatever sources derived (i.e., not solely receipts from NRC licensed activities).

(4) A licensee who is a subsidiary of a large entity, including a foreign entity, does not qualify as a small entity.

NRC Small Entity Fees

In 10 CFR 171.16(c), the NRC has established two tiers of fees for licensees that qualify as a small entity under the NRC's size standards. The fees are as follows:

	Maximum annual fee per licensed category
Small Businesses Not Engaged in Manufacturing (Average gross receipts over last 3 completed fiscal years):	
$350,000 to $6.5 million	$2,300
Less than $350,000	500
Small Not-For-Profit Organizations (Annual Gross Receipts):	
$350,000 to $6.5 million	2,300
Less than $350,000	500
Manufacturing entities that have an average of 500 employees or fewer:	
35 to 500 employees	2,300
Fewer than 35 employees	500
Small Governmental Jurisdictions (Including publicly supported educational institutions) (Population):	
20,000 to 50,000	2,300
Fewer than 20,000	500
Educational Institutions that are not State or Publicly Supported, and have 500 Employees or Fewer:	
35 to 500 employees	2,300
Fewer than 35 employees	500

Instructions for Completing NRC Small Entity Form 526

1. Complete all items on NRC Form 526 as follows:

(**Note:** Incomplete or improperly completed forms will be returned as unacceptable.)

(a) Enter the license number and invoice number exactly as they appear on the annual fee invoice.

(b) Enter the North American Industry Classification System (NAICS).

(c) Enter the licensee's name and address exactly as they appear on the invoice. Annotate name and/or address changes for billing purposes on the payment copy of the invoice—include contact's name, telephone number, e-mail address, and company Web site address. Correcting the name and/or address on NRC Form 526 or on the invoice does not constitute a request to amend the license.

(d) Check the appropriate size standard under which the licensee qualifies as a small entity. Check one box only. Note the following:

(i) A licensee who is a subsidiary of a large entity, including foreign entities, does not qualify as a small entity. The calculation of a firm's size includes the employees or receipts of all affiliates. Affiliation with another concern is based on the power to control, whether exercised or not. Such factors as common ownership, common management and identity of interest (often found in members of the same family), among others, are indications of affiliation. The affiliated business concerns need not be in the same line of business (67 CFR part 59).

(ii) Gross annual receipts, as used in the size standards, include all revenue received or accrued by your company from all sources, regardless of the form of the revenue and not solely receipts from licensed activities.

(iii) NRC's size standards on small entity are based on the Small Business Administration's regulations (13 CFR part 121).

(iv) The size standards apply to the licensee, not to the individual authorized users who may be listed in the license.

2. If the invoice states the ''Amount Billed Represents 50% Proration,'' the amount due is not the prorated amount shown on the invoice but rather one-half of the maximum small entity annual fee shown on NRC Form 526 for the size standard under which the licensee qualifies (either $1,150 or $250) for each category billed.

3. If the invoice amount is less than the reduced small entity annual fee shown on this form, pay the amount on the invoice; there is no further reduction. In this case, do

[1] An educational institution referred to in the size standards is an entity whose primary function is education, whose programs are accredited by a nationally recognized accrediting agency or association, who is legally authorized to provide a program of organized instruction or study, who provides an educational program for which it awards academic degrees, and whose educational programs are available to the public.

not file NRC Form 526. However, if the invoice amount is greater than the reduced small entity annual fee, file NRC Form 526 and pay the amount applicable to the size standard you checked on the form.

4. The completed NRC Form 526 must be submitted with the required annual fee payment and the ''Payment Copy'' of the invoice to the address shown on the invoice.

5. 10 CFR 171.16(c)(3) states licensees shall submit a new certification with its annual fee payment each year. Failure to submit NRC Form 526 at the time the annual fee is paid will require the licensee to pay the full amount of the invoice.

The NRC sends invoices to its licensees for the full annual fee, even though some licensees qualify for reduced fees as small entities. Licensees who qualify as small entities and file NRC Form 526, which certifies eligibility for small entity fees, may pay the reduced fee, which is either $2,300 or $500 for a full year, depending on the size of the entity, for each fee category shown on the invoice. Licensees granted a license during the first 6 months of the fiscal year, and licensees who file for termination or for a (possession only(license and permanently cease licensed activities during the first 6 months of the fiscal year, pay only 50 percent of the annual fee for that year. Such invoices state that the ''amount billed represents 50% proration.''

Licensees must file a new small entity form (NRC Form 526) with the NRC each fiscal year to qualify for reduced fees in that year. Because a licensee's ''size,'' or the size standards, may change from year to year, the invoice reflects the full fee and licensees must complete and return NRC Form 526 for the fee to be reduced to the small entity fee amount. LICENSEES WILL NOT RECEIVE A NEW INVOICE FOR THE REDUCED AMOUNT. The completed NRC Form 526, the payment of the appropriate small entity fee, and the ''Payment Copy'' of the invoice should be mailed to the U. S. Nuclear Regulatory Commission, License Fee Team at the address indicated on the invoice.

If you have questions regarding the NRC's annual fees, please contact the license fee staff at 301–415–7554, e-mail the fee staff at *fees@nrc.gov*, or write to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Office of the Chief Financial Officer.

False certification of small entity status could result in civil sanctions being imposed by the NRC under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801 *et. seq.* NRC's implementing regulations are found at 10 CFR part 13.

[FR Doc. E8–2412 Filed 2–12–08; 8:45 am]

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Federal Register

Wednesday,
February 13, 2008

Part V

Department of Labor

Employment and Training Administration
20 CFR Part 655
Wage and Hour Division

29 CFR Parts 501, 780, and 788

Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement; Proposed Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Wage and Hour Division

29 CFR Parts 501, 780, and 788

RIN 1205–AB55

Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement

AGENCY: Employment and Training Administration, and Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Proposed rule; request for comments.

SUMMARY: The Department of Labor (the Department or DOL) is proposing to amend its regulations regarding the certification of temporary employment of nonimmigrant workers employed in temporary or seasonal agricultural employment and the enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. This notice of proposed rulemaking (NPRM or proposed rule) would re-engineer the process by which employers may obtain a temporary labor certification from the Department for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H–2A (agricultural temporary worker) status. Re-engineering measures focus on the utilization of an attestation-based application process after an employer conducts pre-filing recruitment and the elimination of duplicative activities currently performed by the State Workforce Agencies (SWAs). In concert with these changes, the Department proposes to amend the wage and hour regulations to provide for enhanced enforcement, including more rigorous penalties, under the H–2A program to complement the modernized certification process so that workers are appropriately protected should an employer fail to meet the requirements of the H–2A program.

DATE: Interested persons are invited to submit written comments on the proposed rule on or before March 31, 2008.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205–AB55, by any one of the following methods:

- *Federal e-Rulemaking Portal www.regulations.gov:* Follow the Web site instructions for submitting comments.
- *Mail:* Please submit all written comments (including disk and CD–ROM submissions) to Thomas Dowd, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210.
- *Hand Delivery/Courier:* Please submit all comments to Thomas Dowd, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210.

Please submit your comments by only one method. The Department will post all comments received on *http://www.regulations.gov* without making any change to the comments, including any personal information provided. The *http://www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security numbers, personal addresses, telephone numbers, and e-mail addresses in their comments as such submitted information will become viewable by the public via the *http://www.regulations.gov* Web site. It is the responsibility of the commenter to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Department encourages the public to submit comments via the Web site indicated above.

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking portal at *http://www.regulations.gov.* The Department will also make all the comments it receives available for public inspection during normal business hours at the ETA Office of Policy Development and Research at the above address. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the rule available, upon request, in large print and as an electronic file on a computer disk. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the Office of Policy Development and Research at (202) 693–3700 (VOICE) (this is not a toll-free number) or 1–877–889–5627 (TTY/TDD).

FOR FURTHER INFORMATION CONTACT: For further information regarding 20 CFR part 655, contact Sherril Hurd, Acting Team Leader, Regulations Unit, Employment and Training Administration (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210; Telephone (202) 693–3700 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339. For further information regarding 29 CFR parts 501, 780 and 788, contact James Kessler, Farm Labor Team Leader, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–3510, Washington, DC 20210; Telephone (202) 693–0070 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Revisions to 20 CFR Part 655 Subpart B

A. Background

1. Statutory Standard and Current Department of Labor Regulations

The H–2A worker visa program provides a means for U.S. agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services when U.S. labor is in short supply. Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act (INA or the Act) defines an H–2A worker as a nonimmigrant admitted to the U.S. on a temporary or seasonal basis to perform agricultural labor or services. 8 U.S.C. 1101(a)(15)(H)(ii)(a), see also 8 U.S.C. 1184(c)(1) and 1188. Although foreign agricultural labor has contributed to the growth and success of America's agricultural sector since the 19th century, the modern-day agricultural worker visa program originated with the creation, in the Immigration and Nationality Act of 1952, of the ''H–2 program''—a reference to the INA section that established it. The H–2

program established mechanisms for the use of temporary foreign labor but did not distinguish between agricultural and other types of work.

More than 30 years later, the Immigration Reform and Control Act of 1986 (IRCA) amended the INA to establish a separate H–2A visa classification for agricultural labor under INA Section 101(a)(15)(H)(ii)(A). Public Law 99–603, Title III, 100 Stat. 3359, November 6, 1986. Today, the H–2A nonimmigrant visa program authorizes the Secretary of Homeland Security to permit employers to hire foreign workers to come temporarily to the U.S. and perform agricultural services or labor of a seasonal or temporary nature, if such employment is first certified by the Secretary of Labor (the Secretary).

Section 214(c)(1) of the INA, as amended, requires the Secretary of Homeland Security to consult with appropriate agencies of the Government—in particular, the Department of Labor—before approving a petition from an employer for employment of H–2A nonimmigrant agricultural workers. 8 U.S.C. 1184(c)(1). Section 218 of the Act, together with section 214, establishes the statutory structure for the program and provides that a petition to import H–2A workers may not be approved unless the petitioner has applied to the Secretary of Labor for a certification. Section 218 sets out the explicit obligation for the Department to certify that:

> (A) There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and
>
> (B) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.
>
> 8 U.S.C. 1188(a)(1).

The INA specifies conditions under which the Secretary must deny certification, and establishes specific timeframes within which employers must file—and the Department must process and either reject or certify—applications for H–2A labor certification. In addition, the statute institutes certain employment-related protections, including workers' compensation insurance, recruitment, and housing, to which H–2A employers must adhere. 8 U.S.C. 1188(c). The H–2A program does not limit the number of aliens who may be accorded H–2A status each year or the number of labor certification applications the Department may process.

The Department has published regulations at 20 CFR part 655, subpart B—''Labor Certification Process for Temporary Agricultural Employment Occupations in the United States (H–2A Workers),'' governing the H–2A labor certification process; and at 29 CFR part 501 to implement its enforcement responsibilities under the H–2A program. Regulations impacting employer-provided housing for agricultural workers appear at 20 CFR part 654, subpart E (Housing for Agricultural Workers), and 29 CFR 1910.42 (standards set by the Occupational Safety and Health Administration); see also 20 CFR 651.10, and part 653, subparts B and F.

The INA also sets out the conditions under which a certification may not be granted, including:

> (1) There is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification.
>
> (2)(A) The employer during the previous two-year period employed H–2A workers and the Secretary of Labor has determined, after notice and opportunity for a hearing, that the employer at any time during that period substantially violated a material term or condition of the labor certification with respect to the employment of domestic or nonimmigrant workers.
>
> (B) No employer may be denied certification under subparagraph (A) for more than three years for any violation described in such subparagraph.
>
> (3) The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.
>
> (4) The Secretary determines that the employer has not made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed. Positive recruitment under this paragraph is in addition to, and shall be conducted within the same time period as, the circulation through the interstate employment service system of the employer's job offer. The obligation to engage in positive recruitment under this paragraph shall terminate on the date the H–2A workers depart for the employer's place of employment.
>
> 8 U.S.C. 1188(b).

The statute further sets out strict timelines for the processing of certifications: The Secretary may not require that an application be filed more than 45 days before the employer's date of need, and certification must occur no later than 30 days prior to the date of need, provided that all the criteria for certification are met. 8 U.S.C. 1188(c). If the application fails to meet threshold requirements for certification, notice must be provided to the employer within 7 days of the date of filing, and a timely opportunity to cure deficiencies must be provided to the employer. The Act does not explicitly provide a timeframe for certification in cases where an application as originally filed failed to meet the criteria for certification and the employer is, upon the date that is 30 days prior to the date of need, still coordinating with the Department and making a good faith effort to cure deficiencies.

The Secretary has delegated her statutory responsibilities under the H–2A program, through the Assistant Secretary, Employment and Training Administration (ETA), to ETA's Office of Foreign Labor Certification (OFLC). Under the current regulations in 20 CFR part 655, subpart B, H–2A labor certification applications are processed concurrently through the State Workforce Agency (SWA) having jurisdiction over the area of intended employment and the applicable National Processing Center (NPC) within the OFLC. The SWA and ETA—through the NPCs—receive the application and review the terms of the job offer concurrently.

Upon receipt of an employer's application, the SWA places in its job clearance system a job order initiating local recruitment, but does not place the job in broader circulation until it receives additional instructions from ETA. By law, ETA has 7 calendar days from the employer's date of filing within which to identify and notify the employer and SWA of deficiencies in the application and provide the employer an opportunity to submit an amended or modified application. Alternatively, in that same time period, ETA may accept the application for processing; acceptance reflects ETA's initial determination that the benefits, wages, and working conditions of the employer's job offer, for which temporary certification of foreign labor is sought, will not have an adverse effect on similarly employed U.S. workers. ETA then notifies the employer and SWA of this threshold determination and authorizes the SWA to place the employer's job order in intrastate/interstate clearance. See 20 CFR part 653, subpart F.

The SWA having jurisdiction over the State where the employer's work site is located is responsible for processing the

employer's request for H–2A labor certification, overseeing the recruitment and directing U.S. worker referrals to the employer. The NPC reviews whether the employers comply with advertising and recruitment requirements, and adjudicates the application—determining whether to approve or deny certification for some or all of the jobs requested.

To obtain a temporary labor certification, the employer must demonstrate that the need for the services or labor is of a temporary or seasonal nature. The employer must also establish that the job opportunity for the temporary position is full-time, and, absent extraordinary circumstances, the period of need is 1 year or less.

Historically, Departmental review and adjudication of applications took place through both the SWAs and ETA's Regional Offices. However, in December 2004, the Department opened two new NPCs, one located in Atlanta, Georgia, and the other in Chicago, Illinois, to consolidate processing of permanent and temporary foreign labor certification cases at the Federal level. In 2005, the Department published a notice in the **Federal Register** at 70 FR 41430, Jul. 19, 2005, clarifying that employers seeking H–2A certifications (with a few limited exceptions discussed below) must file two original copies of Form ETA 750, Part A, and Form ETA 790 directly with the NPC of jurisdiction and, concurrently, a copy with the SWA serving the area of intended employment. SWAs coordinate all activities regarding the processing of H–2A applications directly with the appropriate NPC for their jurisdiction, including transmittal to the NPC of housing inspection results, prevailing wage surveys, prevailing practice surveys, or any other material bearing on an application. Once the application is reviewed by the SWA and after the employer conducts its required recruitment, the SWA sends the complete application to the appropriate NPC. The NPC Certifying Officer (CO), on behalf of the Secretary, reviews the application for completeness and either certifies the application for temporary employment under the H–2A program, or denies the certification. Current Department regulations at 20 CFR part 655, subpart B, establish procedures by which an employer may appeal to an administrative law judge either an initial rejection of an application or a final determination denying the application.

Employers receiving approved labor certifications attach them in support of their I–129 petitions to DHS for authorization to employ foreign workers in H–2A status. For situations where prospective H–2A workers are outside of the U.S., the employer forwards the approved petition notice to its prospective employees who then apply for an H–2A visa at the appropriate U.S. consulate or port of entry. The Department of State then determines whether to issue visas to the foreign workers requested under the employer's petition, who can then be admitted through the appropriate port of entry. For H–2A workers already legally present in the U.S., DHS adjudicates an application to extend or change their current status to H–2A status as part of the petition approval process.

2. The Need for a Redesigned System

Modern agriculture is a tremendous benefit to the U.S.—to its culture, its health, and its economic prosperity. The value of U.S. agricultural production was estimated to be $276 billion in 2006.[1] Farm and farm-related industries employ an estimated 2.7 million workers every year.[2] This includes both wage earning workers and those working for no wages on family farms.

One unfortunate reality of modern American agriculture is that the majority of the foreign workers assisting with the year's harvest are undocumented. In fact, the share of the agricultural workforce that is not work-authorized has increased dramatically in recent years while the number of U.S. workers engaged in agriculture has dropped steadily.[3]

Evidence of a shrinking domestic agricultural workforce is found in the U.S. Department of Agriculture's (USDA) Farm Labor Survey, a quarterly survey of employers. Comparing third-quarter totals over the 10 year period 1998–2007, there were 1,450,000 wage-earning workers on the Nation's farms and ranches in July 1998 but only 1,205,000 for the same quarter of 2007, for a decrease of 245,000 workers. The largest decrease occurred between 2005, when there were 1,344,000 wage-earning workers, and 2006, when 1,196,000 were reported.[4] The 1 year change between 2005 and 2006 represents an 11 percent decrease. While increases in productivity have contributed to an expanding agricultural output with fewer inputs, including labor, this sudden and dramatic decrease in the supply of workers cannot be entirely attributed to productivity, and poses severe economic consequences for growers, especially those of perishable crops. Indeed, the Department's program experience and survey data have consistently supported the proposition that the agricultural industry has many more jobs than available legal workers.

Recent reports on the state of agriculture in the U.S. confirm the dependence of many agricultural employers on undocumented workers. The National Agricultural Worker Survey (NAWS)[5] conducted each year by the Department shows that in 1990, 17 percent of agricultural workers were illegally present in the U.S. By 2006, the number of agriculture workers who self-identify as being illegal had increased to 53 percent. Some worker advocates have suggested that the actual number of illegal workers is greater than 70 percent.[6]

Data from NAWS further shows that in 2006, 19 percent of all agricultural workers were first time U.S. farm workers (new farm workers are those who have less than a year of U.S. farm work experience). Among the new workers, 85 percent were foreign-born; 15 percent were U.S. citizens. All of the foreign-born new workers were unauthorized (100 percent).

Authorized workers appear to be leaving farm jobs because of age or opportunities for more stable and higher paying employment outside of agriculture, and are being replaced almost exclusively by unauthorized foreign-born workers. In addition, enhanced enforcement of Federal immigration law appears to have also contributed to a reduction in the availability of agricultural workers, which has in turn had the unintended consequence of sparking a series of agricultural crises across a number of States in the past year. As increased border enforcement efforts have succeeded in limiting the number of border crossings by illegal workers, U.S.

[1] Bureau of Economic Analysis, National Income and Product Accounts, Table 7.3.5; *http://www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=263&FirstYear=2005&LastYear=2006&Freq=Year.*

[2] Bureau of Economic Analysis, Regional Economic Accounts, Table SA25N, *http://www.bea.gov/regional/spi/default.cfm?satable=SA25N&series=NAICS.*

[3] National Agricultural Workers Survey, Public Access Data, Fiscal Years 1989–2006. U.S. Department of Labor, Employment and Training Administration, Office of Policy Development and Research. *http://www.doleta.gov/agworker/naws.cfm.*

[4] 2006 USDA National Agricultural Survey.

[5] The National Agricultural Workers Survey (NAWS) is a Department-sponsored employment-based, random survey of the demographic, employment, and health characteristics of the U.S. crop labor force. The information is obtained directly from farm workers through face-to-face interviews.

[6] *See, e.g.*, Marcos Camacho, General Counsel, United Farm Workers, Testimony Before the Committee on the Judiciary, U.S. House of Representatives, May 24, 2007.

employers, which all too often relied on such workers in the past, have had an increasingly difficult time finding enough workers to harvest their crops.

Numerous reports of shrinking or nonexistent farm seasonal labor, with attendant crop loss for lack of harvest help, have been prominent in recent months and reflect Department survey data. *See, e.g.*, ''Pickers are Few, and Growers Blame Congress,'' *The New York Times,* September 22, 2006; ''Farmers to Congress: Crops are Rotting,'' *Austin-American Statesman,* January 10, 2007. As stepped-up enforcement efforts have diminished the availability of agricultural workers, States and farmers have increasingly resorted to sometimes extreme means to address the resulting labor shortage. For example, the State of Colorado has initiated the use of inmate labor on farms where migrant labor was previously used. ''Facing Illegal Immigrant Crackdown, Farms Look to Inmate Labor,'' *ABC News,* July 25, 2007. In addition, an increasing number of farmers have been investigating alternatives such as raising crops across the Mexican border to secure needed workers that they cannot legally hire in the U.S. ''Short on Labor, Farmers in U.S. Shift to Mexico,'' *The New York Times,* September 5, 2007.

This critical need for legal workers in the U.S. agricultural industry has been recognized by many Members of Congress, including during recent deliberations over immigration reform. Senator Feinstein highlighted the unique labor needs of agriculture and the importance of foreign labor in a September 2006 floor statement:

> We have 1 million people who usually work in agriculture. I must tell you they are dominantly undocumented. Senator Craig pointed out the reason they are undocumented is because American workers will not do the jobs.
>
> When I started this I did not believe it, so we called all the welfare departments of the major agriculture counties in California and asked—can you provide agricultural workers? Not one worker came from the people who were on welfare who were willing to do this kind of work. That is because it is difficult work. The Sun is hot. The back has to be strong. You have to be stooped over. It is extraordinarily difficult work.
>
> For a State as big as mine, there is an immigrant community which is professionally adept at this kind of work. They can pick, they can sort, they can prune, they can harvest—virtually better than anybody. This is what they do. This is what makes our agricultural community exist.
>
> It is very hard for a farmer to hire a documented worker. It is very hard to find that documented worker. So if they are going to produce they have to find the labor somewhere.
>
> My State produces one-half of the Nation's fruits, vegetables and nuts. One-half comes from California. We produce 350 different crops. We have an opportunity now, with this bill, to get adequate labor for this harvest season on this border security bill.
>
> In my State of California, growers are reporting that their harvesting crews are 10 to 20 percent of what they were previously due to two things: Stepped up enforcement, a dwindling pool of workers, and the problem that ensues from both.[7]

In January 2007, Senator Craig summarized the problem facing U.S. agriculture in this way:

> [T]his economic sector, more than any other, has become dependent for its existence on the labor of immigrants who are here without legal documentation. The only program currently in place to respond to a lack of legal domestic agricultural workers, the H–2A guest worker program, is profoundly broken. Outside of H–2A, farm employers have no effective, reliable assurance that their employees are legal.
>
> We all want and need a stable, predictable, legal workforce in American agriculture. Willing American workers deserve a system that puts them first in line for available jobs with fair market wages. All workers should receive decent treatment and protection of fundamental legal rights. Consumers deserve a safe, stable, domestic food supply. American citizens and taxpayers deserve secure borders and a government that works.
>
> Last year, we saw millions of dollars' worth of produce rot in the fields for lack of workers. We are beginning to hear talk of farms moving out of the country, moving to the foreign workforce. All Americans face the danger of losing more and more of our safe, domestic food supply to imports.
>
> Time is running out for American agriculture, farm workers, and consumers. What was a problem years ago is a crisis today and will be a catastrophe if we do not act immediately.[8]

Facing a shortage of available U.S. workers, agricultural employers have been left with the untenable choice of either (a) attempting to legally employ temporary foreign workers through an H–2A program that is widely decried as dysfunctional, but risking losing crops if inefficient program administration results in the workers arriving too late for harvest; (b) using illegal workers, and incurring the risk that the workers, and consequently the crops, will be lost to immigration enforcement; or (c) not hiring any workers at all—in effect, ending U.S. farming operations.

It is entirely unacceptable, but perhaps unsurprising, that many agricultural employers have chosen in recent years to take their chances with undocumented workers—if for no other reason than a lack of viable alternatives. The willingness of agricultural employers to hire illegal workers has created a continuing economic magnet encouraging illegal workers to enter the U.S., resulting in attendant problems for national security and the rule of law, as well as additional costs associated with an underground economy, crime, and social services.

This increasing reliance on undocumented workers has left the agricultural workforce increasingly vulnerable to exploitation because illegal workers fear deportation if they complain about substandard wages or working conditions. As the U.S. Supreme Court has noted, ''[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens.* * *'' *Sure-Tan* v. *NLRB,* 467 U.S. 883, 892 (1984) (citing *De Canas* v. *Bica,* 424 U.S. 351, 356–57, 96 S.Ct. 933, 936–37 (1976). And it is not only wages that are depressed, as Senator Kennedy stated in May 2007:

> [W]e have, unfortunately, employers who are prepared to exploit the current condition of undocumented workers in this country—potentially, close to 12 [and] ½ million are undocumented. Because they are undocumented, employers can have them in these kinds of conditions. If they don't like it, they tell them they will be reported to the immigration service and be deported. That is what is happening today.
>
> I yield to no one in terms of my commitment to working conditions or for fairness and decency in the workplace. That is happening today. The fact that we have those undocumented workers and they are being exploited and paid low wages has what kind of impact in terms of American workers? It depresses their wages. That should not be too hard to grasp. Those are the facts.[9]

The U.S. has an estimated 3 million agricultural job opportunities filled by about 1.2 million hired agricultural workers each year.[10] As noted above, more than 50 percent and perhaps in excess of 70 percent of these workers are in the country illegally. This means there are at least 600,000 and perhaps more than 800,000 illegal workers employed on America's 2 million farms.

The H–2A program is woefully underutilized by agricultural employers. Unlike other temporary worker programs with annual visa caps that are routinely reached on the first day on

[7] 152 Cong. Rec. S9773 (2006).

[8] 153 Cong. Rec. S441-S442 (2007).

[9] 153 Cong. Rec. S6590 (2007).

[10] Dr. James S. Holt, Testimony Before the Committee on Education and Labor, U.S. House of Representatives, June 7, 2007. *http://edworkforce.house.gov/testimony/060707JamesHoltTestimony.pdf.*

which visas are available, the H–2A program has no annual limit on the number of visas that can be issued. Yet despite the vast need for agricultural labor, and the availability of H–2A visas, only about 7,700 agriculture employers used the H–2A program last year, and only 75,000 workers were hired—less than 6 percent of the hired agricultural workforce. This situation clearly demonstrates that the vast majority of agricultural employers in the U.S. find the H–2A program so plagued with problems that they avoid using it altogether. The Department seeks to remedy this problem and render the H–2A program functional so that if and when agricultural employers are unable to locate sufficient numbers of U.S. workers, they will turn to the program to provide them with a fully legal workforce. A functional H–2A program will change the incentives for agricultural employers, thereby assisting in eradicating the underground economy created by the widespread use of unauthorized workers and better protecting the wages and working conditions of U.S. workers who are currently harmed by the employment of workers illegally present in the U.S.

On August 10, 2007, the Administration announced a series of actions the Administration would pursue to address border security and immigration-related processes. As part of that effort, the President directed the Department to review the H–2A program:

> No sector of the American economy requires a legal flow of foreign workers more than agriculture, which has begun to experience severe labor shortages as our Southern border has tightened. The President has therefore directed DOL to review the regulations implementing the H–2A program and to institute changes that will provide farmers with an orderly and timely flow of legal workers, while protecting the rights of laborers.[11]

Pursuant to this directive, the Department conducted a ''top to bottom'' review of the H–2A program, its statutory basis, and current implementing regulations. This analysis identified a number of practices not required by the statute that have made administration of the program unwieldy and parts of the program difficult to use, particularly for an industry that needs its workforce at specific times and cannot afford delays. This NPRM enhances many protections for workers while seeking to eliminate unnecessarily cumbersome regulatory practices that interfere with or inhibit use of the program, provide little or no benefit for U.S workers, and indirectly contribute to the employment of illegal workers.

The process for obtaining a temporary labor certification for H–2A nonimmigrant agricultural temporary workers has been criticized as complicated, time-consuming, and requiring the considerable expenditure of resources by employers, SWAs, and the Federal Government. The current requirement that applications for temporary labor certifications be filed simultaneously at the SWA and the applicable ETA NPC has resulted in burdensome, costly, and unnecessarily duplicative Government review, with little associated benefit to workers. In addition, the compressed time frame for supervised recruitment has burdened employers and made it difficult for U.S. workers to access and pursue these opportunities. The supervised recruitment requirements and process have also been inconsistently applied, leading to further administrative burdens for both employers and workers. While the consolidation of the Regional Office oversight of applications into two NPCs has, to a certain extent, lessened the administrative burden and made application processing more consistent at the Federal level, it has not lessened the burden faced by employers, eliminated delays in application processing, or increased the Department's ability to ensure worker protections. Consequently, the program continues to be regarded with trepidation by many agricultural employers who continue to make the unacceptable choice to employ an undocumented workforce rather than face the program's many complexities.

3. Overview of the Proposed Redesign of the System

In light of its extensive experience in both the processing of applications and the enforcement of worker protections, the Department has re-examined its program administration and is consequently proposing several significant measures to re-engineer the H–2A program processing. These proposals will simplify the process by which employers obtain a labor certification while maintaining, and even enhancing, the Department's substantial role in ensuring that U.S. workers have access to agricultural job opportunities before H–2A workers are hired. These proposals will also increase employer accountability through newly applied penalties to further protect against violations of program and worker standards, including substantially increased civil monetary penalties for non-compliance with program requirements and enhanced provisions for denying non-compliant employers access to the program.

The Department expects that the resulting efficiencies in program administration will significantly encourage increased program participation, resulting in an increased legal farm worker labor supply with the attendant legal rights and protections for workers. The Department further expects that U.S. workers will be better protected from adverse effects when they are competing with workers who are legally present in the U.S. and who are subject to all of the requirements of the H–2A program. *See Sure-Tan* v. *NLRB,* 467 U.S. at 883 (1984).

The Department is proposing to implement an attestation-based process by which employers, as part of their application, would attest, under threat of penalties, including perjury and debarment from the program, they have complied with all applicable program requirements. In addition, employers would be required to maintain all supporting documentation for their application for a period of 5 years in order to support the Department's enforcement of program requirements. The Department would also institute a new auditing process to verify that employers have, in fact, met their responsibilities under the H–2A program.

In the Department's experience, delays by SWAs in conducting housing inspections have frequently caused the Department to miss mandatory statutory deadlines for processing H–2A labor certification applications. By statute, the Department has only 15 days to process H–2A labor certifications; the Department cannot require that applications be filed more than 45 days before the first date of need, 8 U.S.C. 1188(c)(1), and is required to make a determination on applications no fewer than 30 days before the first date of need, 8 U.S.C. 1188(c)(3)(A). Housing determinations are similarly required by statute to be completed no fewer than 30 days before the first date of need—a mandate designed to ensure that housing inspections do not interfere with the specified timeframes for certifying labor applications. 8 U.S.C. 1188(c)(4). The Department's program experience indicates, however, that housing inspections are frequently delayed well past 30 days before the first date of need, causing the Department to make late certification

[11] Fact Sheet: Improving Border Security and Immigration Within Existing Law, Office of the Press Secretary, The White House (August 10, 2007); see also Statement on Improving Border Security and Immigration Within Existing Law, 43 Weekly Comp. Pres. Doc. 1067 (Aug. 13, 2007).

decisions thus violating the statutory timeframe specified. To bring the program back into compliance with the law and ensure that determinations are made no fewer than 30 days prior to the first date of need, the proposed rule would alter the current H–2A housing inspection procedures by adopting procedures that are currently used to inspect housing for U.S. workers under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). These procedures are explained in greater detail below.

Consistent with the Department's statutory obligations under the INA to process H–2A applications under strict time constraints, and the experience we have had in not being able on a regular basis to achieve these obligations with respect to employer-provided housing, it is necessary in this proposed rule to separate the INA procedure from the procedures for inspections not under the H–2A program in 20 CFR 654.400 and 654.403. While this INA rule would apply to H–2A related housing inspections in the future, the housing standards themselves, that is, 20 CFR 654.404–654.417 and 29 CFR 1910.142, whichever are applicable, continue to apply to such housing.

Employer applications would be submitted directly to an NPC, streamlining the intake process and reducing the time required to render a determination on the application. SWAs would continue to post job orders, circulate them through the Interstate Employment Service System, and refer potential U.S. workers to employers. SWAs would no longer directly oversee the employer's recruitment efforts. Instead, as described above, employers will attest to their compliance with the program requirements and those attestations will be audited by the Department to ensure compliance.

Upon submission of the application, the applicable NPC would review the job offer and the attestations to ensure compliance with all the criteria for certification relative to the date of need. As necessary, the NPC may issue a notice of application deficiency to enable the employer to amend or modify the application or job offer. The employer would also submit a preliminary recruitment report to the NPC as part of the filing process, documenting its recruitment efforts (and their outcome) for the period from the initiation of the recruitment efforts to the time of the submission of the application. In addition, the employer would be required to create and retain a supplemental written recruitment report for 5 years from the date of certification for use in a Department audit or other investigation.

Employers would be required to retain for 5 years all supporting documentation for their application including documents supporting recruitment efforts, a copy of the housing certification, any relevant certificate of occupancy used to demonstrate compliance, as well as any written requests submitted to a SWA or other State agency for preoccupancy inspection of housing, and any other documentation required to demonstrate compliance with a program obligation.

The introduction of audits serves as both a quality control measure and a means of evaluating applications. Audits would be conducted for quality control and fraud detection purposes on adjudicated applications as well as randomly-selected applications being processed. The criteria used for selecting applications for audits would be drawn from the Department's program experience and be based in part on information received from the Department's Employment Standards Administration (ESA), which is charged with enforcing the provisions of the H–2A program through its Wage and Hour Division (WHD). During an audit, employers would be required to provide information supporting the attestations in their application. Failure to meet the required program standards or to provide information in response to an audit would result in an adverse finding that could lead to penalties, such as revocation of an approved labor certification or debarment from the program. These penalties may be in addition to penalties separately assessed by ESA.

Finally, the Department's proposal creates an additional process for penalizing employers or their attorneys or agents who have failed to perform obligations required under the H–2A program. The Department will continue to debar employers who have engaged in prohibited activities or who have failed to comply with the obligations and assurances required by the program, and we have added a process to revoke an approved labor certification, which may in turn provide a basis for the DHS to revoke an approved visa petition.

The re-engineering of the H–2A program to include pre-filing recruitment, submission of applications directly to an NPC, modernized processing of applications, reduction of duplication in the application process, and focusing of SWAs on referral of U.S. workers should yield improvements in the time needed to process labor certification applications and help ensure the Department meets its obligation to protect U.S. workers and process applications within the statutory timeframe mandated by Congress.

B. Proposed Redesign To Achieve a Modernized Attestation-Based Program

1. Enhanced Recruitment Requirements

The recruitment process fulfills the Department's statutory mandate to certify that there are not sufficient U.S. workers who are available, able, willing, and qualified to perform the agricultural labor or services and that the employment of the temporary foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 U.S.C. 1188(a)(1). The Department currently ensures that these standards are met by requiring a combination of SWA-supervised recruitment by employers, the posting of job orders in the Interstate Employment Service System, and the independent contacting of other sources of potential labor. These activities must take place in a very narrow 15-day window, as under the statute the Department cannot require that applications be filed more than 45 days prior to date of need for the worker and the Department must approve or deny labor certifications no later than 30 days before the employer's date of need.

The Department is now proposing to require employers to conduct recruitment of U.S. workers for temporary agricultural job opportunities for a substantially longer period of time before the job begins by requiring that recruitment be started well in advance of the employer filing the application. The Department's experience in other programs, such as its permanent labor certification program, has demonstrated that recruitment in advance of filing an application benefits the potential U.S. worker population by providing a maximum opportunity for consideration of the job opportunity. Employers would continue to engage in so-called ''positive recruitment'' and post a job clearance order for both interstate and intrastate clearance with the SWA having jurisdiction over the place of employment in advance of the application being filed with the Department. The Department believes that advance recruitment in the H–2A program would help maximize the ability of employees and organizations representing their interests to identify available jobs with sufficient time to apprise all interested workers of the potential opportunity well in advance of the job's start date.

Under the new recruitment system, which is discussed in more detail below, U.S. workers' ability to identify job opportunities would be further enhanced by requiring employers to place three advertisements, instead of the currently required two, in a newspaper of general circulation most appropriate for the agricultural occupation and most likely to reach the U.S. workers who will apply for the job opportunity. In addition, the Department would require that one of the three newspaper advertisements appear in a Sunday edition. If a newspaper of general circulation with a Sunday edition is not available (as may be the case in many rural areas where such jobs are located), the employer would instead use the edition with the widest circulation in the area of intended employment that is most appropriate to the occupation and most likely to be read by the U.S. workers most likely to apply for the job opportunity. In addition, if the use of a professional, trade or ethnic publication is more appropriate to the occupation, and if that publication is the most likely source to bring responses from qualified and available U.S. workers, the employer may use such publication instead of a newspaper in place of the two required daily (but not Sunday) advertisements. This advertising option will allow recruitment for agricultural jobs to be appropriately tailored in those areas where such jobs are traditionally advertised in ethnic or trade publications. Employers would also be required to contact former employees to determine their willingness to accept the employer's job opportunity.

In addition to recruiting in the area of intended employment, employers would be required, based on an annual determination made by the Secretary, to recruit in any State designated as a State of traditional or expected labor supply for the place the employer's work is to be performed. This additional recruitment would consist of a single newspaper advertisement in the area or areas within the States that are outlined in the Secretary's designation, and must be placed at the same time as the three local newspaper advertisements discussed above. SWAs will also place job orders into those designated states as required.

As required by the current regulations, all advertising must include all of the details required in the job offer, including the name and geographic location of the employer. If the employer is an association, the advertisement may, as is current practice, list only the name of the association, but the Department proposes to require that the advertisement inform the reader that the SWA will have on file and will make available upon request the name and location of every member of the association seeking workers through the advertisement. Ads must identify in all cases the wage being offered. In the event an association is serving as the employer and the wage is a range throughout the area of intended employment, the range of wages must be included in the advertisement, and the advertisement must indicate that the SWA will have on file, and will make available upon request, the wage rate applicable to each member of the association. These requirements will help ensure that potential applicants are afforded the opportunity to make fully informed decisions about job opportunities.

Employers would begin advertising job opportunities no earlier than 120 calendar days and no later than 75 calendar days before the date on which the foreign worker would begin work (i.e., the date of need). This will permit sufficient time for an advertisement to be placed and responded to by potential U.S. workers most likely to apply for the job opportunities, and for workers who apply to be evaluated by the employer before the H–2A application is filed. The Department believes that the expanded recruitment window appropriately balances the need to maximize the notice of available job opportunities to U.S. workers with the need to ensure that recruitment is not conducted so far in advance of the growing season that employers do not yet know when or how many workers will be needed.

Employers filing the labor certification applications would be required to attest under penalty of perjury that (1) they did, in fact, attempt to recruit U.S. workers in the manner prescribed by the regulations, and (2) any potentially qualified U.S. workers that applied were rejected for lawful, job-related reasons. Employers would submit with their application a preliminary recruitment report, documenting their efforts to date in attempting to find eligible U.S. workers, including the outcome of the evaluation of U.S. worker applicants. Employers would also be required to prepare a supplemental report after filing that documents subsequent recruitment efforts and the results, including results from SWA recruitment and referrals, to be retained with the other documentation supporting the application.

The proposed rule expands the period in which the employer must conduct recruitment and consider potential U.S. workers, so that U.S. workers will be given notice well in advance of the actual openings. To account for the fact that the date and extent of need is always flexible in the agriculture industry, the Department has retained current provisions permitting employers to reasonably adjust the numbers of workers needed without engaging in additional recruitment.

The INA also requires employers to engage in recruitment through the Employment Service SWA job clearance system. See 8 U.S.C. 1188(b)(4); see also 29 U.S.C. 49, *et seq.*, and 20 CFR part 653, subpart F. The proposed recruitment model requires employers to submit job orders to the SWA having jurisdiction over the area of intended employment. When the job order is for a work opportunity in more than one State, the SWA to which the job order is submitted will in turn forward the job order to all States listed in the application as anticipated worksites. In circumstances where the employer's anticipated worksite location(s) is contained within the jurisdiction of a single State, the SWA must, to maximize the recruitment of eligible U.S. workers, transmit a copy of its job order to no fewer than three States, which must include any State designated by the Secretary as a State of traditional or expected labor supply for the area of intended employment. This recruitment takes place in tandem with the employer's own recruitment within a multi-state region of traditional labor or expected labor supply, as discussed above. INA § 218(b)(4).

The Department is proposing that SWA job orders also be posted until the time the H–2A worker departs for the place of employment (or 3 days prior to the start date of the employment, whichever is later). Because referrals of U.S. workers resulting from newspaper advertisements and intrastate/interstate job orders will all come from the SWA, this proposal will better synchronize efforts to recruit U.S. workers and ensure that such efforts operate in parallel.

Employers should retain several types of documents reflecting their compliance with the program's recruitment requirements. Documentation relating to newspaper advertisements will be satisfied by copies of pages from the newspapers (or other publication) in which the job opportunity appeared. Documentation of an SWA job order will be satisfied by maintaining copies of the job order printed from the SWA's Internet job listing Web site on the first day of posting, a copy of the job order provided

by the SWA with the start date of posting, or other proof of publication from the SWA containing the text of the job order on the first day of posting. Contact with previous employees, another required positive recruitment element, will be documented by maintaining copies of correspondence with such employees (or records of attempts to contact former employees). Such documentation should also contain a description of the outcome of those contacts, including the lawful, job-related reasons for not rehiring a former employee. In sum, these proposed changes in the recruitment process will increase the likelihood that U.S. workers will receive advance notice of available job opportunities, as well as provide them with additional information on available positions. In addition, the proposed changes will help avoid recruitment-related processing delays.

2. Use of Attestations of Compliance With Assurances and Obligations

The Department is proposing to require employers to submit their application directly to the NPC having jurisdiction over the employer's place of employment. The application under the re-engineered process will differ not only in the manner of its submission, but also in its form. Based on the Department's experience administering the attestation-based Permanent Labor Certification (PERM) program, the Department is proposing instituting an application that would require employers to attest to their adherence to the articulated obligations under the H–2A program. An employer would be required to attest, under penalty of perjury, that it will abide by all of the obligations imposed on employers under the statutory and regulatory framework. The employer would have to attest, for example, that it has begun to conduct and either completed or will complete the required recruitment (and document the recruitment efforts). The employer would also have to attest that it has provided or secured required housing and, where applicable, applied to the SWA and requested or received a satisfactory inspection. The employer would also need to attest its compliance with securing workers' compensation insurance; the so-called ''three-fourths guarantee;'' and the provision of tools and transportation. In addition, the employer would have to attest that it is in compliance with and will continue to comply with all applicable Federal, State and local employment-related laws. In short, all of the obligations of employers to comply with H–2A program requirements would continue and would be documented through these formal attestations.

As part of the application process, employers would attest that they have conducted expanded recruitment in advance of filing an application with the Department. Employers would attest to their compliance with the required elements of the H–2A job offer, including offering the applicable legally required wage, which would be obtained in advance through a request to the NPC. Employers would attest that they have provided the obligatory workers' compensation insurance and met the required working conditions. Employers would further attest to their adherence to requirements regarding the recruitment of qualified U.S. workers through both their own positive recruitment efforts and by requesting the posting of job orders through SWAs, as well as confirming that any U.S. workers who have applied or been referred and were not hired were rejected only for lawful, job-related reasons.

Employers would attest to having obtained worker housing comporting with all applicable safety and health standards. Employers would identify the housing to be provided by location and, if public or rental accommodation, by name, and attest that the housing meets the applicable standards. And, if the housing is of a sort that must by statute be inspected, the employer would attest that such housing has either satisfactorily passed a preoccupancy SWA inspection, or that the employer has made a timely request for such an inspection that has not occurred through no fault of the employer. As part of its recruitment prior to filing its application, the employer would be required to place a job order with the appropriate SWA, which would in turn post it through the interstate/intrastate job clearance system.

The Department anticipates the shift to an attestation-based process with pre-filing recruitment would help to bring the program into compliance with longstanding statutorily required processing timelines and better harmonize the program with the unique needs of the agricultural sector, thereby enabling more employers to utilize the program and better protecting U.S. workers from the adverse effects resulting from the employment of illegal workers. Employers would still be required to comply with all the requirements and obligations of the program, and indeed penalties for noncompliance would increase. Employers would retain supporting documentation evidencing their compliance with the program requirements, while the Department would retain for itself the right to request such documentation to ensure program integrity.

The revised attestation process will dramatically reduce the number of incomplete applications that currently consume valuable processing time only to then have to be returned to the applicant for the inclusion of missing information. The majority of the information on the application form would consist of attestations that will elicit information similar to that required by the current H–2A labor certification process reflecting that the employer has performed the necessary activities to establish eligibility for certification. These proposed attestations lend themselves to a more efficient processing of applications.

The Department anticipates that, with an expected increase in use of the program, it will see a marked increase in participants unfamiliar with the obligations that are integral to the H–2A program. The movement to an attestation system would be accompanied by outreach to potential users as well as those currently utilizing the program. Such education efforts will of necessity focus on employers' obligations and the mechanisms by which compliance will be judged. The Department invites comment on a timeline for its anticipated training and educational outreach initiatives.

3. Form Submission

The Department proposes initially to require employers to submit applications on paper, through an information collection form that will be modified significantly from the current form to reflect an attestation-based process. The use of a redesigned form would provide the necessary assurances of an expeditious paper application review process. The Department ultimately envisions implementing an electronic submission system similar to that employed in other programs administered by the Department's OFLC, such as the electronic submission system in the PERM program.

The Department is proposing to eventually require electronic submission in explicit recognition of the fact that such a process will significantly further improve the application process. An electronic submission process will also improve the collection of key program data and better allow the Department to anticipate trends, investigate areas of concern, and focus on areas of needed program improvement. Improved data collection will also enable the

Department to capture information regarding noncompliance and potential fraud that may lead to future administrative, civil, or criminal enforcement actions against unscrupulous or non-performing employers.

The Department recognizes that H–2A employers may be concerned about their ability to comply with the application requirements through use of an Internet-based submission process and is accordingly not requiring it at this time. The Department is committed to reviewing its ability to transition the H–2A filing process to such a method and is reviewing specifically its ability to provide, based upon its previous experience, user-friendly electronic registration and filing processes that would enable use by any employer with computer and Internet access. The Department's experience with agricultural employers in other contexts (program requirements under the Migrant and Seasonal Agricultural Worker Protection Act, for example) support its determination that such access is common enough among agricultural employers to justify eventually requiring its use in this context. The Department invites comments, in particular from H–2A employers, on the concept of an electronic filing process.

4. Elimination of Unnecessary Duplication in the SWAs' Role

The Department's focus on providing employers a more efficient process has taken into consideration the total time an employer must spend before all Federal agencies to obtain permission to employ an H–2A worker and ensure that workers are available when needed. Employers must by statute apply to DOL, DHS and DOS to obtain H–2A workers. Reducing the time it takes an employer to secure H–2A workers after filing their application, and after their unsuccessful search for U.S. workers, is critical to the program's success given the time sensitive nature of many agricultural employers' labor needs.

Congress has signaled its awareness of the incredible importance to the agricultural sector of timely application processing by building tight mandatory timeframes into the statutes governing the H–2A program. For example, the Secretary is required to make certification decisions ''not later than 30 days before the date such labor or services are first required to be performed,'' 8 U.S.C. 1188(c)(3)(A), and SWAs are required to complete housing inspections by that date as well, 8 U.S.C. 1188(c)(4). Actual practice has shown, however, that the procedures established by the current regulations are cumbersome, slow, unwieldy, and have resulted in both SWAs and the Department regularly failing to meet the required statutory timeframes.

Consequently, the Department's efforts have focused on how to develop a smoother and more expeditious H–2A process while ensuring protections for workers. Among our proposals in this rulemaking is the elimination of duplicate filing of applications with the SWA and the Department's NPC. By focusing the SWAs' role in the initial stages of the application process (placing job orders, managing referrals of eligible U.S. workers, and conducting housing inspections), the Department can more effectively oversee the adjudication and consistent processing of all applications. As a result of this modernized application review procedure, the Department can reduce and equalize the average processing time of applications regardless of the area of the country where the application originated.

We expect that the time savings gained by using a more efficient labor certification process will reduce the total time an employer spends obtaining permission from the Federal Government to employ an H–2A worker and getting that worker from his or her country of origin to the place of employment. Moreover, the Department's consolidation of the review of applications in its NPCs will permit greater consistency of adjudication. Two centers, as opposed to the fifty State agencies, will be charged with all major aspects of application adjudication, ensuring consistency in the application of program requirements and policy. Indeed, the Department is considering consolidating all H–2A applications into one NPC rather than two, to further enhance consistency of adjudication and processing.

The SWA will continue to play its traditional role in the recruitment process by posting and processing an appropriate job order to notify available and qualified U.S. workers of the opportunity. The employer would need to contact the SWA to initiate placement of the job order, rather than relying on the SWA to place it in the course of processing the H–2A application, as is the case now. The job order would be required to provide the same information as the newspaper advertisements contemplated by this proposal. This is an expansion of the information previously required to be included with the job order, and will significantly enhance the transparency of the recruitment process for prospective workers. Employers whose applications involve worksites in multiple SWA jurisdictions would place the job order with the SWA in which the majority of the proposed work assignment will take place. The SWA will arrange to have it posted with other SWAs, as appropriate.

To strengthen the integrity of the Secretary's determination of whether there are available U.S. workers for the position, and to help build employers' confidence in their local SWAs and the H–2A program, the proposed rule at § 655.102(j) clarifies the SWAs' obligation to verify the employment eligibility of prospective U.S. workers before referring them to an employer under a job order in support of a H–2A application. The failure of many SWAs to verify the employment eligibility of referred workers, despite existing statutory requirements that only eligible workers be counted as valid referrals and existing regulatory requirements that no ineligible workers be referred, has created a situation in which it is all too easy for illegal workers, rather than U.S. workers, to be referred to employers. For many years, agricultural employers have complained to this Department that SWA-referred workers are often undocumented, generating substantial additional legal risks and administrative burdens for employers. Collectively, agricultural employers appear to have little confidence in their local employment service or the H–2A program, and consequently rarely utilize either.

The INA provisions governing admission of foreign workers under the H–2A program make employment eligibility of U.S. workers a core element of a worker's ''availability;'' a U.S. worker has long been characterized as being ''available'' for employment when authorized to legally undertake that employment. An employer will not be penalized for turning away applicants who are not authorized to work, and referred workers who are refused employment on the basis of not having work authorization will not be counted as available for purposes of H–2A labor certification. By statute, the Secretary must certify the job opportunity if the employer: (1) ''Has complied with the criteria for certification (including criteria for the recruitment of *eligible* individuals as prescribed by the Secretary),'' and (2) ''does not actually have, or has not been provided with referrals of, qualified *eligible* individuals who have indicated their availability to perform such labor or services on the terms and conditions of a job offer which meets the requirements of the Secretary.'' 8 U.S.C.

1188(c)(3)(A) (emphasis added); see also definition of ''agricultural worker,'' 20 CFR 651.10 (applicable to referrals under the Employment Service System regulations at 20 CFR parts 651–658). For purposes of employment, the INA defines an ''eligible individual'' as one ''who is not an unauthorized alien * * * with respect to that employment.'' 8 U.S.C. 1188(i)(1).

SWAs receiving ETA Alien Labor Certification (ALC) grant funding to support H–2A activities are required to verify the employment eligibility of applicants seeking referral under a job order in support of an H–2A application pursuant to current regulations and agency guidance; this proposed regulation provides additional clarification of this requirement. The Department notes that DHS regulations at 8 CFR 274a.6 provide additional verification authority and procedures for SWAs. To confirm its continued eligibility to receive ALC grant funding, each State agency will be asked to submit proof of these procedures to the Department prior to the beginning of the 2009 fiscal year (FY). In the event a SWA refers a worker who is not eligible, current H–2A employer responsibilities will not change; an employer is not required to hire such worker and can include ineligibility as a reason for rejection in its recruitment report.

We strongly caution that the SWA's responsibility to perform threshold, pre-referral verification exists separate from each employer's independent obligation under Immigration Reform Control Act of 1986 (IRCA) to verify the employment eligibility of every worker to whom it has extended a job offer. The INA does provide, however, that employers who accept referrals from SWAs that verify employment eligibility in compliance with the DHS process and provide referred employees with appropriate documentation certifying that verification has taken place are entitled to ''safe harbor'' in the event it is later discovered a referred worker was not authorized to work in the U.S. 8 U.S.C. 1324a(a)(5). To simplify the recruiting process and avoid unnecessary duplication of functions, SWAs are directed to provide all referred employees with adequate documentation that verification of their employment eligibility has taken place. Employers can rely on INA § 274A(a)(5) only where the documentation complies with all statutory and regulatory requirements, including 8 CFR 274a.6. SWAs are strongly encouraged to provide this documentation to employers. The Department is not insensitive to the resource and time constraints facing SWAs in their administration of H–2A program requirements and the difficulties inherent in making informed referrals from a population of workers that is frequently itinerant and often difficult to contact. However, we do not believe that this requirement has resulted or will result in a significant workload increase or administrative burden. Further, the mechanisms available for verification, including the E-Verify Web-based system operated by DHS, allow SWA staff to perform this function relatively quickly after training.

E-Verify is a program administered by the United States Citizenship and Immigration Services (USCIS) within DHS. E-Verify electronically confirms a person's employment eligibility after the Employment Eligibility Verification Form (Form I–9) has been completed. SWAs that choose to use E-Verify refer a job seeker to an H–2A-related job opportunity only after completing a Form I–9 and submitting the required information via E-Verify. The SWA will be required to follow the terms and conditions in the Memorandum of Understanding that must be signed by the SWA and USCIS in order to gain access to E-Verify. The SWA may not refuse to make a referral and the employer may not refuse to accept a referral because of an E-Verify tentative nonconfirmation (TNC), unless the job seeker decides not to contest the TNC. SWAs and employers may not take any adverse action, such as delaying a referral or start date, against a job seeker or referred worker based on the fact that E-Verify may not have yet generated a final confirmation of employment eligibility. The SWA will be required to advise the employer when E-Verify generates a final confirmation or nonconfirmation.

The requirement that SWAs verify employment eligibility prior to referral is designed to strengthen the integrity of the temporary labor certification process, afford employers a legal pool of U.S. worker applicants, and improve confidence in and use of the H–2A labor certification program.

5. Retention of Supporting Documentation

Employers would be required to retain the documentation outlined in the proposed regulations in hard copy for 5 years from the date of adjudication, and to provide all documentation to demonstrate compliance with the requirements of the program in response to an audit or other investigative matter, whether conducted by the Department or another Federal agency, such as DHS. As described above, the documents to be retained include proof of recruitment efforts, including advertising, contact made with applicants and former employees, and a written recruitment report with results of efforts and reasons for not hiring U.S. workers.

Finally, the Department recognizes that there is always a risk that less-than-scrupulous H–2A program participants will try to secure workers through fraud or misrepresentation. Long-standing practice and coordination with SWAs in the H–2A program, as well as experience with the attestation-based PERM system, have provided us substantial insight regarding the mechanisms by which employers may seek to take advantage of the re-engineered attestation-based system. The Department proposes to employ various measures to address potential fraud or abuse in the attestation-based process and the H–2A program generally. These will include audits, a combination of increased deterrent penalties, including [0]fines, revocation of approved applications, and debarment from future participation in the H–2A program, all of which are discussed below, as well as other mechanisms for detecting fraud. In addition, employers and their agents and attorneys are reminded that submission of any materially false, fictitious, or fraudulent statements to any Federal Government agency constitutes a criminal violation (18 U.S.C. 1001 and 1546), subjecting anyone convicted of a violation to fines and/or imprisonment for not more than 5 years.

C. Maintaining and Enhancing Program Integrity

The shift to an attestation-based temporary H–2A agricultural labor certification system will be accompanied by the Department's vigorous enforcement of employer obligations under this program. Consequently, the Department is proposing certain actions in this rulemaking, consistent with its statutory authority, to examine and enforce compliance with the enumerated obligations and responsibilities of employers that seek approval of labor certifications pursuant to the H–2A program.

1. Prohibition on Cost-Shifting

Under proposed new § 655.105(n), an employer must attest that it has not shifted and will not shift to the H–2A worker the costs of preparing or filing the application, including the costs of recruitment or attorneys' fees, and that it has not utilized a foreign recruiter without contractually prohibiting that

foreign recruiter from passing on such costs. The recruitment, legal, and other costs associated with filing a temporary labor certification application are business expenses necessary for, or in the case of legal fees, desired by, the employer to complete the labor market test and to prepare and submit the labor certification application. The employer's responsibility to pay the costs of preparing an application exists separate and apart from any potential benefit that may accrue to the foreign worker as a result of the employer filing the application. Prohibiting the employer, including a Farm Labor Contractor (FLC), from passing these costs on to its H–2A worker(s) allows the Department to better protect the integrity of the process, as well as protect the wages of the H–2A worker from deterioration by disallowable deductions. Disallowable deductions taken from an H–2A worker's wages cause those workers to be paid less than the required wage, which results in an adverse effect on U.S. workers.

2. The Use of Audits

Pursuant to proposed new § 655.112, after a labor certification application has been adjudicated, the Department would, based upon various selection criteria, identify certain applications for audit review. Investigations performed by the Department's WHD and the Department of Justice's Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) would provide another potential source of information triggering audits. In addition, some applications would be randomly selected for audit as part of the Department's quality control processes. This authority would enable the Department to perform its directed and random audits on any application that has been adjudicated, regardless of whether the application was approved or denied.

If an application is selected for an audit, the employer will be notified in writing of the selection. The employer would then be required to submit, within 30 days, the documentation specified in the audit request to verify the information stated in or attested to on the selected application. Upon timely receipt of an employer's audit documentation, and after any further investigation that may be warranted, the audit information would be reviewed by the Department's Certifying Officer (CO). The Department would then determine whether the employer complied with its obligations and would notify the employer in writing of its findings.

The Department will take firm action when it discovers non-compliance by employers. The Department is invoking all available statutory authorities to bolster its enforcement capabilities. If, at the conclusion of an audit, there is evidence of non-compliance with required attestations and/or other program requirements, or if an employer refuses to participate in the audit process, the proposed rule would enable the CO to order a variety of remedies. The CO may initiate debarment proceedings against the employer, agent and/or attorney in order to prohibit participation in the H–2A program for a period of up to 3 years at the Department's discretion and depending on the nature and severity of the violations. If the audit reveals that employer's documentation is incomplete, is inconsistent with the employer's statements and/or attestations contained in the application, or if the application and supporting documentation is otherwise deficient in some material respect, the employer may, in addition to debarment, also experience revocation of the approved H–2A certification, as described below. The proposed rule also adds a provision explaining that the Department of Justice's OSC will refer to the CO pertinent information gained in the course of OSC's investigations. Likewise, the proposed rule would require the Department and Department-funded entities to share pertinent information with OSC.

3. Revocation of Existing Labor Certifications

Section 218(e)(1) of the INA authorizes the Department to revoke a temporary agricultural labor certification in appropriate instances. When the Department initiated rulemaking in 1987 to implement IRCA, it considered implementing this provision, but determined that the SWA's supervision of the employer's activities during the labor certification application process, together with WHD's post-certification enforcement role, vitiated the need for such a sanction. 52 FR 20524, 20525, Jun. 1, 1987.

Along with the modernized approach to the application and certification processes proposed in this rule, we also include proposed measures, consistent with the provisions of INA § 218(e)(1), to ensure compliance. This includes the possibility of revocation of an approved certification if it is subsequently determined that an employer has not complied with a material term or condition of the certification, or upon recommendation of WHD for egregious program violations or interference with or failure to cooperate with an investigation. DHS, in a separate rulemaking, is proposing to revoke approved visa petitions that were approved on the basis of the revoked H–2A labor certifications.

4. Debarment

Proposed § 655.118 seeks to modernize and enhance the statutory process relating to the debarment of employers who substantially violate the terms of a labor certification. Over the past two decades, effective policing of the program has been hampered by an unnecessarily narrow definition of employer actions warranting debarment. In particular, the current regulation does not authorize debarment for actions that occurred during the recruitment process, including the rejection of domestic workers for other than lawful job-related reasons. Under the proposed rule, however, where certification would be granted based on employer attestations that recruitment of U.S. workers was unsuccessful, the availability of debarment as a sanction would be a powerful tool to encourage compliance.

Accordingly, if the OFLC Administrator finds that an employer or an employer's agent or attorney has misrepresented a material fact or made fraudulent statements in its attestations, materially failed to comply with the terms of the attestations, or committed an act(s) of commission or omission that reflects a willful failure to comply with an obligation, attestation or other activity listed in proposed § 656.118, the OFLC Administrator may order debarment of the employer, agent and/or attorney from the H–2A program for a period of up to 3 years. In addition, other Federal agencies will be notified, as appropriate, of the audit findings.

The current regulation provides debarment authority solely to ETA and requires the WHD to report findings of violations to ETA and make recommendations to deny future certifications. Under the proposal, debarment authority for issues identified by WHD investigations would reside with the Wage and Hour Administrator, while debarment authority for violations of program requirements committed during the application and attestation process would remain with ETA. This change will allow administrative hearings and appeals for civil money penalties assessed by the WHD to be consolidated with debarment actions arising from the same facts. It will also eliminate the need for ETA to review Wage and Hour investigations, allowing for more

expeditious proceedings and efficient enforcement.

D. Other Significant Changes

1. Wages and the Adverse Effect Wage Rate (AEWR)

Section 218(a)(1)(B) of the INA requires as a condition for approval of H–2A petitions that the Secretary has certified that ''the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' To ensure that the wages of similarly employed U.S. workers are not adversely affected, agricultural employers wishing to utilize the H–2A program have traditionally been required to offer and pay their covered U.S. workers and H–2A workers the higher of the applicable hourly ''Adverse Effect Wage Rate'' (AEWR), as determined by the Federal government; the applicable prevailing wage, as determined by the States; or the Federal or State statutory minimum wage.

Over the last 20 years, it has become clear that perhaps the biggest threat to the wages and working conditions of U.S. workers is direct competition from a large undocumented workforce that is often underpaid and taken advantage of yet is afraid to assert its rights. Senators from both political parties remarked upon this phenomenon during the recent immigration debates in Congress,[12] and the U.S. Supreme Court has also noted the threat that undocumented workers pose to the wages and working conditions of U.S. workers. See *Sure-Tan* v. *NLRB,* 467 U.S. 883, 892 (1984).

Thus, based on data collected during more than 20 years of experience in administering the H–2A program, the Department has concluded that one of the most significant actions it can take to protect the wages and working conditions of U.S. workers is to render the H–2A program sufficiently functional such that, rather than resorting to the employment of workers illegally present in the U.S. to make up for shortages in the number of U.S. workers who are willing and available to perform agricultural work, agricultural employers will instead use the H–2A program, with all of its accompanying legal requirements and protections.

One of the most important things the Department must do to ensure that the H–2A program is fully functional and protective of the wages and working conditions of U.S. workers is to set AEWRs that appropriately reflect market realities and labor costs. Two decades of experience with the H–2A program have shown that, in light of the prevailing conditions in the agricultural labor market, an AEWR that is set too low or too high is likely to harm U.S. workers. It is no secret that foreign workers may be willing to work for wages that are lower, and often substantially lower, than wages that are typically paid to U.S. workers. Allowing foreign workers to work at substandard wages would likely harm U.S. agricultural workers by causing them to be displaced or by forcing them to accept substandard wages in order to compete with the foreign workers. Direct harm effects of a too-low AEWR may also include increased levels of unemployment among U.S. workers. Indirect effects of a too-low AEWR could include worsening working conditions.

Conversely, an AEWR that is artificially set too high can also result in harm to U.S. workers. If the AEWR is set so high that it is seen as not reflective of actual market conditions, agricultural employers may hire undocumented foreign workers instead of participating in the H–2A program, and the resulting influx of undocumented foreign workers erodes the earnings and employment opportunities of U.S. workers in agricultural occupations. U.S. workers cannot fairly compete against undocumented workers, who may accept work at below-market wages, and who are also cheaper to employ than H–2A workers because they do not require the additional payment of other H–2A program requirements, including transportation, and housing. Although the threat of legal sanctions and attendant risks of work disruption will constrain some employers from employing undocumented workers, the greater the total cost to employers of the AEWR plus all other attendant H–2A program costs as compared to the market rate for labor, the greater the likelihood is that employers will risk hiring undocumented foreign labor.

Indeed, according to the USDA, there are an estimated 1.2 million hired agriculture workers in the United States. Recent survey data from the Department indicate that more than 50 percent of agriculture workers in the U.S. admit to being here illegally, and some farm worker advocacy groups have estimated that 70 percent of the agricultural labor force is undocumented.[13] That means there are currently more than 600,000 and perhaps more than 800,000 illegal agricultural workers on U.S. farms, a strong indication of the failures of the current system.

These system failures have contributed to the large number of undocumented workers in agricultural positions in the U.S., which has in turn adversely impacted U.S. workers by eroding agricultural employment opportunities and wages. The effect on U.S. workers of an AEWR that is set too high is ultimately similar to the effect of an AEWR that is set too low: Loss of family income, increased duration of job searches, and increased levels of unemployment. The undocumented workers whose hiring is incentivized when AEWRs are artificially set too high lack the legally enforced protections and benefits that the H–2A program provides, further threatening to degrade U.S. workers' working conditions.

The Supreme Court expressly recognized in its decision in *Sure-Tan,* 467 U.S. at 892, that ''acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens * * *.'' This is still the case today. As Senator Kennedy stated in May 2007,

> We have, unfortunately, employers who are prepared to exploit the current condition of undocumented workers in this country—potentially, close to 12 [and] 1/2 million are undocumented. Because they are undocumented, employers can have them in these kinds of conditions. If they don't like it, they tell them they will be reported to the immigration service and be deported. That is what is happening today.'' [14]

Because illegal aliens may be willing to work for substandard wages, may be reluctant to report violations of the labor and employment laws, and in some instances may even accept illegally low wages that are paid off the books, the prevalence of illegal aliens in the agricultural sector today represents a substantial threat to the wages and working conditions of U.S. workers.

As noted above, there is demand for hundreds of thousands of agricultural workers beyond what the domestic labor market is able to supply. Replacing the hundreds of thousands of undocumented agricultural workers currently employed in the U.S. with U.S. workers or with H–2A program workers paid at a legally required wage

[12] See e.g., 152 Cong. Rec. S9773 (2006) (statement of Senator Dianne Feinstein); 153 Cong. Rec. S441–S442 (2007) (statement of Senator Larry Craig); and 153 Cong. Rec. S6590 (2007) (statement of Senator Edward Kennedy).

[13] *See* Julia Preston, ''Farmers Call Crackdown on Illegal Workers Unfair,'' The New York Times, August 11, 2007.

[14] 153 Cong. Rec. S6590 (2007).

that will not undermine agricultural wages will substantially counteract these adverse effects.

Wages vary across the U.S. by geographic location, by specific agricultural occupation, and by level of skill. An AEWR that does not take into account these variables will inevitably disrupt program functionality and adversely affect U.S. workers. For example, a single national AEWR applicable to all agricultural jobs in all geographic locations would prove to be below market rates in some areas and above market rates in other areas, resulting in all of the associated adverse effects that have been previously discussed. AEWRs covering large multi-state regions suffer from similar flaws. In an agricultural sector where prevailing labor conditions make the need for precision in AEWR determinations paramount, it is essential that a methodology be adopted that allows for as great a degree of geographic refinement as possible.

It is therefore critical that the AEWR be accurate and reflect market conditions for each locality across the country. If the AEWR does not reflect market wages and is too low or too high in any given area, it will harm U.S. workers directly by artificially lowering wages or it will harm U.S. workers indirectly by providing an incentive for employers to hire undocumented workers. Improving the geographic precision of the AEWR is essential to ensuring that the AEWR meets its statutory objective.

Another important element in determining an appropriate AEWR that reflects market realities and labor costs is including wage data relating to the specific occupation and level of skill or experience required for a position. Farm labor comprises a number of occupations and skills, and both the demand for and supply of farm workers with a particular skill level or experience varies significantly across geographic areas. The farm labor market is not a monolithic entity, but rather is a matrix of markets across a spectrum of occupations, skill or experience levels, and local areas. Effectively protecting U.S. workers from unfair foreign competition by setting an AEWR that is neither too low nor too high requires that the AEWR be specifically applicable to the labor market affected in terms of specific occupation, skill or experience, and geographic location.

The present AEWR calculation method is based on a 1989 final rule, 29 CFR part 655, that calculates regional AEWRs based on the previous year's annual combined average hourly wage rate for field and livestock workers in each of 15 multi-state regions and 3 stand-alone States, as compiled by the USDA quarterly Farm Labor Survey Reports. In 1989, the Department determined that the USDA survey was the best available ''barometer'' for measuring farm wages on a nationwide basis. In the succeeding years, however, the Department has gained vast knowledge and experience in applying wage data that simply did not exist in 1989.

The Department's reliance on USDA Farm Labor Survey data creates several problems for functional program administration. The USDA quarterly Farm Labor Survey does not provide refined data by skill level or experience, occupations, or geographic locales of workers typically sought by agriculture employers in the H–2A program. The USDA Farm Labor Survey population includes not only the lower-skilled crop field workers typically sought by agriculture employers who turn to the H–2A program for labor resources, but also inspectors, animal breeding technicians, and trained animal handlers—all occupations that provide a poor basis for determining H–2A wages because they are rarely, if ever, filled by H–2A workers. Additionally, the USDA Farm Labor Survey does not account at all for different skill levels required by agriculture occupations.

The accuracy of AEWRs based on the USDA Farm Labor Survey is further diminished because the Farm Labor Survey is not based on reported hourly wage rates. Instead, USDA's Farm Labor Survey asks employers to report total gross wages and total hours worked for all hired workers for the two reference weeks of the survey. Based on this limited information, the survey constructs annual average wages for the broad general categories of field workers and livestock workers. The AEWR is then calculated by combining the average of the annual wage for field workers and the average annual wage for livestock workers into one annual wage rate covering both of those general occupational categories. The survey thus determines the hourly AEWR based not on reported hourly wages, but rather on the basis of the numerator (total gross wages for the combined occupations) and denominator (total hours for the combined occupations) derived from the information supplied by employers.

In addition, the Farm Labor Survey estimates hired labor use and costs at the aggregation of 15 multi-state regions (along with 3 stand-alone states). The aggregation of a widely diverse national agricultural landscape into just 15 regions (and 3 stand-alone states) results in extremely broad generalizations that fail to account for specific market conditions at the local level. Wage data collected at each individual State and even substate level would be more appropriate for purposes of computing an accurate, sub-regional AEWR that reflects local market conditions. Indeed, market-based wage survey data at the state or substate level is the standard for calculating comparison wages in other temporary worker programs administered by the Department, including the H–2B program that is the non-agricultural counterpart of H–2A and the H–1B specialty occupation worker program.[15]

Moreover, the USDA Farm Labor Survey is administered and funded through USDA, giving the Department no direct control over its design and implementation. USDA could terminate the survey at any time and leave the Department without the basic data, problematic as it is, used to calculate the AEWR. In fact, just this past year, USDA announced that it would suspend the survey in February 2007 due to budget constraints. Ultimately, USDA resumed the Survey in May 2007. The possibility that USDA may suspend the survey at some point in the future adds a measure of instability and uncertainty for AEWR determinations in future years.

Therefore, this NPRM proposes to institute an alternative methodology for determining the AEWR that will more accurately measure market-based wages by occupation, skill level, and geographic location. A more accurate and refined AEWR methodology will produce an AEWR that more closely approximates actual market conditions, which will, in turn, help protect the wages and working conditions of U.S. workers.

The Department invites comment on an alternative AEWR methodology that achieves the goals described above. Under this proposed rule, the Department suggests a revised AEWR methodology that would achieve those goals by utilizing the Bureau of Labor Statistics (BLS) Occupational Employment Survey (OES) data instead of USDA Farm Labor Survey data. The OES program in BLS collects data on wage and salary workers and produces employment and wage estimates for about 800 occupations covering over 70 percent of the employment in the U.S. See 67 FR at 30479, May 6, 2002.

The wage component of the OES survey is, with the exception of the

[15] Calculation of the applicable wage by a SWA using the OES survey is, in fact, a ''safe harbor'' providing presumption of correctness in the H–1B labor condition application. 20 CFR 655.730.(a)(2)(ii)(A)(3).

Decennial Census, the most comprehensive survey conducted by any agency of the Federal Government. The OES program surveys approximately 200,000 establishments every 6 months, and over 3 years collects the full sample of 1.2 million establishments. The OES program collects occupational employment and wage data in every State in the U.S. and the data are published annually. The OES wage data is already utilized by the Department for determining comparison wages in other temporary worker programs and has proven to be an accurate and successful wage reference. In 1989, when the Department established the current AEWR methodology, the OES program was not well developed and thus was not an effective alternative for the USDA Labor Survey. In the intervening 18 years the OES program has surpassed the USDA Labor Survey as a source for comprehensive agricultural wage data in several respects.

First, the OES program produces occupational estimates by geographic area and by industry. Estimates based on geographic areas are available at the national, State, and metropolitan area levels. Industry estimates are available for over 450 industry classifications at the national level. The industry classifications correspond to the sector, 3, 4, and 5-digit North American Industry Classification System (NAICS) industrial groups.

Second, the OES program provides data at the substate level in addition to the State level. Data is compiled for each metropolitan statistical area (MSA) and for additional non-MSA areas that completely cover the balance of each State. Data is available for 573 distinct areas comprehensively covering the U.S. This level of detail will enable AEWRs to be defined for H–2A applicant occupations that are specific to a relevant substate labor market area, greatly improving the ability of the Department to tailor certification decisions and parameters to relevant local labor market conditions. By contrast, the current AEWR provides wage data for just 15 multi-state regions and 3 stand-alone States across the U.S.

Another advantage of OES is that it offers the ability to establish four wage level benchmarks commonly associated with the concepts of experience, skill, responsibility, and difficulty variations within each occupation. The four skill levels for each occupation afford the employer and the Department the opportunity to more closely associate the level of skill required for the job opportunity to the relevant OES occupational category and skill level. This is another important advantage over the USDA Farm Labor Survey, which makes absolutely no skill distinctions.

There are five OES categories of occupations that would most likely be identified with H–2A job classifications. The Department expects that the ''farm workers and laborers, crop, nursery and greenhouse'' occupational category would encompass the majority of the jobs that employers would seek to fill under the H–2A program. The survey does, however, contain other categories, such as ''sorters and graders'' and ''farmworkers, farm and ranch animals,'' that will enable employers and the Department to more closely match the job opportunity to the relevant OES job category and, in turn, the appropriate AEWR. This is a significant advantage over the USDA Farm Labor Survey, which awkwardly provides just a single wage that purports to cover the entire spectrum of agricultural occupations.

Importantly, the OES survey is conducted by the Department's Bureau of Labor Statistics, which will enable continuity and coordination between those who gather the wage data and those who utilize it. This will help ensure the data needs of the H–2A program and AEWR calculation are consistently met.

The Department recognizes that the proposed new methodology utilizing the OES survey data to determine the AEWR is subject to some limitations. For example, the OES survey presently determines agricultural wages by surveying establishments that provide support activities for crop production, such as farm labor contractors, who provide workers and laborers to farm owners and operators. The survey does not include farm establishments that are directly engaged in the business of crop production. Nonetheless, the survey is broad enough to provide accurate and statistically valid wage rates: The latest OES data covers agricultural establishments accounting for the employment of 451,770 hired agricultural workers of all types or more than one-third of the 1.2 million hired farm workers in the U.S., according to the USDA. Moreover, employees of farm labor contractors and other similar businesses generally perform the same type of work as H–2A workers, and thus provide a good general basis for wage comparison. In the Department's estimation, taking these factors into account, the OES survey data is substantially more complete, detailed, and accurate—considering geography, occupation, and skill level—than is the USDA Farm Labor Survey.

The Department's examination of data from the Census Bureau's Current Population Survey (CPS), which includes agricultural workers from both farm and nonfarm establishments, confirms that the OES data covering wages paid by nonfarm agricultural establishments provides an effective and appropriate proxy for the wages paid directly to workers by farm operators. The CPS, a monthly survey of 60,000 households, collects information on the employment and unemployment experience of workers in the U.S. Estimates based on CPS data for 2006 show little difference in the mean or median earnings of agricultural workers employed by farm establishments and those employed by nonfarm establishments (the establishments within the scope of OES).[16] Agricultural workers in nonfarm establishments had mean hourly earnings of $8.86 and median hourly earnings were $8.20. In the farm establishments, mean hourly earnings were $8.55 and median hourly earnings were $7.80. Because of the small size of the CPS survey, the difference in wages reported by agricultural workers in farm establishments and nonfarm establishments is not statistically significant. Comparable OES estimates place mean hourly earnings at $8.94 for agricultural workers in nonfarm establishments and are very similar to the CPS estimate of $8.86.[17]

In looking at the CPS as a possible source of wage data for this purpose, the Department determined that while that survey may provide a reasonable basis for making national level estimates and comparisons, the sample size is too small to provide the type of detailed State and substate-level estimates that can be gleaned from the OES data. And for that reason, the Department

[16] As noted above, although an OES-surveyed employer may technically be a nonfarm establishment, the employer's workers may work on farms in agricultural occupations as reflected in the OES agricultural worker categories.

[17] The CPS estimates were for miscellaneous agricultural workers (occupation code 45–2090). The OES estimates were done for four more specific occupations: Agricultural equipment operators (occupation code 45–2091); farmworkers and laborers, crop, nursery, and greenhouse (45–2092); farmworkers, farm and ranch animals (45–2093); and agricultural workers, all other (45–2099). Average hourly earnings for these four occupations ranged from $8.48 to $12.05 (see *www.bls.gov/oes/current/oes_nat.htm#b45-0000*) and the weighed average across the four occupations was $8.94. Median hourly earnings range from $7.95 to $10.80. The vast majority of the workers in these occupations are in the ''farmworkers and laborers, crop, nursery, and greenhouse'' category, which has median earnings of $7.95, and so it is likely that the median across all four occupational categories differs little from $7.95 or from the CPS estimate of $7.80.

determined that the CPS program would not be able to provide sufficiently accurate comprehensive data on agricultural wages to compute a precise and reliable AEWR.

The Department is aware that shifting from regional AEWRs derived from USDA Farm Labor Survey data to more geographically and occupationally refined AEWRs derived from OES data may raise the legally required wage rates in some areas while lowering them in others. Although these changes in wage rates presumably will make local AEWRs more reflective of actual local labor market conditions, the Department proposes, and asks for comment on, adding an additional protection for workers against potential short-term wage reductions resulting from the change in AEWR methodology. To counteract potential wage reductions in some areas, the Department proposes to use the future (effective July 24, 2009) Fair Labor Standards Act (FLSA) minimum wage of $7.25 as the floor for any AEWR, regardless of the methodology ultimately selected for calculating the AEWR. This basic wage floor will provide a fundamental protection to both foreign temporary workers and U.S. workers that will ensure that AEWRs cannot be lower than new federal minimum wage even though that wage will not be legally required until 2009.

An additional frame of reference on appropriate wage rates is the proposed ''AgJOBS'' legislation, which has been widely endorsed by groups representing both agricultural businesses and agricultural workers.[18] Many AgJOBS provisions implicate important Governmental interests that may not have been adequately taken into account when business and worker groups worked out their proposed compromise legislation, but the wage provisions are at the heart of the direct economic interests of both groups, and the bargain they have struck with respect to wages presumably reflects a comfortable middle ground from their point of view. At a minimum, the Department believes that the many worker advocacy groups and congressional sponsors who have endorsed the legislation would never agree to wage rates that they believe would hurt the interests of U.S. workers.

As a comparison of the OES hourly wage rate at the national average or median rates for the occupational category ''Farmworkers and Laborers, Crop, Nursery and Greenhouse'' and the national average for the AEWR included in the ''AgJOBS'' legislation shows that on average, these workers would receive higher wages if paid an AEWR based on the OES data ($8.39) rather than the AEWR prescribed in AgJOBS ($7.50), thus demonstrating that use of the OES data provides additional wage protection to similarly employed U.S. workers. Even at the 25th percentile OES wage rate, workers in several States will receive higher AEWR wages on average than the AEWR rates proposed in AgJOBS. Further, when considering the proposed addition of the 2009 FLSA minimum wage floor to the OES data, that average AEWR turns out to be almost exactly the same as the average AEWR prescribed in AgJOBS.

Even in those instances where the use of OES data may result in lower AEWRs for H–2A workers in the short term, the Department is confident that the wages and working conditions of U.S. workers will be protected because the total costs of hiring H–2A workers are higher than the hourly AEWR alone reflects, and employers focus not only on wages when making hiring decisions, but on a workers' total cost. The program requirement that employers pay for H–2A workers' transportation and lodging, as well as the administrative expense of filing H–2A applications with several different Government agencies, add substantial additional costs to the employment of H–2A workers. The additional costs beyond wages (administrative expense, transportation and lodging) associated with utilization of foreign labor under the H–2A program are an important consideration that provides significant protection for U.S. workers. It is expected that U.S. workers in similar occupations, with similar skills and working in the same locality would likely be able to command higher hourly wages than H–2A workers and at least equivalent benefits because the additional cost considerations associated with utilization of the H–2A program provide an economic incentive for employers to seek out and hire U.S. workers instead of H–2A workers.[19] And of course, U.S. workers also have the protection of the rule requiring agricultural employers to first attempt to recruit U.S. workers before they can employ H–2A workers. This proposed rule also includes added protection for U.S. workers by requiring employers to recruit U.S. workers for an expanded period of time.

In conclusion, the Department seeks comment on alternative methodologies for calculating AEWRs for the H–2A program, including the use of OES data. The Department believes that to achieve a more accurate AEWR, the proposed methodology must include data concerning occupational category, skill level, and geographical distinctions, at a state or substate level. The Department's proposals have been made after careful consideration of the statutory requirements of the program and with the full knowledge of the administrative record developed in earlier rulemaking activities regarding AEWRs, as published in the **Federal Register**. The Department has reviewed the current methodology in light of the limitations of the USDA data sources, as well as improvements in alternative data collection instruments. The Department invites specific comments on the current AEWR methodology as well as its proposals to improve it, including reasonable alternatives that both provide adequate protections for U.S. workers and avoid introducing undesirable inflexibilities in agricultural labor markets.

2. The 50 Percent Rule

The 50 percent rule, which requires employers of H–2A workers to hire any qualified U.S. worker who applies to the employer during the first 50 percent of the period of the H–2A work contract, was originally created by regulation as part of the predecessor H–2 agricultural worker program in 1978. 20 CFR 655.203(e); 43 FR 10316, Mar. 10, 1978. In 1986, IRCA added the 50 percent rule to the INA as a temporary 3 year statutory requirement, pending the findings of a study that the Department was required to conduct ''and other relevant materials including evidence of benefits to U.S. workers and costs to employers addressing the advisability of continuing a policy which requires an

[18] The *Agricultural Job Opportunities, Benefits, and Security Act (AgJOBS)* builds upon years of discussion and ideas from growers, farm worker advocates, and various groups and organizations, including several Latino groups, focused on the issue of immigration.'' Senator Larry Craig, AgJOBS Issue Briefing, *http://craig.senate.gov/~craig/i_agjobs.cfm#faq.* Myriad advocacy groups have supported the AgJOBS legislation, including for example, the United Farm Workers, Farmworker Justice, National Council of LaRaza, AFL–CIO, Change to Win, Farm Labor Organizing Committee, Int'l Brotherhood of Teamsters, Laborers' Int'l Union of North America, Service Employees Int'l Union, United Food and Commercial Workers, UNITE HERE, National Council of Agricultural Employers, American Farm Bureau Federation, Western Growers Assn, Florida Fruit and Vegetable Assn, Agricultural Coalition for Immigration Reform, U.S. Chamber of Commerce, National Cattlemen's Beef Assn, American Nursery and Landscape Assn, United Egg Producers, United Fresh Fruit and Vegetable Assn, and New England Apple Council. See letter signed by more than 850 organizations supporting AgJOBS legislation that was sent to every member of the U.S. Senate, available at *http://fj.nclr.org/Public/webpage/October2007edits/InformationAboutAgJOBS/110thAgJOBSsignonApril2007Final.pdf.*

[19] U.S. workers hired in response to recruitment required by the H–2A program are entitled to at least the same benefits received as those received by H–2A workers.

employer as a condition for certification under this section, to continue to accept qualified, eligible U.S. workers for employment after the date the H–2A workers depart for work with the employer.'' *Id.*; Public Law 99–603. In the absence of the enactment of Federal legislation prior to the end of the 3 year period, the Secretary was instructed to immediately publish the findings and promulgate an interim or final regulation based on the findings.

The Secretary hired a research firm to analyze the cost-benefit impact of the 50 percent rule on U.S. workers, growers, and the general public. The research firm studied the impact of the 50 percent rule in just Virginia and Idaho, the two States that were determined to have had the highest number of 50 percent rule workers. The number of growers interviewed was small, as the firm interviewed only those growers that actually hired U.S. workers because of the 50 percent rule—just 66 growers (0.1 percent) in all of Virginia and Idaho's total 64,346 farms (according to the USDA). The study did not take into consideration the 131 growers in the two States who received referrals under the 50 percent rule but did not hire any of the referred workers. The study also did not investigate why so few growers were using the H–2A program, and therefore did not take into account the overwhelming number of growers who were not using the program. The study sought only to determine the costs to employers that hire referred 50 percent rule workers and the concomitant benefits to the U.S. workers hired under the rule.

Even with this narrow focus, the study made it clear that the H–2A program was not regarded as desirable by growers. Of those questioned, 6 percent said they were dropping out of the H–2A program because of the 50 percent rule. Forty percent wanted the rule eliminated entirely and 33 percent wanted to alter the requirement by, for example, requiring the 50 percent rule workers to finish the season or modifying substantially the 50 percent rule by requiring the hiring of U.S. workers only up to a certain point before the date of need. In fact, 16 years later, only one of the agriculture employers surveyed in 1990 is still using the H–2A program.

In 1990, pursuant to what is now INA § 218(c)(3)(B)(iii), ETA published an interim final rule to continue the 50 percent requirement. 55 FR 29356, July 19, 1990. Since the 1990 publication of the interim final rule continuing the 50 percent rule, the Department has gained experience and additional perspective that calls into question whether the Department's decision to continue the 50 percent rule was, at the time, supported by the data in the 1990 study; and whether the rule is in fact a necessary, efficient and effective means of protecting U.S. workers from the adverse impact resulting from the employment of foreign workers, No other temporary foreign labor program administered by the Department includes such a requirement, which may be yet another reason the H–2A program is viewed by many as containing burdensome requirements that do not provide a corresponding benefit to U.S. workers.

The Department has heard complaints that the 50 percent rule creates substantial uncertainty for the employer in terms of managing their labor supply and labor costs during the life of the contract. In many situations, it appears the employer does not substitute the U.S. worker arriving under the 50 percent rule for the existing H–2A worker, but rather retains both workers and incurs the added expense in order to prevent further disruption to work flow resulting from dismissing an H–2A worker and sending that worker home. Anecdotally, employers report that the majority of the U.S. workers who are hired under the 50 percent rule remain on the job for less than the term of the H–2A contract. This means that if an employer immediately dismisses an H–2A worker when a U.S. worker is hired under the 50 percent rule, that action could result in the employer being short of labor if and when the U.S. worker leaves the job early. In any case, the concern that new workers may arrive well into the harvest cycle and create the type of disruption described above can serve as a serious disincentive for employers to participate in the H–2A program. Given the ready availability of jobs in the agricultural sector to authorized workers, there is also reason to believe that U.S. workers would generally be best served by referrals to jobs that have not yet begun, rather than being thrust into job opportunities that have already partly elapsed.

With the newly redesigned process being proposed, employers will be required to conduct additional recruitment in advance of their application. Employers will begin advertising for job opportunities no earlier than 120 days and no later than 75 days before the date on which the foreign worker will begin. This is a significant expansion of the period of required recruitment in the current rule and would enable more U.S. workers to be apprised of the job opportunities in a timely manner before the job begins. Additionally, under the redesigned process, the SWA will post the job orders until the date of departure of the foreign workers for the place of employment. These expanded time frames for recruitment will ensure that U.S. workers have substantially better and more effective notice about opportunities to obtain full term employment than is currently afforded by the 50 percent rule. Substituting these expanded recruitment requirements for the current 50 percent rule would provide employers substantially greater certainty regarding required recruitment, expected labor costs, and the available workforce, and would help lend greater stability to a program that has been rendered unattractive to many agricultural employers because of the many administratively imposed uncertainties.

For the above reasons, the Department is inclined to replace the 50 percent rule with expanded up-front recruitment requirements that will enhance the ability of U.S. workers to identify and apply for agricultural job openings before the jobs begin. The Department would like more information about the impact of the 50 percent rule before it makes a final decision, however, and requests comment on and information regarding the costs and benefits of the 50 percent rule in the current labor market. The Department requests comments from employers, workers and their representatives on the merits of retaining or eliminating the rule, as well as possible alternatives, such as reducing the applicable time period for mandatory hiring to the first 25 percent of the H–2A worker's contract, that might be effective in protecting U.S. worker access to job opportunities without creating uncertainty and competitive disadvantage for employers.

3. Housing

Section 218(c)(4) of the INA requires employers to provide housing in accordance with specific regulations. Employer-provided housing, depending on when it was built, must meet either the Department's Occupational Safety and Health Administration (OSHA) standards set forth under 29 CFR 1910.142 (standards for temporary labor camps), or the ETA standards at 20 CFR 654.404–654.417 (standards for H–2A housing). In circumstances where rental, public accommodation, or another substantially similar class of habitation is used, the housing must first meet any local standards for such housing or, in the absence of applicable local standards, any applicable State standards. In the absence of both local and State standards, the housing must

meet the OSHA standards for temporary labor camps.

The Department is proposing to require that employers attest to having secured the necessary housing and having requested or obtained the necessary inspection. The requirement that housing be inspected in a timely fashion is often problematic for SWAs, whose staff must travel to the site of the housing, sometimes over great distances to remote areas; perform the inspection; and issue a final determination, all within the current 15-day processing window (i.e., between 45 days and 30 days prior to the date of need). The Department is accordingly proposing that employers who have commenced recruitment request a housing inspection no earlier than 75 days and no later than 60 days before the date of need, well in advance of the statutory deadline requiring the Department to issue a labor certification determination no later than 30 days before the date of need.

The Department is not proposing to alter the discretion currently afforded to SWAs in the method by which inspections are conducted. The ability to perform inspections earlier than the date of filing will, however, provide SWAs with more time and more flexibility in executing this charge. This change is essential to address the frequent failure of SWAs to comply with the statutory mandate that housing inspections be completed ''prior to the date * * * by which the Secretary of Labor is required to make a certification,'' INA § 218(d), which has in turn resulted in labor certifications being issued outside of the statutorily required timeframes. Absent an expansion in the timeframe for inspections, the expected increase in program participation would likely lead to ever greater strains on the resources of SWAs to keep up with requested inspections, and ever greater delays beyond the legally required deadline for completion of inspections.

To ensure efficient and legally sufficient processing of applications, the Department is proposing to use the same basic model that applies to housing inspections for U.S. workers under the Migrant and Seasonal Workers Protection Act (MSPA). Employers would be required to request housing inspections no later than 60 days prior to the anticipated date of need. If an employer has not received or does not receive a housing inspection prior to the statutory deadline of 30 days prior to date of need, and the SWA failed to conduct the inspection for reasons beyond the employer's control, the Department will make a conditional determination on the application in the absence of a physical inspection. This conditional determination would only be granted in situations in which an employer has made a timely request and housing has not been inspected; employers who have been informed of deficiencies by SWAs and have failed to act to correct these deficiencies will not be conditionally certified, nor will those who have made untimely requests or who have not otherwise met all other criteria for certification. Moreover, the issuance of a conditional determination would not in any way prevent SWAs from later conducting housing inspections and ensuring that appropriate penalties are imposed if housing fails to meet standards. This proposed system closely parallels MSPA and ensures that foreign workers receive every protection to which U.S. workers are entitled while avoiding punishing employers for the Government's failure to meet its statutory deadlines with respect to housing.

The Department appreciates the obstacles faced by employers when looking to build housing for farm workers, including zoning restrictions, resistance from the community, cost and the Federal housing standards to which the housing must be built. Therefore, the Department is proposing to allow H–2A employers to provide a housing voucher as an additional option by which H–2A certified employers may meet the requirement to provide housing to H–2A and U.S. workers who are not reasonably able to return to their residences within the same day.

To ensure that workers receive the benefit to which they are entitled, the Department has proposed a number of safeguards when housing is provided via the voucher method. These safeguards include the requirement that the voucher method may not be used in an area where the Governor of the State has certified that there is inadequate housing available in the area of intended employment for farm workers; the voucher is not transferable and is not redeemable for cash by the employee, it may only be redeemed for cash paid by the employer to a party providing appropriate housing; and the voucher may not be used to secure housing located outside the reasonable commuting distance of the place of employment. Workers may ''pool'' the housing vouchers to secure housing (e.g., to secure a house instead of a motel room), but such pooling may not result in a violation of the applicable safety and health standards. The proposed voucher is one way an employer may meet his obligation to provide housing. However, if acceptable housing cannot be obtained via the voucher, the employer is not relieved of his obligation to provide housing meeting the applicable safety and health standards and must either provide or secure housing for the H–2A workers. The Department invites comments on whether this proposal appropriately balances the needs of employers and workers.

In addition, the Department proposes to clarify and codify additional limited flexibility in the matter of post-certification changes in housing. Currently, under policy clarified by the Training and Employment Guidance Letter 11–07, Change 1 (November 14, 2007) if the employer-provided housing becomes unexpectedly unavailable, an employer is required to (1) notify the SWA in writing of the housing change, and (2) provide to the SWA evidence from the appropriate local or State agency responsible for determining compliance with the applicable safety and health standards and licensing such rental or public accommodations, which may include a certificate of occupancy where such a certificate demonstrates current compliance with applicable safety and health standards. This NPRM further clarifies and codifies this policy. Only if the employer takes these steps will a housing certification continue to be considered valid. The SWA may then, in its discretion, inspect the housing to ensure that it complies with the applicable safety and health standards. The SWA shall notify the appropriate CO of all housing changes and of the results of any housing inspections. This process will enable employers to avoid the delays associated with amending certifications and beginning the process anew when previously arranged and inspected housing becomes unavailable or uninhabitable for reasons outside their control (i.e., fire, natural disaster).

4. Transportation

The NPRM at § 655.104(h) proposes to continue the Department's policy of requiring employers to provide or pay for the worker's daily subsistence and transportation from the worker's home or place of employment, provided the worker works for 50 percent or more of the contract period. This proposal also retains the requirement that employers advance transportation and subsistence costs (or otherwise provide them) if it is the prevailing practice of non-H–2A agricultural employers in the occupation in the area to do so. The Department recognizes, however, that these requirements are unique to the H–2A program, and invites comments providing information on the costs and

benefits to employers and workers of continuing to require employers to pay for the inbound and outbound transportation and subsistence costs of H–2A workers.

5. Treatment of Logging

The Department has long held logging employment to the same or similar standards as those found in the H–2A regulations, even though logging has not been included in the statutory definitions of agricultural employment. In 1978, the Department included logging in its final H–2 regulations for temporary labor certifications for ''agricultural and logging workers,'' encompassing most of the same obligations found today in the current H–2A program. 43 FR 10306 Mar. 10, 1978. This continued a Departmental policy going back to 1965. See 20 CFR 602.10 and 602.10a (1971), 35 FR 12393, Aug. 4, 1970; 20 CFR 602.10 (1966), 30 FR 12292, Sept. 25, 1965.

In 1986, when IRCA separated the H–2 visa category into agricultural work under the H–2A visa and nonagricultural work under the H–2B visa, Congress provided the Secretary explicit authority in administering the H–2A program to expand the definition of ''agriculture'' through regulation beyond IRCA's required minimum definition, which includes all agricultural labor as defined in the Federal Insurance Contributions Act (FICA) (the social security tax in section 3121(g) of the Internal Revenue Code) and in § 3(f) of the FLSA. IRCA § 301(a), Public Law 99–603, Title III, 100 Stat. 3359, November 6, 1986. The Department chose at that time not to expand the definition of agriculture beyond the statutory minimum. Nevertheless, the Department simultaneously continued the existing regulatory H–2A-like standards for logging workers who were admitted under the H–2B program. Those pre-IRCA standards for agricultural and logging applications continue to apply to logging today (20 CFR part 655, subpart C), and are the model from which the H–2A agricultural regulatory processing framework derived. 52 FR 20496, Jun. 1, 1987. Logging employers, therefore, have been subject to a substantially similar set of obligations and processes as H–2A employers, but their nonimmigrant employees must enter on H–2B, rather than H–2A, visas.

The Department no longer sees any reason to maintain two substantially similar yet slightly divergent processes for agriculture and logging, and intends to return to our 1965–1986 practice of treating both activities alike. The types of activities in which the employers in both fields engage—i.e., harvesting of agricultural and horticultural products—and the labor certification requirements to which they are subject, are essentially the same.

Accordingly, the Department proposes to include logging employment in its definition of ''agricultural activity'' for purposes of H–2A labor certification. By doing so, the Department is exercising its legislative authority under § 101(a)(15)(H)(ii)(a) of the INA to expand the definition of agriculture beyond the definitions in FICA and FLSA to include logging. Conforming amendments are being made to reflect this change, including the removal of the current regulations specific to logging employment. This change will result in loggers being eligible for H–2A visas rather than H–2B.

The Department seeks comments as to whether there are other businesses that should be similarly included within the definition of agriculture under this program.

6. Definitions

The Department is proposing to include the definition of employee and to modify the definition of employer to conform these definitions to those used in other Department-administered programs. The definition of employee conforms to the Supreme Court's holding in *Nationwide Mutual Insurance* v. *Darden,* 503 U.S. 318, 322–324 (1992). The Department is proposing these clarifications to remove any confusion that may exist for agricultural employers who have compliance obligations under FLSA, MSPA and the H–2A program.

In defining an H–2A worker, the INA gives the Secretary of Labor the authority to define in regulations the term ''agricultural labor or services,'' with the requirement that the definition include agricultural labor or services as defined in the IRC, the FLSA, and the pressing of apples for cider on a farm. The work must also be of a temporary or seasonal nature. 8 U.S.C. 1101(a)(15)(h)(ii)(A). The activity of ''pressing of apples for cider on a farm'' was added to the statute by Public Law 109–90, dated October 18, 2005. The Department proposes to change the regulatory definition to reflect the 2005 amendment.

The Department is also proposing changes to the regulatory definition of ''agricultural labor or services'' to clarify that an activity that meets either the IRC or the FLSA definitions of agriculture is considered agricultural labor or services for H–2A program purposes and to remove limitations on the performance of traditional agricultural activities which, when performed for more than one farmer, are not considered agricultural labor or services under the IRC or the FLSA. The Department is also proposing clarifications to reflect that work activity of the type typically performed on a farm and incident to the agricultural labor or services for which an H–2A labor certification was approved may be performed by an H–2A worker. This clarification will ensure that H–2A workers can engage in minor amounts of other incidental farm work activity during periods when they are not performing the agricultural labor of services that is the subject of their application. In no case can this work amount to more than an incidental portion of the H–2A worker's total labor or services for which they were admitted.

7. Fees

The proposed rule continues to provide that each employer (except joint employer associations) of H–2A workers must pay to the Department appropriate fees for each temporary agricultural labor certification received. The application fee for each employer receiving a temporary agricultural labor certification is supplemented by an appropriate fee covering each H–2A worker certified under the application. These processing fees, which are authorized by statute and set by regulations originally published in 1988, are required by the current statutory language to be deposited in the Treasury rather than being used to fund program costs at the Department. Nevertheless, the Department is updating the fees to an amount appropriate to comport with the statute's expectation that the fee recover ''the reasonable costs of processing'' H–2A applications.

II. Other Proposed Amendments to the Department's Regulations

A. Changes to Parts 780 and 788

The Department proposes a modification to the FLSA regulations so that the production of trees through the application of agricultural and horticultural techniques to be harvested and sold for seasonal ornamental use as Christmas trees will be recognized as ''agriculture'' under the FLSA. The Department has determined that this modification is necessary in light of the Fourth Circuit Court of Appeals' decision in *U.S. Department of Labor* v. *North Carolina Growers Association,* 377 F.3d 345 (4th Cir. 2004), as well as a recognition that modern production of such trees typically involves extensive

care and management. Indeed, Christmas tree production is already an eligible job under the H–2A program.

The FLSA provides that employees who are ''employed in agriculture'' are exempt from the FLSA's overtime provisions. 29 U.S.C. 213(b)(12). Section 203(f) of the FLSA defines ''agriculture'' as follows:

> Agriculture includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

In an interpretive bulletin published in 1956, the Department interpreted § 203(f) of the FLSA to exclude Christmas tree farming. *See* 29 CFR 780.115, 780.200, 780.208. The Court of Appeals for the Fourth Circuit has noted that the exclusion of Christmas tree farming from the definition of ''agriculture'' is not consistent with the typical manner in which Christmas trees are produced. Indeed, as the *North Carolina Growers Association* court recognized:

> Christmas tree farming has evolved since the FLSA was enacted in 1938. Before the 1960's, Christmas tree harvesting was more in the nature of ''enterprising individuals who took what nature provided.'' * * * However, since the mid 1960's, Christmas tree farming has evolved into the current system where growers plant and cultivate the trees for harvest.

N. Car. Growers Ass'n., 377 F.3d at 348 n.2 (internal citation omitted).

Based on the Department's experience, modern Christmas tree production usually involves extensive care and management through the application of agricultural and horticultural techniques to raise such trees as ornamental horticultural products, such as planting seedlings in beds in a nursery; on-going treatment with fertilizer, herbicides, and pesticides as necessary; re-planting in lineout beds; lifting and re-planting the small trees in cultivated soil with continued treatment with fertilizers, herbicides, and pesticides as indicated by testing to see if such applications are necessary; pruning or shearing yearly; and harvesting of the tree for seasonal decorative use typically within 7 to 10 years of planting. The Fourth Circuit described these activities as ''significant changes [from the time of the initial interpretive bulletin] in the industry's cultivation and management techniques.''

Thus, the Department proposes to revise those references in 29 CFR part 780 and 29 CFR part 788 stating that planted Christmas trees are within the scope of forestry and lumbering operations and are not agricultural or horticultural commodities for purposes of ''agriculture'' under the FLSA.

The Department does not intend to change the treatment of Christmas trees that are not produced through the application of agricultural or horticultural techniques as discussed above. Production of such trees will continue to fall outside the scope of ''agriculture'' under the FLSA. In sections listed below for changes, references to § 13(a)(13) have been updated to make the reference to 13(b)(28). The exemption in 13(a)(13) for forestry and lumbering operations was repealed and a new exemption from overtime only was created in § 13(b)(28) in the 1974 amendments to the FLSA. See § , 23(b)(1) and (2), Public Law 93–259, 88 Stat. 69 (Apr. 8, 1974).

B. Changes to Part 501

Section 218(g)(2) of the INA authorizes the Secretary of Labor to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to ensure employer compliance with terms and conditions of employment under this section of the statute. The Secretary determined that enforcement of the contractual obligations of employers under the H–2A program is the responsibility of the WHD. Regulations at 29 CFR part 501 were issued to implement the WHD's responsibilities under the H–2A program; amendment of these regulations is part of this proposed rulemaking.

Concurrent with the Department's proposed amendments to its regulations in 20 CFR part 655 subpart B to modernize the certification of temporary employment of nonimmigrant H–2A workers, the Department proposes to amend its regulations at 29 CFR part 501 regarding enforcement under the H–2A program.

Changes are proposed for enhanced enforcement to complement the modernized certification process so that workers are appropriately protected when employers fail to meet the requirements of the H–2A program. This notice of proposed rulemaking would make changes to specific sections of the existing regulations in 29 CFR part 501, as summarized below.

1. Definitions

Section 501.10 of the current regulations sets forth the definitions used in part 501. The proposed rule would update the definition of ''work contract'' to reflect language used in the proposed changes to 20 CFR part 655, subpart B. As had been done in the current regulations, proposed § 501.10 incorporates the same definitions listed in 20 CFR part 655, subpart B that pertain to 29 CFR part 501.

In addition, language in §§ 501.4, 501.15, and elsewhere has been modified to indicate that ''corresponding employment'' includes only U.S. workers who are newly hired by the employer in the occupations and during the period of time set forth in the application for labor certification and does not include U.S. workers who were already employed by the H–2A employer at the time the application was filed. The INA requires that U.S. workers hired during the H–2A recruitment period, including workers who respond to job advertisements, must be offered and provided no less than the same wages, benefits, and working conditions that the employer offers, intends to offer, or provides to the H–2A workers. U.S. workers who were already employed by the H–2A employer at the time the labor certification application was filed, however, cannot possibly be adversely affected by the subsequent hiring of H–2A workers who are paid higher wages. This modification to the Department's enforcement policy appropriately ties that policy to the Department's statutory authority to prevent adverse effects to the wages and working conditions of U.S. workers. The Department notes that its experience with the H–2A program indicates that situations where H–2A workers are paid more than similarly employed U.S. workers will arise very rarely, if ever, in practice.

2. Sanctions and Remedies—General

The number of FLCs applying for labor market certifications enabling them to hire and employ H–2A workers has risen in recent years and is expected to continue to increase. The WHD's enforcement statistics reveal that FLCs are generally more likely to be found in violation of applicable requirements than fixed-site agricultural employers. To address this higher violation rate of FLCs and given the transient nature of FLCs, ESA has proposed in 29 CFR part 655, subpart B that FLCs must attest to, obtain, and maintain a surety bond, based on the number of workers

employed, throughout the period the temporary labor certification is in effect, including any extensions thereof. WHD will have authority to make a claim against the surety bond to secure unpaid wages or other benefits due to workers under the labor certification.

3. Civil Monetary Penalties

In order to deter significant violations of the H–2A worker protection provisions, § 501.19 would be amended to increase the maximum civil money penalties. The proposed maximum civil money penalty amount would be increased from $1,000 to $5,000 for a willful failure to meet a condition of the work contract, or for discrimination against a U.S. or H–2A worker who in connection with the INA or these regulations has filed a complaint, has testified or is about to testify, has exercised or asserted a protected right. Additionally, the fine amount would be increased to up to $15,000 for a willful failure to meet a condition of the work contract that results in displacing a U.S. worker employed by the employer during the period of employment on the employer's application, or during the period of 75 days preceding such period of employment.

The proposed penalties for violators who willfully disregard their obligations under an attestation program would provide the Department with an effective tool to discourage potential abuse of the program. Such penalties will deter willful violations, discrimination and interference with investigations, and strengthen necessary enforcement of laws that protect workers who may be unlikely to approach Government agencies to intercede on their behalf.

Further, if a violation of an applicable housing or transportation safety and health provision of the work contract causes the death or serious injury of any worker, the Department proposes a new penalty of up to $50,000 per worker. The Department also proposes a new penalty of up to $100,000 per worker where the violation of a safety and health provision involving death or serious injury is repeated or willful.

In an attestation-based program the proposed penalties for such violations of applicable safety and health provisions would provide a meaningful assurance that participants meet their obligation to see that housing and/or transportation provided to the workers meets all applicable safety and health requirements and that housing and/or vehicles used in connection with employment do not endanger workers. The proposed penalty for repeat or willful violations that involve a fatality or serious injury will provide a significant deterrent to ensure that such violations do not occur. The Department's experience in enforcing safety and health standards shows that penalties are an important tool in reducing fatalities and injuries. Increased penalties will induce employers to be more proactive in their approach to complying with the applicable safety and health standards.

The assessment of the maximum penalty under proposed § 501.19 would not be mandatory, but rather would be based on regulatory guidelines and the facts of each individual case.

4. Debarment by the WHD

The current regulations provide ETA the authority to deny certification (i.e., debarment) and require the WHD to report findings to make a recommendation to ETA to deny future certifications. Under proposed § 501.20, debarment authority for issues arising from WHD investigations would reside with the WHD Administrator, while debarment authority for issues arising out of the attestation process would remain with ETA. This proposal is in keeping with recommendations made as far back as 1997 in a General Accounting Office (GAO) report to Congress in which GAO proposed that authority to suspend employers with serious labor standard or H–2A contract violations be extended to the WHD. *See* U.S. Gen. Accounting Office: Report to Congressional Committees: H–2A Agricultural Guestworker Program, Changes Could Improve Services to Employers and Better Protect Workers, 68, 70 (1997)). Both agencies will coordinate their activities whenever debarment is considered. The proposed standards for debarment within WHD's purview are identical to those proposed by ETA for debarment actions under 20 CFR part 655, thus ensuring consistency in application. This change will allow administrative trials and appeals for civil money penalties assessed by the WHD to be consolidated with the debarment actions that arise from the same facts. This change will remove the requirement that ETA review WHD investigations, eliminating a step in the administrative process and allowing for more expeditious proceedings and efficient enforcement. This will not affect ETA's ability to institute its own debarment proceedings regarding issues that arise from the application or attestations or ETA's proposed audits. Conforming changes are proposed to other sections in part 501 to reflect the proposed WHD debarment authority.

5. Referrals of Revocations to ETA

Section 501.21 is proposed to conform to the proposed changes in 20 CFR part 655, which provides ETA the authority to revoke an existing certification, by allowing the WHD to recommend revocation to ETA based upon the WHD's investigative determinations.

6. Exhaustion of Administrative Remedies

Sections 501.33 and 501.42 would be revised to include language that clarifies and assures that the exhaustion of all administrative remedies is required before an appeal of a final agency action may be taken to the Federal courts pursuant to the Administrative Procedures Act.

7. Nomenclature Changes

The proposed rule would also make a number of non-substantive nomenclature changes and technical corrections to 29 CFR part 501. These include: Reflecting that the INA was amended in 1988 while the current regulations were published in June 1987 and H–2A provisions that were in § 216 are now codified in § 218 of the INA; changing references from the State Employment Service offices to the SWA; and reflecting that appeals from administrative law judge decisions are made to the Department's Administrative Review Board.

III. Administrative Information

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order (E.O.) 12866, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the E.O. and subject to review by the Office of Management and Budget (OMB). Section 3(f) of the E.O. defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Department has determined that this proposed rule is not an ''economically significant regulatory action'' under § 3(f)(1) of E.O. 12866. The procedures for filing an *Application for Temporary Employment Certification* under the H–2A visa category on behalf of nonimmigrant temporary agricultural workers, as proposed under this regulation, will not have an economic impact of $100 million or more. The regulation will not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, nor public health or safety in a material way. In fact, this proposed rule is intended to provide relief to the affected employers both directly, by streamlining the process by which they can apply for H–2A labor certification, and indirectly, by increasing the available legal workforce. The Department, however, has determined that this proposed rule is a ''significant regulatory action'' under § 3(f)(4) of the E.O.

Summary of Impacts

The changes being proposed are expected to have little or no direct cost impact, above and beyond the baseline of the current costs required by the program as it is currently implemented, with the exception of increased fees for filing. The re-engineering of the program requirements, including attestation-based applications and pre-application recruitment, will have the effect of reducing employer application costs in time and resources and introduce processing efficiencies that will reduce costs for employers, particularly costs associated with loss of labor due to delayed certifications. The Department is specifically requesting comment on what costs these policies introduce and what efficiencies may be gained from adopting these new proposed procedures, toward the goal of ensuring a thorough consideration and discussion of the costs and benefits at the final rule stage.

The additional filing fees will offset these reductions to a certain extent, but the Department believes that the increased filing fees represent the actual cost of processing and will have a net benefit to employers in the increased access to the program and the benefit of having a workforce in place when and where needed. The additional record retention costs for employers are minimal. The new record retention requirements will require a burden of approximately 10 minutes per year per application to retain the application and supporting documents above and beyond the 1 year of retention required by regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR 1602.14, promulgated pursuant to Title VII of the Civil Rights Act and the American With Disabilities Act, and 29 CFR 1627.3(b)(3), promulgated pursuant to the Age Discrimination in Employment Act. In FY 2007, 7,725 employers filed requests for 80,294 workers. Using standard administrative wage rates, including benefits, of $60.42 [20] per hour, this additional burden for each of the 4 years following the mandated year above is approximately $77,791 total per year (or approximately $10 per applicant per year) if the current number of requests remains constant. Any increase in the use of the program would result in the same ultimate burden to applicants.

Employers will experience efficiencies as a result of the reengineering of the process. These savings are expected to be found in the simplified attestation-based application. While the Department cannot precisely estimate the cost savings as a result of this time saved, it believes that employers will experience economic benefits as a result of this reengineering of the application process to an attestation-based submission, including lower advertising costs and fewer labor costs from overlapping or duplicative workforces. These savings may be impacted by increased usage of the program by employers; while at this time it is impossible to tell exactly what that increased usage will be, the savings to employers will be universal to new users as well as current participants.

B. Regulatory Flexibility Analysis

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires that a regulatory flexibility analysis be prepared and made available for public comment. The RFA must describe the impact of the proposed rule on small entities. (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have significant economic impact on a substantial number of small entities. The Assistant Secretary of ETA has notified the Chief Counsel for Advocacy, Small Business Administration (SBA), and certifies under the RFA at 5 U.S.C. 605(b), that this proposed rule will not have a significant economic impact on a substantial number of small entities. The rule does not substantively change existing obligations for employers who choose to participate in the H–2A temporary agricultural worker program.

The factual basis for such a certification is that even though this proposed rule can and does affect small entities, there are not a substantial number of small entities that will be affected, nor is there a significant economic impact upon those small entities that are. In FY 2007, 7,725 employers filed requests for 80,294 workers. Of the total 2,089,790 farms, 98 percent have sales of less than $750,000 per year and fall within SBA's definition of small entities. However, the Department does not expect that there will be a substantial number of small businesses that will utilize the H–2A program in light of its prior history. In FY 2007, 7,725 employers filed requests for 80,294 workers. Even if all of the 7,725 employers who filed applications under H–2A in FY 2007 were small entities, the percentage of small entities applying for temporary foreign worker certification would be only 3 percent of the total number of small farms.

The Department contends the costs incurred to employers under this proposed rule will not be substantially different from those incurred under the current application filing process. Employers seeking to hire foreign workers on a temporary basis under the H–2A program must continue to establish to the Secretary's satisfaction that their recruitment attempts have not yielded enough qualified and available U.S. workers and that their hiring of foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Similar to the current process, employers under this proposed H–2A process will file a standardized application for temporary labor certification and will retain recruitment documentation, a recruitment report, and any supporting evidence or documentation justifying the temporary need for the services or labor to be performed.

To estimate the cost of this reformed H–2A process on employers, the Department calculated each employer will likely pay in the range of $500 to $1,850 to meet the advertising and recruitment requirements for a job opportunity, and spend approximately 3 hours of staff time preparing the standardized applications for the required offered wage rate and for temporary labor certification, final recruitment report, and retaining all other required documentation (e.g., newspaper ads, job orders, business necessity) in a file for audit purposes

[20] Derived by utilizing the Bureau of Labor Statistics 2006 median wage for Human Resources Manager wage of $42.55 and a 1.42 factor for the cost of benefits and taxes.

that is not otherwise required to be retained in the normal course of business. In estimating employer staff time costs, the Department used the median hourly wage rate for a Human Resources Manager ($42.55), as published by the Department's OES survey, O*Net OnLine,[21] and increased it by a factor of 1.42 to account for employee benefits and other compensation for a total staff time cost of $181.00 per applicant.

The Department acknowledges that there might be some extremely small businesses that may incur additional costs to file their application on-line if and when the Department moves to an electronic processing model. However, neither these additional costs nor the advertising and human resource staff time, if any, will eliminate more than 10 percent of the businesses' profits; exceed 1 percent of the gross revenue of the entities in a particular sector; nor exceed 5 percent of the labor costs of the entities in the sector.

The total costs for the small entities affected by this program will be reduced or stay the same as the costs for participating in the current program. Even assuming that all entities who file H–2A labor certification applications are considered to be small businesses, the net economic effect is not significant.

The Department invites comments from members of the public who believe there will be a significant impact on a substantial number of small entities or who disagree with the size standard used by the Department in certifying that this proposed rule will not have a significant impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. This proposed rule has no ''Federal mandate,'' which is defined in 2 U.S.C. 658(6) to include either a ''Federal intergovernmental mandate'' or a ''Federal private sector mandate.'' A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector which is not voluntary. A decision by a private entity to obtain an H–2A worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

The SWAs are mandated to perform certain activities for the Federal Government under this program, and are compensated for the resources used in performing these activities. Under the current regulations, employers file applications for H–2A labor certifications concurrently with the Department and the SWA having jurisdiction over the area of intended employment. The SWA and the Department through the NPCs of the OFLC both receive the application and review the terms of the job offer. The SWA then places the job order to initiate local recruitment. The SWA directly supervises and assists employer recruitment, and makes referrals of U.S. workers. The NPC directs the SWA to place job orders into intrastate/interstate clearance ensuring employers meet advertising and recruitment requirements. The SWA is responsible for processing the employer's certification request for H–2A labor certification, overseeing the recruitment and directing referrals to the employer. SWAs coordinate all activities regarding the processing of H–2A applications directly with the appropriate NPC for their jurisdiction, including transmittal to the NPC of housing inspection results, prevailing wage surveys, prevailing practice surveys or any other material bearing on the application. Once the application is reviewed by the SWA and after the employer conducts its required recruitment, the SWA then sends the complete application to the appropriate NPC for final certification or denial.

Under the re-engineered process in the NPRM, the SWAs will still play a role in the clearance of job orders, the referral of eligible U.S. workers to employers, and conducting housing inspections, but will no longer be responsible for the receipt and substantive review of H–2A applications. SWA activities under the H–2A program are currently funded by the Department pursuant to grants provided under the Wagner-Peyser Act. 29 U.S.C. 49, *et seq.* The Department anticipates continuing funding under the Wagner-Peyser Act. As a result of this NPRM and the publication of a final regulation, the Department will analyze the amounts of such grants made available to each State to fund the activities of the SWAs.

D. Small Business Regulatory Enforcement Fairness Act of 1996

The Department determined that this rulemaking did not impose a significant impact on a substantial number of small entities under the RFA; therefore, the Department is not required to produce any Compliance Guides for Small Entities as mandated by the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801) (SBREFA). The Department has similarly concluded that this proposed rule is not a ''major rule'' requiring review by the Congress under the SBREFA because it will not likely result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local Government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

E. Executive Order 13132, Federalism

The Department has reviewed this proposed rule in accordance with E.O. 13132 regarding federalism and has determined that it does not have ''federalism implications.'' The proposed rule does not ''have substantial direct effects on States, on the relationship between the States, or on the distribution of power and responsibilities among the various levels of Government'' as described by E.O. 13132. Therefore, the Department has determined that this proposed rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

F. Executive Order 13175, Indian Tribal Governments

This rule was reviewed under the terms of E.O. 13175 and determined not to have ''tribal implications.'' 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.'' As a result, no tribal summary impact statement has been prepared.

G. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681) requires the Department to assess the impact of this proposed rule on family well-being. A rule that is determined to have a negative effect on families must

[21] Source: Bureau of Labor Statistics 2006 wage data.

be supported with an adequate rationale.

The Department has assessed this proposed rule and determines that it will not have a negative effect on families.

H. Executive Order 12630

This proposed rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

I. Executive Order 12988

This regulation has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The regulation has been written so as to minimize litigation and provide clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

J. Plain Language

The Department drafted this Notice of Proposed Rulemaking in plain language.

K. Executive Order 13211, Energy Supply

This rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

L. Paperwork Reduction Act

This NPRM contains revised paperwork requirements at §§ 655.100(a), 655.101, 655.102(c), 655.104(d)(5), 655.105, 655.106, 655.107, 655.108, and 655.109 of Title 20 in the Code of Federal Regulations. This NPRM proposes to significantly change the method of collecting information for the H–2A program for which the current collection instruments do not suffice. Employers are currently required to file a Form ETA 750 (OMB Control Number 1205–0015) and Form ETA 790 (OMB Control Number 1205–0134) when requesting a labor certification for temporary agricultural workers. Additionally, each SWA has its own form for its offered wage rate determinations. This proposed rule revises the current process for applying by requiring petitioners to attest to certain terms, conditions, and obligations. These attestations are made to the U.S. Government in accordance with these proposed regulations in order to modernize processing. To streamline the process, the proposed rule mandates the offered wage rate determination requests be filed with the Department instead of the individual SWAs. Under the Paperwork Reduction Act of 1995 (PRA), OMB considers the attestations and the wage rate determination requests an information collection requirement subject to review. Accordingly, this information collection in this proposed rule has been submitted to OMB for review under § 3507(d) of the PRA. Copies of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice or at this Web site: *http://www.doleta.gov/OMBCN/OMBControlNumber.cfm* or *http://www.reginfo.gov/public/dol/pramain.* Written comments are encouraged and will be accepted until April 14, 2008.

When submitting comments on the information collection, your comments should address one or more of the following four points.

Review Focus: The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

I. Overview of Information Collection Form 1

Type of Review: New.
Agency: Employment and Training Administration.
Title: Application for Temporary Employment Certification.
OMB Number: 1205–NEW1.
Agency Number(s): (Proposed) Form ETA–9142.
Recordkeeping: On occasion.
Affected Public: Individuals, households, businesses, farms, Federal, State, local and tribal governments.
Total Respondents: 7,725.
Estimated Total Burden Hours: 16,738.
Total Burden Cost (capital/startup): $9,573,400.
Total Burden Cost (operating/maintaining): 0.

II. Overview of Information Collection Form 2

Type of Review: New.
Agency: Employment and Training Administration.
Title: Job Offer and Required Wage Request Form.
OMB Number: 1205–NEW2.
Agency Number(s): (Proposed) Form ETA–9141.
Recordkeeping: On occasion.
Affected Public: Individuals, households, businesses, farms, Federal, State, local and tribal governments.
Total Respondents: 7,725.
Estimated Total Burden Hours: 5,794.
Total Burden Cost (capital/startup): 0.
Total Burden Cost (operating/maintaining): 0.

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record. All comments and suggestions or questions regarding additional information should be directed to the *Federal e-Rulemaking Portal* at: *www.regulations.gov* or mailed to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for Employment & Training Administration. The information collection aspects of the proposed rulemaking will not take effect until published in a final rule and approved by OMB. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(k)(1).

M. Catalog of Federal Domestic Assistance Number

This program is listed in the *Catalog of Federal Domestic Assistance* at Number 17–273, ''Temporary Labor Certification for Foreign Workers.''

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Foreign workers, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

List of Subjects in 29 CFR Part 501

Administrative practice and procedure, Agriculture, Aliens, Employment, Housing, Housing standards, Immigration, Labor, Migrant labor, Penalties, Transportation, Wages.

List of Subjects in 29 CFR Part 780

Agricultural commodities, Agriculture, Employment, Forests and forest products, Labor, Minimum wages, Nursery stock, Overtime pay, Wages.

List of Subjects in 29 CFR Part 788

Employment, Forests and forest products, Labor, Overtime pay, Wages.

For reason stated in the preamble, the Department of Labor proposes that 20 CFR part 655 and 29 CFR parts 501, 780, and 788 be amended as follows:

Title 20—Employees' Benefits

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

1. Revise the authority citation for part 655 to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); § 3(c)(1), Public Law 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); § 221(a), Public Law 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); § 303(a)(8), Public Law 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); § 323(c), Public Law 103–206, 107 Stat. 2428; § 412(e), Public Law 105–277, 112 Stat. 2681; and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts A and C issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and § 323(c), Public Law 103–206, 107 Stat. 2428.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); § 303(a)(8), Public Law 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); § 412(e), Public Law 105–277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K issued under § 221(a), Public Law 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); § 2(d), Public Law 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Public Law 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

2. Revise the heading of part 655 to read as set forth above.

3. Revise § 655.1 to read as follows:

§ 655.1 Purpose of scope of subpart A.

This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the United States in occupations other than agriculture or registered nursing.

4. Revise subpart B to read as follows:

Subpart B—Labor Certification Process for Temporary Agricultural

Sec.

655.90 Purpose and scope of subpart B.
655.92 Authority of ETA–OFLC.
655.93 Special procedures
655.100 Overview of subpart B and definition of terms.
655.101 Applications for temporary employment certification in agriculture.
655.102 Required pre-filing recruitment.
655.103 Advertising requirements.
655.104 Contents of job offers.
655.105 Assurances and obligations of H–2A employers.
655.106 Assurances and obligations of Farm Labor Contractors.
655.107 Receipt and processing of applications.
655.108 Offered Wage Rate.
655.109 Labor certification determinations.
655.110 Validity and scope of temporary labor certifications.
655.111 Required departure.
655.112 Audits.
655.113 H–2A applications involving fraud or willful misrepresentation.
655.114 Petition for higher meal charges.
655.115 Administrative review and de novo hearing before an administrative law judge.
655.116 Job Service Complaint System; enforcement of work contracts.
655.117 Revocation of H–2A certification approval.
655.118 Debarment.

§ 655.90 Purpose and scope of subpart B.

General. This subpart sets out the procedures established by the Secretary of Labor (the Secretary) to acquire information sufficient to make factual determinations of:

(a) Whether there are sufficient able, willing, and qualified U.S. workers available to perform the temporary and seasonal agricultural employment for which an employer desires to import nonimmigrant foreign workers (H–2A workers); and

(b) Whether the employment of H–2A workers will adversely affect the wages and working conditions of workers in the U.S. similarly employed.

§ 655.92 Authority of ETA–OFLC.

Under this subpart, the accepting for consideration and the making of temporary agricultural labor certification determinations are ordinarily performed by the Administrator, Office of Foreign Labor Certification (OFLC), who, in turn, may delegate this responsibility to a designated staff member, e.g., a Certifying Officer (CO).

§ 655.93 Special procedures.

(a) *Systematic process.* This subpart provides systematic and accessible procedures for the processing of applications from agricultural employers and associations of employers for the certification of employment of nonimmigrant workers, usually in relation to the production or harvesting of a particular agricultural crop or the raising of livestock for market.

(b) *Establishment of special procedures.* To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities under the INA, while not deviating from statutory requirements to determine U.S. worker availability and make a determination as to adverse effect, the OFLC Administrator has the authority to establish or to revise special procedures in the form of variances for processing certain H–2A applications when employers can demonstrate upon written application to and consultation with the OFLC Administrator that special procedures are necessary. In a like manner, for work in occupations characterized by other than a reasonably regular workday or workweek, such as the range production of sheep or other livestock, the Administrator has the authority to establish monthly, weekly, or bi-weekly adverse effect wage rates for those occupations, for a Statewide or other geographical area, other than the rates established pursuant to § 655.108, provided that the Administrator uses a methodology to establish adverse effect wage rates that are consistent with the methodology in § 655.108. Prior to making determinations under this paragraph (b), the Administrator may consult with employer and worker representatives.

(c) *Construction.* This subpart shall be construed to permit the OFLC Administrator, where the OFLC Administrator deems appropriate, to devise, continue, revise, or revoke special procedures where circumstances warrant. These include procedures previously in effect for the handling of applications for sheepherders in the Western States (and adaptation of such procedures to occupations in the range production of other livestock), for custom combine crews, and others on an as-needed basis.

§ 655.100 Overview of subpart B and definition of terms.

(a) *Overview*—(1) *Filing application process.* (i) This subpart provides guidance to an employer that desires to apply for temporary agricultural labor certification for the employment of H–2A workers to perform agricultural employment of a temporary or seasonal nature. The regulations in this subpart provide that such employer shall file an H–2A application, including a job offer, on forms prescribed by the Employment

and Training Administration (ETA), that describes the material terms and conditions of employment to be offered and afforded to U.S. and H–2A workers, with the OFLC Administrator. The entire application shall be filed with the OFLC Administrator at least 45 calendar days before the first date the employer requires the services of the H–2A workers. The application will contain attestations of the employer's compliance or promise to comply with program requirements regarding recruitment of eligible U.S. workers, including the payment of an appropriate wage, and terms and conditions of employment.

(ii) No earlier than 120 calendar days and no later than 75 calendar days before the first date the employer requires the services of the H–2A workers, the employer shall initiate positive recruitment of eligible U.S. workers and cooperate with the local office of the State Workforce Agency (SWA) which serves the area of intended employment to place a job order into intrastate and interstate recruitment. To comply with the regulation and as part of its positive recruitment, an employer will: Obtain the appropriate agricultural wage directly from the ETA National Processing Center (NPC); place a job order with the SWA; place advertisements meeting the requirements of this regulation; contact former U.S. workers; and engage in recruitment in traditional labor supply States, when required, based on an annual determination from the Secretary, where such determination results in a finding of a multistate region of traditional or expected labor supply with a significant number of U.S. workers who, if recruited, would be willing to make themselves available at the time and place needed. The SWA will post a job order locally, as well as in all States listed in the application as anticipated work sites and in any States in which the Secretary finds that a multistate region of traditional or expected labor supply exists with a significant number of U.S. workers who, if recruited, would be willing to make themselves available at the time and place needed. No more than 60 days prior to the first date the employer requires the services of the H–2A workers, the employer will prepare an initial written recruitment report that it must submit with its application. The employer will cease any recruitment and acceptance of referrals of eligible U.S. workers no earlier than the actual date on which the H–2A workers depart for the place of work, or no earlier than three days prior to the first date the employer requires the services of the H–2A workers, whichever is later.

(iii) The application for H–2A temporary labor certification may be filed by mail; in addition, the Department may require the application to be filed electronically. Applications that meet threshold requirements for completeness and accuracy will be forwarded for processing to NPC staff, who will review each application for compliance with the criteria for certification. Each application must meet requirements for timeliness, temporary need, and the provision of assurances and other safeguards against adverse impact, and must be free of technical errors. Employers receiving a labor certification must continue to cooperate with the SWA by accepting referrals—and have the obligation to accept eligible U.S. workers who apply—until the date on which the H–2A workers depart for the place of work, or 3 days prior to the first date the employer requires the services of the H–2A workers, whichever is later.

(2) *Deficient applications.* Under this subpart, the CO will promptly review the application and notify the applicant in writing if there are deficiencies that render the application not acceptable for certification, and afford the applicant a 5 business day period for resubmission of an amended application or an appeal of the CO's refusal to approve the application as acceptable for consideration. Amended applications that fail to cure deficiencies in a way that would make them certifiable will be denied. In addition, when an initial application contains a deficiency related to recruitment or some other element of adverse effect, the CO will deny the application, instruct the employer to file a new application, and include guidance on how to correct the deficiency during the new recruitment period. In these cases, the application must contain a new, later date of need and demonstrate compliance with pre-filing recruitment requirements.

(3) *Amendment of applications.* This subpart provides for the amendment of applications, at any time prior to the CO's certification determination, to increase the number of workers requested in the initial application; and/or change the period of employment. In circumstances where the recruitment was not materially altered by such amendments, such amendments may not require an additional recruitment period for eligible U.S. workers.

(4) *Recruitment of U.S. workers; determinations—(i) Recruitment.* If the employer has complied with the criteria for certification, including recruitment of eligible U.S. workers, the CO shall make a determination no later than 30 calendar days before the first date the employer requires the services of the H–2A workers to grant or deny, in whole or in part, the application for certification. Failure to comply with any of the certification criteria, and efforts to cure deficiencies identified by the CO, may lengthen the time required for processing, resulting in a final determination issued later than 30 days prior to date of need.

(ii) *Granted applications.* This subpart provides that an application for temporary agricultural labor certification shall be granted if the CO finds that the employer has not offered and does not intend to offer foreign workers higher wages or better working conditions (or has imposed less restrictions on foreign workers) than those offered and afforded to U.S. workers; that sufficient U.S. workers who are able, willing, qualified, and eligible, will not be available at the time and place needed to perform the work for which H–2A workers are being requested; and that the employment of such nonimmigrants will not adversely affect the wages and working conditions of similarly employed U.S. workers.

(iii) *Fees.* (A) *Amount.* This subpart provides that each employer (except joint employer associations) of H–2A workers shall pay to the appropriate CO fees for each temporary agricultural labor certification received. The application fee for each employer receiving a temporary agricultural labor certification is $200 plus $100 for each H–2A worker certified under the *Application for Temporary Employment Certification.* In the case of a joint employer association receiving a temporary agricultural labor certification, each employer-member receiving a temporary agricultural labor certification shall pay an application fee of $200 plus $100 for each H–2A worker certified for that employer-member. The joint employer association will not be charged a separate fee. Any amendments requested pursuant to § 655.107(a)(6) by the employer to a temporary agricultural labor certification, which are received, accepted, and processed by the appropriate CO, will be subject to an additional processing fee of $100. In circumstances where the CO grants an amendment to increase the number of H–2A workers requested on the initial certified application, the employer shall be subject to a fee of $100 for each additional H–2A worker certified on the amended temporary agricultural labor certification.

(B) *Timeliness of payment.* The fee must be received by the appropriate CO no later than 30 calendar days after the granting of each temporary agricultural labor certification. Fees received any later are untimely. Failure to pay fees in a timely manner is a substantial program violation which may result in the denial of future temporary agricultural labor certifications and program debarment.

(iv) *Denied applications.* This subpart provides that if the application for temporary agricultural labor certification is denied, in whole or in part, the employer may seek review of the denial, or a *de novo* hearing, by an administrative law judge as provided in this subpart.

(b) *Definitions of terms used in this subpart.* For the purposes of this subpart:

Administrative law judge means a person within the DOL Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105; or a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by part 656 of this chapter, but which shall hear and decide appeals as set forth in § 655.115. ''Chief Administrative Law Judge'' means the chief official of the DOL Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

Administrator, Office of Foreign Labor Certification (OFLC) means the primary official of the Office of Foreign Labor Certification, or the Administrator's designee.

Adverse effect wage rate (AEWR) means the minimum wage rate that the Administrator has determined must be offered and paid to every H–2A worker employed in a particular occupation and/or area to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

Agent means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, which:

(1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes, and

(2) Is not itself an employer, or a joint employer, as defined in this paragraph (b).

Agricultural association means any nonprofit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable State law, which recruits, solicits, hires, employs, furnishes, or transports any H–2A worker. An agricultural association may act as the agent of an employer for purposes of filing an H–2A temporary labor certification application.

Agricultural employer means any person who owns or operates a farm or ranch, or otherwise engages in agriculture as defined in this subpart, and who either recruits, solicits, hires, employs, furnishes, or transports any H–2A worker. Agricultural employers may file H–2A applications either directly or through their agents or other legal representatives.

Application for Temporary Employment Certification means the form submitted by an employer to secure a temporary agricultural labor certification determination from DOL.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of intended employment of the job opportunity for which the certification is sought. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, quality of regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

Attorney means any person who is a member in good standing of the bar of the highest court of any state, possession, territory, or commonwealth of the United States, or the District of Columbia, and who is not under suspension or disbarment from practice before any court or before DHS or the United States Department of Justice's Executive Office for Immigration Review. Such a person is permitted to act as an agent, representative, or attorney for an employer and/or foreign worker under this part.

Certifying Officer (CO) means the person designated by the Administrator, OFLC with making programmatic determinations on employer-filed applications under the H–2A program.

Date of need means the first date the employer requires services of the H–2A workers.

Department of Homeland Security (DHS), through the *United States Citizenship and Immigration Services (USCIS),* means the Federal agency making the determination under the INA whether to grant petitions filed by employers seeking H–2A workers to perform temporary agricultural work in the U.S.

DOL or Department means the U.S. Department of Labor.

Eligible worker means, with respect to employment, an individual who is not an unauthorized alien (as defined in section 274A(h)(3) of the INA, 8 U.S.C. 1324a(h)(3), or in this paragraph (b)) with respect to that employment.

Employee means ''employee'' as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors should be considered and no one factor is dispositive.

Employer means a person, firm, corporation or other association or organization:

(1) Which has a location within the U.S. to which U.S. workers may be referred for employment, or qualifies as a farm labor contractor (FLC) under this subpart;

(2) Which has an employer relationship with respect to employees under this subpart as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and

(3) Which possesses a valid Federal Employer Identification Number (FEIN).

(4) Where two or more employers each have the definitional indicia of employment with respect to an employee, those employers shall be considered to jointly employ that employee.

(5) FLCs, for purposes of this subpart, shall be considered to be employers.

Employment Service (ES) means the system of Federal and State entities responsible for administration of the labor certification process for temporary and seasonal agricultural employment of nonimmigrant foreign workers. This includes the State Workforce Agencies (SWAs) and the OFLC, including the NPCs.

Employment Standards Administration (ESA) means the agency within the Department of Labor (DOL) that includes the Wage and Hour Division, and which is charged with carrying out certain investigative and

enforcement functions of the Secretary under the INA.

Employment and Training Administration (ETA) means the agency within the Department that includes the OFLC.

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

Farm labor contracting activity means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant and seasonal agricultural worker as those terms are used in 29 U.S.C. 1801 *et seq.* and 29 CFR part 500, with the intent to contract those workers to fixed-site employers.

Farm Labor Contractor (FLC) means any person—other than an agricultural association, or an employee of an agricultural association—who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

H–2A worker means any nonimmigrant who shall perform agricultural labor or services of a temporary or seasonal nature under INA § 101(a)(15)(H)(ii)(a), as amended, 8 U.S.C. 1101(a)(15)(H)(ii)(a).

INA means the Immigration and Nationality Act, as amended, 8 U.S.C. 1101 *et seq.*

Job offer means the offer made by an employer or potential employer of H–2A workers to eligible workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means a job opening for temporary, full-time employment at a place in the U.S. to which a U.S. worker can be referred.

Office of Foreign Labor Certification (OFLC) means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the INA concerning the admission of foreign workers to the U.S. to perform work described in INA § 101(a)(15)(H)(ii)(a), as amended.

Occupational Safety and Health Administration (OSHA) means the organizational component of DOL that assures the safety and health of America's workers by setting and enforcing standards; providing training, outreach, and education; establishing partnerships; and encouraging continual improvement in workplace safety and health under the Occupational Safety and Health Act, as amended.

Positive recruitment means the active participation of an employer or its authorized hiring agent in recruiting and interviewing qualified and eligible individuals in the area where the employer's establishment is located and any other area designated by the Secretary as a multistate area of traditional or expected labor supply with respect to the area where the employer's establishment is located in an effort to fill specific job openings with U.S. workers.

Prevailing means, with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that practice or benefit which is most commonly provided by employers (including H–2A and non-H–2A employers) for the occupation in the area of intended employment.

Representative means the official employed by or duly authorized to act on behalf of the employer with respect to activities entered into for and/or attestations made with respect to the *Application for Temporary Employment Certification.* In the case of an attorney who acts as an employer's representative and who interviews and/or considers U.S. workers for the job offered to the foreign worker(s), such individual must be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered in the application, but which do not involve labor certifications.

Secretary means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

Secretary of Homeland Security means the chief official of the U.S. Department of Homeland Security (DHS) or the Secretary of Homeland Security's designee.

Secretary of State means the chief official of the U.S. Department of State (DOS) or the Secretary of State's designee.

State Workforce Agency (SWA), formerly known as State Employment Security Agency (SESA), means the State Government agency that receives funds pursuant to the Wagner-Peyser Act to administer the public labor exchange delivered through the State's one-stop delivery system in accordance with the Wagner-Peyser Act. 29 U.S.C. 49 *et seq.* Separately, SWAs receive ETA grants, administered by the OFLC, to assist them in performing certain activities related to foreign labor certification—including conducting housing inspections.

Temporary agricultural labor certification means the certification made by the Secretary with respect to an employer seeking to file with DHS a visa petition to employ a foreign national as an H–2A worker, pursuant to §§ 101(a)(15)(H)(ii)(a), 214(a) and (c), and 218 of the INA that:

(1) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the agricultural labor or services involved in the petition, and

(2) The employment of the foreign worker in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the U.S. similarly employed, 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1188.

Temporary agricultural labor certification determination means the written determination made by the CO to approve or deny, in whole or in part, an application for temporary agricultural labor certification to employ a foreign worker(s).

Unauthorized alien means, with respect to employment, an alien who is not at that time either (a) a foreign national lawfully admitted for permanent residence or (b) otherwise authorized to be so employed.

United States (U.S.), when used in a geographic sense, means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, and the Virgin Islands of the United States.

United States worker (U.S. worker) means a worker who is either

(1) A citizen or national of the U.S., or

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under § 207 of the INA, is granted asylum under § 208 of the INA, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.

Wages means all forms of cash remuneration to a worker by an employer in payment for personal services.

(c) *Definition of agricultural labor or services of a temporary or seasonal nature.* For the purposes of this subpart, ''agricultural labor or services of a temporary or seasonal nature'' means the following:

(1) ''*Agricultural labor or services.*'' Pursuant to § 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), ''agricultural labor or services'' is defined for the purposes of this subpart as:

(i) ''Agricultural labor'' as defined and applied in § 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g));

(ii) ''Agriculture'' as defined and applied in § 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f));

(iii) The pressing of apples for cider on a farm;

(iv) Logging employment; or

(v) Handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm; or

(vi) Other work typically performed on a farm that is incidental to the agricultural labor or services for which the worker was sought.

(2) An occupation included in either of the statutory definitions cited in paragraphs (c)(1)(i) and (ii) of this section shall be ''agricultural labor or services'', notwithstanding the exclusion of that occupation from the other statutory definition.

(i) ''*Agricultural labor*'' for purposes of paragraph (c)(1)(i) of this section means all services performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D)*(1)* In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(2) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (c)(2)(i)(A) of this section, but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph (c)(2)(i)(D)(*2*), any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(3) The provisions of paragraphs (c)(1) and (2) of this section shall not be deemed to be applicable with respect to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(4) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(E) As used in this subsection, the term ''farm'' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. (See § 3121(g) of the Internal Revenue Code of 1986 (26 U.S.C. 3121(g).)

(ii) ''*Agriculture.*'' For purposes of paragraph (c)(1)(ii) of this section agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in 12 U.S.C. 1141j(g)), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. (See 29 U.S.C. 203(f) (§ 3(f) of the FLSA of 1938, as amended.).

(iii) ''*Agricultural commodity*''. For purposes of paragraph (c)(1)(ii), of this section ''agricultural commodity'' includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as processed by the original producer of the crude gum (oleoresin) from which derived.. ''Gum spirits of turpentine'' means spirits of turpentine made from gum (oleoresin) from a living tree and ''gum rosin'' means rosin remaining after the distillation of gum spirits of turpentine. (See 12 U.S.C. 1141j(g) (§ 15(g) of the Agricultural Marketing Act, as amended, and 7 U.S.C. 92.)

(3) ''*Of a temporary or seasonal nature.*''

(i) ''*On a seasonal or other temporary basis*''. For the purposes of this subpart, ''of a temporary or seasonal nature'' means ''on a seasonal or other temporary basis'', as defined in the ESA's WHD's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) *MSPA definition.* The definition of ''on a seasonal or other temporary basis'' found in MSPA, summarized as follows, is:

(A) Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

(B) A worker is employed on ''other temporary basis'' where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

(C) ''On a seasonal or other temporary basis'' does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

(D) ''On a seasonal or other temporary basis'' does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(iii) ''*Temporary*''. For the purposes of this subpart, the definition of ''temporary'' in paragraph (c)(2)(ii) of this section refers to any job opportunity covered by this subpart where the employer needs a worker for a position for a limited period of time, which shall be for less than 1 year, unless the original temporary agricultural labor

certification is extended based on unforeseen circumstances, pursuant to § 655.110 of this part.

§ 655.101 Applications for temporary employment certification in agriculture.

(a) *Application Filing Requirements.* (1) An employer that desires to apply for certification of temporary employment of one or more nonimmigrant foreign workers must file a completed DOL *Application for Temporary Employment Certification* form, including a job offer. If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one NPC, the application, if filed by mail, shall be filed with the NPC having jurisdiction over the place where the work is contemplated to begin. The employer's application will contain information related to the job opportunity, which shall comply with the requirements of §§ 655.104 and 653.501 of this chapter and the assurances required by § 655.105.

(2) If an association of agricultural producers, which uses agricultural labor or services, files the application, the association shall identify whether it is either the sole employer, a joint employer with its employer-member employers, or the agent of its employer-members. The association shall identify on the *Application for Temporary Employment Certification*, by name and address, each member that will be an employer of H–2A workers. The association shall retain documentation substantiating the employer or agency status of the association and be prepared to submit such documentation to the CO in the event of an audit examination.

(3) If an employer intends to be represented by an agent, the employer shall sign the appropriate statement on the *Application for Temporary Employment Certification* that the agent is representing the employer and the employer assumes full responsibility for the accuracy of any representations made by the agent. The agent may accept for interview workers being referred to the job and make hiring commitments on behalf of the employer.

(4) If an FLC intends to file the application, he/she must meet all of the requirements of the definition of ''employer'' in § 655.100(b), and comply with all the assurances, guarantees, and other requirements contained in this part and in part 653, subpart F, of this chapter. The FLC must have a place of business (physical location) in the United States to which U.S. workers may be referred. If an FLC files an application, H–2A workers employed by the FLC may not perform services for an agricultural employer unless the FLC has filed a confirmation of the agricultural employer's compliance with the housing and transportation obligations, as outlined in § 655.106, with the OFLC, for each agricultural employer listed on the application. The FLC shall retain a copy of the compliance certificate.

(b) *Filing.* The employer may complete the *Application for Temporary Employment Certification* and send it by U.S. Mail or private mail courier to the appropriate NPC. The Department shall publish a Notice in the **Federal Register** identifying the address(es), and any future address changes, to which paper applications must be mailed, and shall also post these addresses on the DOL Internet Web site at *http://www.foreignlaborcert.doleta.gov/*. The form must bear the original signature of the employer (or that of the employer's authorized agent or representative) at the time it is submitted.

(c) *Timeliness.* A completed *Application for Temporary Employment Certification* is not required to be filed with the appropriate NPC more than forty-five (45) calendar days before the date of need.

§ 655.102 Required pre-filing recruitment.

(a) *Time of Filing of Application.* An employer may not file an *Application for Temporary Employment Certification* before all of the pre-filing recruitment steps set forth in this section have been fully satisfied. An employer may file earlier than 45 days prior to the date of need, but is not required to do so.

(b) *General Attestation Obligation.* An employer must document recruitment efforts on the application form and attest to performing all necessary steps of the recruitment process as specified in this section and having rejected any eligible U.S. workers who have applied only for lawful reasons. In addition, the employer shall attest that it will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the H–2A workers depart for the place of work, or 3 days prior to the first date the employer requires the services of the H–2A workers, whichever is later, and then preparing a written recruitment report for submission to the CO in the event of an audit examination.

(c) *Retention of documentation.* An employer filing an *Application for Temporary Employment Certification* must maintain documentation of its advertising and recruitment efforts as required in this subpart and be prepared to submit this documentation in response to a Notice of Deficiency from the CO prior to rendering a Final Determination or in the event of an audit examination. The documentation required in this section to be retained by the employer must be retained for a period of no less than 5 years from the date of the certification or, if such application was denied, no less than 5 years from the date of notification from the Department of such denial.

(d) *Positive Recruitment Steps.* An employer filing an application must:

(1) Post a job order with the SWA serving the area of intended employment,

(2) Run three print advertisements (one of which must be on a Sunday, except as outlined in paragraph (g) of this section);

(3) Contact former U.S. employees who were employed within the last year (except those who were dismissed for cause or who abandoned the worksite); and

(4) Based on an annual determination made by the Secretary, as described in paragraph (i) of this section, recruit in any States currently designated as States of traditional or expected labor supply with respect to the State in which the employer's work is to be performed.

(e) *Job Order.* (1) The employer shall place an active job order, consistent with part 653, subpart F, of this chapter, with the SWA serving the area of intended employment no earlier than 120 calendar days and no later than 75 calendar days before the date of need for intrastate and interstate clearance and begin recruitment of U.S. workers. For an application filed by an association of agricultural employers, the SWA shall prepare a single job order in the name of the association on behalf of all employer-members named in the application. If the job opportunity contains multiple work locations within the same area of intended employment and the area of intended employment is found in more than one State, the employer shall place a job order with the SWA having jurisdiction over the place where the work is contemplated to begin. Documentation of this step shall be satisfied by maintaining a copy of the SWA job order downloaded from the SWA Internet job listing site on the first day of posting, a copy of the job order provided by the SWA with the start date of posting, or other proof of publication from the SWA containing the text of the job order on the first day of posting.

(2) The job order contents submitted by the employer to the SWA must satisfy all the requirements for newspaper advertisements contained in § 655.103 and the adverse effect

requirements set forth at § 655.104. In the job order, the SWA shall disclose that only eligible workers shall be referred and list the name of the employer and location(s) of work, or in the event that an association is serving as the employer, a statement indicating that the name and location of each member of the association can be obtained through the SWA.

(3) Unless otherwise directed by the CO, the SWA shall keep the job order on its active file for intrastate clearance until the date the H–2A worker(s) depart for the place of work, or upon 3 days prior to the date the employer requires the services of the H–2A workers, whichever is later.

(f) *Intrastate/Interstate Recruitment.* (1) Upon placing a job order for intrastate clearance, the SWA receiving the job offer under paragraph (e) of this section shall promptly transmit, on behalf of the employer, a copy of its active job order to all States listed in the application as anticipated worksites. If the employer's anticipated worksite location(s) is contained within the jurisdiction of a single State, the SWA shall transmit a copy of its active job order to no fewer than 3 States, which must include those States designated as traditional or expected labor supply States (''out-of-state recruitment States'') for the State in which the employer's work is to be performed as defined in paragraph (i) of this section. Upon receipt of the active job order, each SWA shall promptly prepare a job order for intrastate clearance within its respective State and begin recruitment of eligible U.S. workers. For applications filed by an association of agricultural producers, each SWA shall prepare a single job order in the name of the association on behalf of all employer-members duly named in the application.

(2) The job order contents must satisfy all the requirements for newspaper advertisements contained in § 655.103 and the adverse effect requirements set forth at § 655.104. In the job order, the SWA shall disclose that only eligible U.S. workers shall be referred and list the name of the employer and location(s) of work, or in the event that an association is serving as the employer, a statement indicating that the name and location of each member of the association can be obtained from the SWA to which the job offer was originally submitted under paragraph (e) of this section.

(3) Unless otherwise directed by the CO, the SWA shall keep the job order on its active file for intrastate clearance until and only until the date the H–2A worker(s) depart for the place of work, or 3 days prior to the date the employer requires the services of the H–2A workers, whichever is later. Each of the SWAs to which the job order was referred shall refer back to the SWA to which the job offer was originally submitted under paragraph (e) of this section each eligible U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(g) *Newspaper Advertisements.* (1) Within the same period of time as the job order is being circulated by the SWA(s) for interstate clearance under paragraph (f) of this section, the employer shall place an advertisement on 3 separate days, which may be consecutive, one of which is to be a Sunday advertisement (except as provided in paragraph (g)(2) of this section), in a newspaper of general circulation serving the area of intended employment, which may be a daily local newspaper, that is most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, available, qualified, and eligible U.S. workers. The first newspaper advertisement must be printed no earlier than 120 calendar days and no later than 75 calendar days before the date of need.

(2) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the employer shall use, in place of a Sunday edition advertisement, the regularly published edition with the widest circulation in the area of intended employment.

(3) The newspaper advertisements must satisfy the requirements under § 655.103 and the adverse effect requirements set forth at § 655.104. Documentation of this step shall be satisfied by maintaining copies of newspaper pages (with date of publication and full copy of ad), tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication containing the text of the printed advertisements and the dates of publication furnished by the newspaper.

(4) If the use of a professional, trade or ethnic publication is more appropriate to the occupation and the workers likely to apply for the job opportunity than the use of a general circulation newspaper and is the most likely source to bring responses from able, willing, qualified, and available U.S. workers, the employer may use a professional, trade or ethnic publication in place of two newspaper advertisements, but shall not replace the Sunday advertisement, or the substitute outlined in (g)(2), as appropriate.

(h) *Contact with former U.S. workers.* Within the same period of time as the job offer is being circulated by the SWA(s) for intrastate/interstate clearance under paragraph (f) of this part, the employer must contact by mail former U.S. workers (except those who were dismissed for cause or who abandoned the worksite) employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job. Such contact can be documented by providing copies of official correspondence signed and dated by the employer demonstrating that the workers were contacted and either unable or unwilling to return to the job or non-responsive to the employer's request.

(i) *Additional positive recruitment.* (1) Each year, the Secretary shall make a determination with respect to each State whether there are other States in which there are located a significant number of able and qualified workers who, if recruited, would be willing to make themselves available for work in that State. Such determination shall be based on information provided by State agencies or by other sources within the 120 days preceding the determination, and shall take into account the success of recent efforts by out-of-state employers to recruit in that State. The Secretary shall not designate a State as a State of traditional or expected labor supply with respect for any other State if the State has a significant number of local employers that are recruiting for U.S. workers for the same types of occupations. The Secretary's annual determination as to which other States, if any, applicants from each State must recruit in shall be published in the **Federal Register** and made available through the ETA Web site.

(2) Each employer shall be required to engage in positive multistate recruitment efforts in those States, if any, that the Secretary has designated as out-of-state recruitment States for the State in which the employer's work is to be performed. Such recruitment shall consist of one newspaper advertisement in each State so designated, published within the same period of time as the newspaper advertisements under paragraph (g) of this section, which must satisfy the requirements under § 655.103 and the adverse effect requirements set forth at § 655.104.

(3) The obligation to engage in such positive recruitment shall terminate on the date H–2A workers depart for the employer's place of work.

(j) *Referrals of U.S. workers.* SWAs shall refer for employment only those individuals whom they have verified are eligible U.S. workers.

(k) *Recruitment Report.* No earlier than 60 calendar days before the date of need the employer must prepare, sign, and date a written recruitment report. The recruitment report must be submitted with the *Application for Temporary Labor Certification.* The recruitment report must:

(1) Identify each recruitment source by name;

(2) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report for consideration by the employer, and the disposition of each U.S. worker who applied or was referred to the job opportunity;

(3) If applicable, explain the lawful job-related reason(s) for not hiring any U.S. workers who applied for the position.

(4) The employer shall retain resumes of (if available), and evidence of contact with, each U.S. worker who applied or was referred to the job opportunity. Such resumes and evidence of contact shall be retained as part of the recruitment report for a period of no less than 5 years and must be provided in response to a Notice of Deficiency from the CO prior to rendering a Final Determination or in the event of an audit.

(5) The employer shall update the recruitment report within 48 hours of the date the H–2A workers depart for the place of work, or 3 days prior to the date the employer requires the services of the H–2A workers, whichever is later. This supplement to the recruitment report shall list the name(s) and contact information of any additional U.S. workers who applied or were referred to the job opportunity, and list the disposition of each U.S. worker who applied or was referred to the job opportunity; explaining, if applicable, the lawful job-related reason(s) for not hiring any U.S. workers who applied or who were referred. The employer must sign and date this supplement to the recruitment report and retain it for a period of no less than 5 years. The supplement to the recruitment report must be provided in the event of an audit.

§ 655.103 Advertising requirements.

All advertising conducted to satisfy the required recruitment steps under § 655.102 before filing the *Application for Temporary Employment Certification* must meet the adverse effect requirements set forth at § 655.104 and disclose the following information:

(a) Identify the employer's name and location(s) of work, or in the event that an association is serving as the employer, a statement indicating that the name and location of each member of the association can be obtained from the SWA;

(b) Indicate the geographic area of employment with enough specificity to apprise applicants of any travel requirements or where applicants will likely have to reside to perform the services or labor;

(c) Describe the job opportunity with particularity to apprise U.S. workers of services or labor to be performed for which certification is sought and the duration of the job opportunity;

(d) Identify the wage offer, or in the event that an association is serving as the employer, the range of applicable wage offers and a statement indicating that the rate applicable to each member can be obtained from the SWA;

(e) Give the three-fourths guarantee described in § 655.104(h)(3)(i);

(f) If applicable, state that work tools, supplies, and equipment will be provided without cost to the worker;

(g) State that housing will be made available at no cost to workers who cannot reasonably return to their permanent residence at the end of the day;

(h) If applicable, state that transportation and subsistence expenses to the worksite will be provided by the employer;

(i) Indicate the position is temporary and the total number of job openings the employer intends to fill;

(j) Contain terms and conditions of employment which are not less favorable than those subsequently offered to the foreign worker(s); and

(k) Direct applicants to report or send resumes to the SWA for referral to the employer; and

(l) Contact information for the SWA and the job order number.

§ 655.104 Contents of job offers.

(a) *Preferential treatment of aliens prohibited.* The employer's job offer shall offer no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers. Except where otherwise permitted under this section, no job offer may impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers.

(b) *No less than minimum offered.* The job duties and requirements specified in the job offer shall be consistent with the normal and accepted duties and requirements of non-H–2A employers in the same or comparable occupations and crops in the area of intended employment and shall not require a combination of duties not normal to the occupation. The employer cannot offer less than the minimum wages, benefits and working conditions that are required by paragraph (a) of this section.

(c) *Minimum benefits, wages, and working conditions.* Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, every job offer accompanying an H–2A application must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (i) of this section.

(d) *Housing.* (1) *Obligation To Provide Housing.* The employer shall provide housing to those workers who are not reasonably able to return to their permanent residence within the same day through one of the following means:

(i) *Employer-owned housing.* Employer-owned housing that meets the full set of DOL OSHA standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable pursuant to § 654.401.

(ii) *Rental and/or public accommodations.* Rental and/or public accommodations or other substantially similar class of habitation which meets applicable local standards for such housing. In the absence of applicable local standards, State standards shall apply. In the absence of applicable local or State standards, DOL OSHA standards at 29 CFR 1910.142 shall apply. Any charges for rental housing shall be paid directly by the employer to the owner or operator of the housing. When such housing is to be supplied by an employer, the employer shall document to the satisfaction of the CO that the housing complies with the applicable Federal housing standards.

(iii) *Housing voucher.* Except where the Governor of the State has certified that there is inadequate housing available in the area of intended employment for migrant farm workers and H–2A workers seeking temporary housing while employed in agricultural work, the employer may satisfy the requirement to provide housing by furnishing the worker a housing voucher provided that:

(A) The employer has verified that housing meeting applicable standards is available for the period during which the work is to be performed, within a reasonable commuting distance of the place of employment, for the amount of

the voucher provided, and that the voucher is useable for that housing;

(B) Upon the request of a worker seeking assistance in locating housing for which the voucher will be accepted, the employer shall make a good faith effort to assist the worker in identifying, locating and securing housing in the area of intended employment; and

(C) Payment for the housing shall be made with a housing voucher, or such other means, that is not redeemable for cash by the employee to a third party.

(D) The Governor's certification will be valid for a period of 3 years from the date of the certification.

(2) *Standards for range housing.* Housing for workers principally engaged in the range production of livestock shall meet standards of the DOL OSHA for such housing. In the absence of such standards, range housing for sheepherders and other workers engaged in the range production of livestock shall meet guidelines issued by ETA.

(3) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing shall not be levied upon workers. However, employers may require workers to reimburse them for damage caused to housing, bedding, or other property by the individual workers found to have been responsible for damage which is not the result of normal wear and tear related to habitation.

(4) *Family housing.* When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, family housing shall be provided to workers with families who request it.

(5) *Housing inspection.* In order to ensure that the housing provided by an employer pursuant to this section meets the relevant standard:

(i) An employer must make the required attestation at the time of filing the *Application for Temporary Employment Certification* pursuant to § 655.105(e)(2).

(ii) The employer must make a request to the SWA for a housing inspection no more than 75 days and no fewer than 60 days before the date of need.

(iii) The determination that the housing meets the statutory criteria applicable to the type of housing provided must take place prior to certification as outlined in § 218(c)(4) of the INA. If the employer has attested and met all other criteria for certification, and the employer has made a timely request for a housing inspection pursuant to this paragraph (d)(5), and the housing inspection has not taken place by the statutory deadline of 30 days prior to date of need, the certification shall not be withheld. The SWA shall in such cases inspect the housing prior to or during occupation to ensure it meets applicable housing standards. If, upon inspection, the SWA determines the supplied housing does not meet the applicable housing standards, the SWA shall promptly provide written notification to the NPC for appropriate action, which may include, but need not be limited to, referral to the ESA and where the violations is more than de minimis, revocation of the temporary labor certification, and/or debarment.

(6) *Certified Housing that Becomes Unavailable.* For situations in which housing certified by the SWA later becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with applicable housing standards and for which the employer is able to submit evidence of such compliance. The employer must notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance from the appropriate local or State agency responsible for determining compliance with applicable local, State or Federal safety and health standards. The SWA should make every effort to inspect such accommodations prior to occupation but may also conduct inspections during occupation, to ensure that they meet applicable housing standards. The SWA will notify the appropriate CO of all housing changes and of the results of any housing inspections

(e) *Workers' compensation.* The employer shall provide, at no cost to the worker and for the entire time of the worker's employment, insurance, under a State workers' compensation law or otherwise, covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law, if any, for comparable employment. The employer shall retain for the full period of record retention required (5 years from the date of adjudication of the application) the name of the insurance carrier, the insurance policy number, and proof of insurance, or, if appropriate, proof of State law coverage.

(f) *Employer-provided items.* Except as provided below, the employer shall provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. The employer may charge the worker for reasonable costs related to the worker's refusal or negligent failure to return any property furnished by the employer or due to such worker's willful damage or destruction of such property. Where it is a common practice in the particular area, crop activity and occupation for workers to provide tools and equipment, with or without the employer reimbursing the workers for the cost of providing them, such an arrangement will be permitted.

(g) *Meals.* The employer either shall provide each worker with three meals a day or shall furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer shall state the charge, if any, to the worker for such meals. Until a new amount is set pursuant to this paragraph (g), the charge shall not be more than $9.52 per day unless the CO has approved a higher charge pursuant to § 655.114. Each year the charge allowed by this paragraph (g) will be changed by the same percentage as the 12-month percent change in the Consumer Price Index for All Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Department as a Notice in the **Federal Register**.

(h) *Transportation; daily subsistence.* (1) *Transportation to place of employment.* If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer shall pay the worker for costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer to the place of employment. When it is the prevailing practice of non-H–2A agricultural employers in the occupation in the area to do so, or when such benefits are extended to H–2A workers, the employer shall advance the required transportation and subsistence costs (or otherwise provide them) to workers. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence payment shall be at least as much as the employer will charge the worker for providing the worker with three meals a day during employment, but in no event less than

the amount permitted under paragraph (g) of this section.

(2) *Transportation from place of employment.* If the worker completes the work contract period, the employer shall provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, came to work for the employer, or, if the worker has contracted with a subsequent employer who has not agreed in that contract to provide or pay in advance for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer shall provide or pay for such expenses.

(3) *Transportation between living quarters and worksite.* The employer shall provide transportation between the worker's living quarters (i.e., housing provided or secured by the employer directly or through a voucher pursuant to paragraph (d) of this section) and the employer's worksite without cost to the worker, and such transportation will be in accordance with all applicable Federal, State or local laws and regulations, and shall provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500. If workers' compensation is used to cover such transportation, in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation. This paragraph (h) is applicable to the transportation of workers eligible for housing, pursuant to paragraph (d) of this section.

(i) *Three-fourths guarantee.* (1) *Offer to worker.* The employer shall guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any. For purposes of this paragraph (i)(1), a workday shall mean the number of hours in a workday as stated in the job order and shall exclude the worker's Sabbath and Federal holidays. The employer shall offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract during or any modified work contract period of at least the same duration to which the worker and employer have mutually agreed and has been approved by ETA. The work contract period can be shortened only with the approval of the Department. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect. Therefore, if, for example a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (e.g., 10 weeks × 48 hours/week = 480-hours × 75 percent = 360). A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker shall not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If the employer affords the U.S. or H–2A worker during the total work contract period less employment than that required under this paragraph (i)(1), the employer shall pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days.

(2) *Guarantee for piece-rate paid worker.* If the worker will be paid on a piece rate basis, the employer shall use the worker's average hourly piece rate earnings or the AEWR, whichever is higher, to calculate the amount due under the guarantee.

(3) *Failure to work.* Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to do so in accordance with paragraph (i)(1) of this section may be counted by the employer in calculating whether the period of guaranteed employment has been met.

(4) *Obligation to provide housing and meals.* Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide subsistence and, where appropriate, transportation for each day of the contract period up until the day the H–2A workers depart for other H–2A employment or depart to their place of permanent residence.

(j) *Records.* (1) The employer shall keep accurate and adequate records with respect to the workers' earnings, including but not limited to field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (i)(3) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions made from the worker's wages.

(2) To assist in determining whether the three-fourths guarantee at paragraph (i)(3) of this section has been met, if the number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job opportunity for a work day, the records shall state the reason or reasons therefor.

(3) Upon reasonable notice, the employer shall make the records available, including field tally records and supporting summary payroll records, for inspection and copying by representatives of the Secretary of Labor, and by the worker and representatives designated by the worker; and

(4) The employer shall retain the records for not less than 5 years after the completion of the work contract.

(k) *Hours and earnings statements.* The employer shall furnish to the worker on or before each payday in one or more written statements the following information:

(1) The worker's total earnings for the pay period;

(2) The worker's hourly rate and/or piece rate of pay;

(3) The hours of employment offered to the worker (broken out by offers in accordance with and over and above the guarantee);

(4) The hours actually worked by the worker;

(5) An itemization of all deductions made from the worker's wages; and

(6) If piece rates are used, the units produced daily.

(l) *Rates of Pay.* (1) If the worker will be paid by the hour, the employer shall pay the worker at least the adverse effect

wage rate in effect at the time the work is performed, the prevailing hourly wage rate, or the legal Federal or State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period; or

(2)(i) If the worker will be paid on a piece rate basis and the piece rate does not result at the end of the pay period in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate, the worker's pay shall be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the appropriate hourly wage rate for each hour worked; and the piece rate shall be no less than the piece rate prevailing for the activity in the area of intended employment; and

(ii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards shall be specified in the job offer and be no more than those normally required by other employers for the activity in the area of intended employment.

(m) *Frequency of Pay.* The employer shall state the frequency with which the worker will be paid, which must be in accordance with the prevailing practice in the area of intended employment, or at least twice monthly, whichever is more frequent.

(n) *Abandonment of employment or termination for cause.* If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the Department and DHS in writing or any other method specified not later than 48 hours of such abandonment or termination, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under paragraph (h) of this section, and that worker is not entitled to the ''three-fourths guarantee'' (see paragraph (i) of this section).

(o) *Contract impossibility.* If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, hurricane, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an event constitutes a contract impossibility will be determined by the Department. In the event of such termination of a contract, the employer shall fulfill the three-fourths guarantee at paragraph (i)(1) of this section for the time that has elapsed from the start of the work contract to its termination. The employer shall:

(1) Offer to return the worker, at the employer's expense, to the place from which the worker came to work for the employer,

(2) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment, and

(3) Pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Daily subsistence shall be computed as set forth in paragraph (h) of this section. The amount of the transportation payment shall be no less (and shall not be required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(p) *Deductions.* The employer shall make those deductions from the worker's paycheck required by law. The job offer shall specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions shall be reasonable.

(q) *Copy of work contract.* The employer shall provide to the worker, no later than on the day the work commences, a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) through (p) of this section. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the *Application for Temporary Employment Certification,* including the job offer, shall be the work contract.

§ 655.105 Assurances and obligations of H–2A employers.

An employer seeking to employ H–2A foreign workers shall attest that it will abide by the following conditions of this subpart. By so attesting, the employer makes each of the following assurances:

(a) The job opportunity is open to any U.S. worker regardless of race, creed, color, national origin, age, sex, religion, handicap, or citizenship, and the employer conducted or will conduct the required recruitment, in accordance with regulations, prior to filing the labor certification application and was unsuccessful in locating qualified U.S. applicants for the job opportunity for which certification is sought. Any U.S. workers who applied for the job were rejected only for lawful, job-related reasons;

(b) The employer is offering terms and working conditions normal to workers similarly employed in the area of intended employment and which are not less favorable than those offered to the H–2A worker(s) and are not less than the minimum terms and conditions required by this subpart;

(c) There is not, at the time the labor certification application is filed, a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification at the place of employment;

(d) The employer will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the H–2A workers depart for the place of work, or three days prior to the first date on which the employer requires the services of the H–2A workers, whichever is later;

(e) During the period of employment that is the subject of the labor certification application, the employer will:

(1) Comply with applicable Federal, State and local employment-related laws and regulations, including employment-related health and safety laws;

(2) Provide housing to those workers who are not reasonably able to return to their permanent residence within the same day, without charge to the worker, that complies with the applicable local, State, or Federal standards and guidelines for housing; and, where applicable, has requested a preoccupancy inspection of the housing and, if one has been conducted, received certification;

(3) Provide insurance, without charge to the worker, under a State workers' compensation law or otherwise, that meets the requirements set forth at § 655.104(e).

(4) Provide transportation in compliance with all applicable Federal, State or local laws and regulations between the worker's living quarters (i.e., housing provided by the employer pursuant to § 655.104(d)) and the employer's worksite without cost to the worker.

(f) Upon the separation from employment of H–2A worker(s) employed under the labor certification application, if such separation occurs prior to the end date of the employment specified in the application, the employer will notify the Department and DHS in writing or any other method specified of the separation from employment not later than 48 hours after such separation is effective.

(g) The offered wage rate is the highest of the adverse effect wage rate, the prevailing wage rate, which may be a prevailing wage piece rate, or the legal Federal or State minimum wage, and the employer will pay the offered wage during the entire valid period of the approved labor certification.

(h) The offered wage is not based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals of exceeds the adverse effect wage rate, prevailing wage rate, which may be a prevailing wage piece rate, or the legal Federal or State minimum wage, whichever is highest.

(i) The job opportunity is a full-time temporary position, whose qualifications are consistent with the normal and accepted qualifications required by non-H–2A employers in the same or comparable occupations and crops in that they shall not require a combination of duties not normal to the occupation,

(j) The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 75 days before the date of need, except that such layoff shall be permitted where the employer also attests that it offered the opportunity to the laid-off U.S. worker(s) and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons.

(k) The employer shall not intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, and shall not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has with just cause:

(1) Filed a complaint under or related to § 218 of the INA (8 U.S.C. 1188), or this subpart or any other DOL regulation promulgated pursuant to § 218 of the INA;

(2) Instituted or caused to be instituted any proceeding under or related to § 218 of the INA, or this subpart or any other DOL regulation promulgated pursuant to § 218 of the INA;

(3) Testified or is about to testify in any proceeding under or related to § 218 of the INA or this subpart or any other DOL regulation promulgated pursuant to § 218 of the INA;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to § 218 of the INA or this subpart or any other DOL regulation promulgated pursuant to § 218 of the INA; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by § 218 of the INA, or this subpart or any other DOL regulation promulgated pursuant to § 218 of the INA.

(l) The employer shall not discharge any person for the sole reason of that person's taking any action listed in paragraphs (k)(1) through (k)(5) of this section.

(m) All fees associated with processing the temporary labor certification will be paid in a timely manner.

(n) The employer will inform H–2A workers of the requirement that they leave the U.S. at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under § 655.111, unless the H–2A is being sponsored by another employer and that employer has already filed and received a certified *Application for Temporary Employment Certification* and has filed that certification in support of a petition to employ that worker with DHS.

(o) The employer has not sought or received payment of any kind for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees or domestic recruitment costs, whether as an incentive or inducement to filing, or as a reimbursement for costs incurred in preparing or filing the application or securing the H–2A workers, from the employee or any other party, except when work to be performed by the H–2A worker in connection with the job opportunity will benefit or accrue to the person or entity making the payment, based on that person's or entity's established business relationship with the employer. In connection with this attestation, the employer is required to contractually forbid any foreign labor contractor whom they engage in international recruitment of H–2A workers to seek or receive payments from prospective employees. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, or tributes, in kind payments, and free labor.

(p) The applicant shall attest to whether it is a fixed-site employer, an agent or recruiter, an FLC as defined by MSPA, or an association, and—in cases in which the filer is someone other than a fixed-site employer—whether it is an employer as defined by these regulations with respect to the H–2A workers sought.

§ 655.106 Assurances and obligations of Farm Labor Contractors.

In addition to all the assurances and obligations listed in § 655.105, FLC applicants shall also be required to:

(a) Provide the MSPA certificate of registration number and expiration date;

(b) Identify the farm labor contracting activities the FLC is authorized to perform;

(c) Provide for each fixed-site agricultural business to whom the FLC will provide workers, the name and location of the fixed-site agricultural business, the approximate beginning and ending dates of when the FLC will be providing the workers, and a description of the crops and activities the workers will perform;

(d) Provide proof of its ability to discharge financial obligations under the H–2A program by attesting that it has obtained a surety bond as required by 29 CFR 501.8, stating on the application the name, address, phone number, and contact person for the surety, and providing the amount of the bond and any identifying designation utilized by the surety for the bond;

(e) Attest that it has engaged in, or will engage in within the timeframes required by § 102, positive recruitment efforts in each location in which it has listed a fixed-site agricultural business; and

(f) Attest that it has obtained from each fixed-site agricultural business that will provide housing or transportation to the workers a certificate of compliance regarding the following:

(1) All housing utilized by H–2A workers and owned and/or operated by the fixed-site agricultural business complies with the applicable local, State or Federal standards and guidelines for such housing and

(2) All transportation between the H–2A workers' living quarters and the worksite that is provided by the fixed-site agricultural business complies with all applicable Federal, State, or local laws and regulations and shall provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR part 500.

§ 655.107 Receipt and processing of applications.

(a) *Processing.* (1) *Receipt.* Upon receipt of the application, the CO will promptly review the application for completeness and compliance with the requirements of the program as outlined under paragraph (a)(2) of this section.

(2) *Review.* Each *Application for Temporary Employment Certification* will be substantively reviewed for compliance with the criteria for

certification, and the CO will make a determination to certify, deny, or issue a Notice of Deficiency prior to making a Final Determination on the application. ''Criteria for Certification,'' as used in this part, shall include, but not be limited to, the nature of the employer's need for the agricultural services or labor to be performed is temporary; all assurances and obligations outlined in § 655.105 in this part; compliance with the timeliness requirements as outlined in § 655.102 of this part; and a lack of errors in completing the application prior to submission, which would make the application otherwise non-certifiable.

(3) *Notice of Deficiencies.* If the CO determines the employer has made all necessary attestations and assurances sufficient to reflect compliance with the assurances and obligations related to the recruitment of U.S. workers, but the application still fails to comply with one or more of the criteria for certification as outlined under paragraph (a)(2) of this section, the CO will promptly notify the employer (by means normally assuring next day delivery) within 7 calendar days with a copy to the SWA serving the area of intended employment of any deficiencies.

(4) The notice shall:

(i) State the reason(s) why the application is unacceptable for temporary labor certification, citing the relevant regulatory standard(s);

(ii) Offer the applicant an opportunity for submitting a modified application within 5 business days, stating the modification is needed for the CO to accept the application for consideration;

(iii) State that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification to the application within 5 business days and in a manner specified by the CO.

(iv) Offer the employer an opportunity to request an expedited administrative review of or a *de novo* administrative hearing before an administrative law judge of the non-acceptance. The notice shall state that in order to obtain such a review or hearing, the employer, within five business days of the notice, shall file by facsimile (fax), telegram, or other means normally assuring next day delivery, a written request to the Chief Administrative Law Judge of the DOL (giving the address) and simultaneously serve a copy to the CO. The notice shall also state that the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's action; and

(v) State that if the employer does not request an expedited administrative judicial review or a *de novo* hearing before an administrative law judge within the 5 business days no further consideration of the employer's application for temporary employment certification under the H–2A classification will be made by a Department official.

(5) *Submission of Modified Applications.*

(i) Provided that the CO notifies the employer of any deficiencies within the 7 calendar day timeframe set forth under paragraph (a)(3) of this section, the date by which the CO's Final Determination is required by statute to be made will be postponed by 1 day for each day that passes beyond the 5 business day period allowed under paragraph (a)(4)(ii) before an amended or modified application is filed.

(ii) In circumstances where the employer submits an amended or modified application as required by the CO, and the CO approves the amended or modified application, the CO shall not deny the application based solely on the fact that it now does not meet the timeliness requirements for filing applications.

(iii) If the amended or modified application is not approved, the CO shall deny the application in accordance with the labor certification determination provisions set forth at 655.109.

(6) *Amendments to Applications.* (i) Applications may be amended to increase the number of workers requested in the initial application by not more than 20 percent (50 percent for employers of less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the request is submitted in writing, the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period.

(ii) Applications may be amended to make minor changes in the period of employment, as stated in the application, including the job offer, only when a written request is submitted to the CO and approved in advance. In considering whether to approve the request, the CO shall review the reason(s) for the request, determine whether each reason is justified, and take into account the effect(s) of a decision to approve on the adequacy of the underlying test of the domestic labor market for the job opportunity. If a request for a change in the start date of the period of employment is made after workers have departed for the employer's place of work, the CO may only approve the change if the request is accompanied by a written assurance signed and dated by the employer that all such U.S. workers will be provided housing and subsistence, without cost to the U.S. workers, until work becomes available.

(iii) Other minor technical amendments to the application, including the job offer, may be requested if the CO determines the proposed amendment(s) are justified and will have no significant effect upon the CO's ability to make the labor certification determination required under § 655.109.

(7) *Appeal procedures.* With respect to either a notice of deficiency issued pursuant to paragraph (a)(6) of this section or a notice of final determination issued pursuant to paragraph (a)(2) of this section, if the employer timely requests an expedited administrative review or *de novo* hearing before an administrative law judge, the procedures set forth at § 655.115 shall be followed.

(b) [Reserved]

§ 655.108 Offered Wage Rate.

(a) *Highest wage.* To comply with its obligation under § 655.105(g), an employer must provide an offered wage rate that is the highest of the adverse effect wage rate, the prevailing wage rate, which may be a prevailing wage piece rate, or the legal Federal or State minimum wage.

(b) *Wage rate request.* The employer shall request an offered wage rate from the NPC having jurisdiction over the proposed area of intended employment before commencing any recruitment under this subpart. If the job opportunity involves multiple work sites within the same area of intended employment over which more than one NPC has jurisdiction, the employer shall request an offered wage rate from the NPC having jurisdiction over the area where the work is scheduled to begin.

(c) *Validity of wage rate.* The employer must obtain an offered wage rate that is valid either on the date recruitment begins or the date of filing the *Application for Temporary Employment Certification* with the Department.

(d) *Wage offer.* The employer must offer and advertise in its positive recruitment, as outlined in § 655.103, for the position to all potential workers

at a wage at least equal to the wage rate obtained from the NPC.

(e) *Adverse effect wage rate.* The adverse effect wage rate (AEWR) shall be based on published wage data for the occupation, skill level, and geographical area from the BLS, Occupational Employment Statistics (OES) survey. The NPC shall obtain wage information on the AEWR using the Agricultural Online Wage Library (AOWL) found on the Foreign Labor Certification Data Center Web site (*http://www.flcdatacenter.com/*). This wage shall not be less than the 2009 Federal minimum wage of $7.25.

(f) *Wage determination.* The NPC must enter its wage determination on the form it uses for these purposes, indicate the source, and return the form with its endorsement to the employer. The employer must offer this wage (or higher) to both its U.S. and H–2A workers.

§ 655.109 Labor certification determinations.

(a) *COs.* The Administrator, OFLC, is the DOL National CO. The Administrator and the CO(s) in the NPC(s), by virtue of delegation from the Administrator, have the authority to certify or deny applications for temporary employment certification under the H–2A nonimmigrant classification. If the Administrator has directed that certain types of temporary labor certification applications or specific applications under the H–2A nonimmigrant classification be handled by the National OFLC, the Director(s) of the ETA NPC(s) shall refer such applications to the Administrator.

(b) *Determination.* No later than 30 calendar days before the date of need, as identified in the *Application for Temporary Employment Certification*, except as provided for under § 655.107(a)(7) of this part for amended or modified applications, or applications not otherwise meeting certification criteria by that date, the CO makes a determination either to grant or deny the *Application for Temporary Employment Certification*, and will grant the application if and only if:

(1) The employer has properly attested that it has met the requirements of this subpart.

(2) The nature of the employer's need is temporary or seasonal.

(3) The application was timely filed with the Department.

(4) The job opportunity does not contain duties, requirements or other conditions that preclude consideration of U.S. workers or that otherwise inhibit their effective recruitment for the temporary job opportunity. In making this determination, the following requirements shall apply:

(i) The job opportunity is not vacant because the former occupant(s) is or are on strike or locked out in the course of a labor dispute involving a work stoppage;

(ii) The job is not at issue in a labor dispute involving a work stoppage;

(iii) The job opportunity's terms, conditions, and/or occupational environment are not contrary to Federal, State, or local law(s);

(iv) The employer has a location within the U.S. to which domestic workers can be referred and hired for employment;

(v) The employer is paying the highest of the adverse effect wage rate, the prevailing wage rate, which may be a prevailing wage piece rate, or the legal Federal or State minimum wage for the job to be performed; and

(vi) The requirements of the job opportunity are not unduly restrictive and do not represent a combination of duties not normal to the occupation being requested for certification.

(5) The employment of the H–2A worker(s) will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.

(c) *Notification.* The CO shall notify the employer in writing (either electronically or by mail) of the labor certification determination.

(d) *Approved certification.* If temporary labor certification is granted, the CO must send the certified *Application for Temporary Employment Certification* and a Final Determination letter to the employer, or, if appropriate, to the employer's agent or attorney, with a copy to the SWA serving the area of intended employment. The Final Determination letter shall notify the employer to file the certified application and any other documentation required by USCIS with the appropriate USCIS office and to continue to cooperate with the SWA by accepting all referrals of eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the H–2A worker(s) depart for the place of work, or three days prior to the first date the employer requires the services of the H–2A workers, whichever is later.

(e) *Denied certification.* If temporary labor certification is denied, the Final Determination letter will:

(1) State the reasons the application is not accepted for consideration, citing the relevant regulatory standards and/or special procedures;

(2) If applicable, address the availability of U.S. workers in the occupation as well as the prevailing benefits, wages, and working conditions of similarly employed U.S. workers in the occupation and/or any applicable special procedures.

(f) *Partial Certification.* The CO may, in his/her discretion, and to ensure compliance with all regulatory requirements, issue a partial certification, reducing either the period of need or the number of H–2A workers being requested or both for certification, based upon information the CO receives in the course of processing the temporary labor certification application, an audit, or otherwise.

(g) *Payment of Processing Fees.* A determination by the CO to grant an *Application for Temporary Employment Certification* or grant amendments to a certified application pursuant to § 655.107(a)(6) shall include a bill for the required fees. Each employer (except joint employer associations) of H–2A workers under the *Application for Temporary Employment Certification* shall pay in a timely manner a non-refundable fee upon issuance of the certification granting the application (in whole or in part), as follows:

(1) *Amount.* The application fee for each employer receiving a temporary agricultural labor certification is $200 plus $100 for each H–2A worker certified under the *Application for Temporary Employment Certification.* In the case of a joint employer association receiving a temporary agricultural labor certification, each employer-member receiving a temporary agricultural labor certification shall pay an application fee of $200 plus $100 for each H–2A worker certified. Any amendments requested pursuant to § 655.107(a)(6) by the employer to a temporary agricultural labor certification, which are received and processed by the appropriate CO will be subject to an additional processing fee of $100. In circumstances where the CO grants an amendment to increase the number of H–2A workers requested on the initial certified application, the employer shall be subject to a fee of $100 for each additional H–2A worker certified on the amended temporary agricultural labor certification. The fees shall be paid by check or money order made payable to ''United States DOL.'' In the case of H–2A employers that are members of a joint-employer association applying on their behalf, the aggregate fees for all employers of H–2A workers under the application must be paid by one check or money order.

(2) *Timeliness.* Fees received by the CO no more than 30 days after the date the temporary labor certification is granted will be considered timely. Non-payment of fees shall be considered a substantial program violation.

§ 655.110 Validity and scope of temporary labor certifications.

(a) *Validity Period.* A temporary labor certification shall be valid for the duration of the job opportunity for which certification is being requested by the employer. Except as provided for under paragraph (c) of this section, the validity period shall be the beginning and ending dates of certified employment, as listed on the *Application for Temporary Employment Certification.* The beginning date of certified employment cannot be earlier than the date certification was granted by the CO. The certification expires on the last day of authorized employment.

(b) *Scope of Validity.* Except as provided for under paragraphs (c) and (d) of this section, a temporary labor certification is valid only for the number of H–2A workers, the area of intended employment, the specific occupation and duties, the beginning and ending dates of employment, and the employer(s) specified on the *Application for Temporary Employment Certification* and may not be transferred from one employer to another.

(c) *Scope of Validity—Associations.* (1) *Certified Applications.* If an association is requesting temporary labor certification as a joint employer, the certified *Application for Temporary Employment Certification* shall be granted jointly to the association and to each of its employer members named on the application. Such workers may be transferred among its certified employer members to perform work for which the temporary labor certification was granted, provided the association controls the assignment of such workers and maintains a record of such assignments. All temporary agricultural labor certifications to associations may be used for the certified job opportunities of any of its employer members named on the application. If an association is requesting temporary labor certification as a sole employer, the certified *Application for Temporary Employment Certification* shall be granted to the association only.

(2) *Ineligible employer-members.* Workers shall not be transferred or referred to an association's employer member, if that employer member has been debarred.

(d) *Extensions on Period of Employment.* (1) *Short-term extension.* An employer who seeks an extension of 2 weeks or less of the certified *Application for Temporary Employment Certification* shall apply for such extension to DHS. If DHS grants such an extension, the corresponding *Application for Temporary Employment Certification* shall be deemed extended for such period as is approved by DHS.

(2) *Long-term extension.* For extensions beyond the period which may be granted by DHS pursuant to paragraph (d)(1) of this section, an employer, after 50 percent of the work contract period has elapsed, may apply to the CO for an extension of the period of employment on the certified *Application for Temporary Employment Certification,* for reasons related to weather conditions or other external factors beyond the control of the employer (which may include unforeseen changes in market conditions), provided that the employer's need for an extension is supported in writing by the employer, with documentation showing that the extension is needed and could not have been reasonably foreseen by the employer. The CO shall grant or deny the request for extension of the period of employment on the *Application for Temporary Employment Certification* based on available information, and shall notify the employer of the decision on the request in writing. The CO shall not grant an extension where the total work contract period, including past temporary labor certifications for the job opportunity and extensions, would be 12 months or more, except in extraordinary circumstances. The CO shall not grant an extension where the *Application for Temporary Employment Certification* has already been extended by DHS pursuant to paragraph (d)(i) of this section.

§ 655.111 Required departure.

(a) *Limit to worker's stay.* As defined further in DHS regulations, a temporary labor certification shall limit the authorized period of stay for any H–2A worker whose admission is based upon it. 8 CFR § 214.2(h). A foreign worker may not remain beyond the validity period of any labor certification under which the H–2A worker is employed nor beyond separation from employment, whichever occurs first, absent an extension or change of such worker's status pursuant to DHS regulations.

(b) *Notice to worker.* Upon establishment of a program by DHS for registration of departure, an employer must notify any H–2A worker starting work at a job opportunity for which the employer has obtained labor certification that the H–2A worker, when departing the United States by land at the conclusion of employment as outlined in paragraph (a) of this section, must register such departure at the place and in the manner prescribed by DHS.

§ 655.112 Audits and Referrals.

(a) *Discretion.* The Department shall, in its discretion, conduct audits of temporary labor certification applications, regardless of whether the Department has issued a certification or denial of the application.

(b) *Audit letter.* In circumstances where an application is selected for audit, the CO shall issue an audit letter. The audit letter will:

(1) State the documentation that must be submitted by the employer;

(2) Specify a date, no more than 30 days from the date of the audit letter, by which the required documentation must be received by the CO; and

(3) Advise that failure to comply with the audit process, including providing documentation within the specified time period, may result in a finding by the CO to

(i) Revoke the labor certification and/or

(ii) Debar the employer from future filings of H–2A temporary labor certification applications as outlined in § 655.118.

(c) *Supplemental information request.* During the course of the audit examination, the CO may request supplemental information and/or documentation from the employer in order to complete the audit.

(d) *Audit violations.* If, as a result of the audit or otherwise, the CO determines the employer failed to produce required documentation, or determines a material misrepresentation was made with respect to the application, or if the CO determines it is appropriate for other reasons, the employer may be referred for revocation pursuant to § 655.117 and/or debarment pursuant to § 655.118. The CO may determine to provide the audit report and underlying documentation to DHS or another appropriate enforcement agency. With respect to any findings that an employer may have discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, the CO shall refer those matters to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

§ 655.113 H–2A applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If possible fraud or willful misrepresentation involving an *Application for Temporary Employment Certification* application is discovered by the CO or if the CO and/or Administrator become aware the employer, or its attorney or agent (with

respect to an application) is the subject of a criminal indictment or information filed in a court, the Administrator shall refer the matter to the DHS and the Department's Office of the Inspector General for investigation.

(b) *Continued processing.* If a court finds an employer or agent not guilty of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an employer or agent, the CO shall decide each pending temporary labor certification application on its merits related to that employer or agent.

(c) *Terminated processing.* If a court or the DHS determines that there was fraud or willful misrepresentation involving an *Application for Temporary Employment Certification,* the application is thereafter invalid, consideration of the application shall be terminated and the Administrator shall return the application to the employer or agent with the reasons therefore stated in writing.

§ 655.114 Petition for higher meal charges.

(a) *Filing petitions.* Until a new amount is set pursuant to this paragraph (a), the CO may permit an employer to charge workers up to $9.52 for providing them with three meals per day, if the employer justifies the charge and submits to the CO the documentation required by paragraph (b) of this section. In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal such denial. Such appeals shall be filed with the Chief Administrative Law Judge. Administrative law judges shall hear such appeals according to the procedures in 29 CFR part 18, except that the appeal shall not be considered as a complaint to which an answer is required. The decision of the administrative law judge shall be the final decision of the Secretary. Each year the maximum charge allowed by this paragraph (a) will be changed by the same percentage as the 12 month percent change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments shall be effective on the date of their publication by the Administrator as a Notice in the **Federal Register**. However, an employer may not impose such a charge on a worker prior to the effective date contained in the CO's written confirmation of the amount to be charged.

(b) *Required documentation.* Documentation submitted shall include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead and similar charges may not be included. Receipts and other cost records for a representative pay period shall be retained and available for inspection by the CO upon request for a period of one year.

§ 655.115 Administrative review and de novo hearing before an administrative law judge.

(a) *Administrative review.* (1) *Consideration.* Whenever an employer has requested an administrative review before an administrative law judge of a decision by the CO not to accept for consideration an *Application for Temporary Employment Certification,* to deny an *Application for Temporary Employment Certification,* or to revoke a certified *Application for Temporary Employment Certification* the CO shall send a certified copy of the ETA case file to the Chief administrative law judge by means normally assuring next-day delivery. The Chief administrative law judge shall immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by 20 CFR part 656 of this chapter, but which shall hear and decide the appeal as set forth in this section) to review the record for legal sufficiency. The administrative law judge shall not remand the case and shall not receive additional evidence.

(2) *Decision.* Within 5 business days after receipt of the ETA case file the administrative law judge shall, on the basis of the written record and after due consideration of any written submissions from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision by written decision. The decision of the administrative law judge shall specify the reasons for the action taken and shall be immediately provided to the employer, CO, the Administrator, and DHS by means normally assuring next-day delivery. The administrative law judge's decision shall be the final decision of the Secretary and no further review shall be given to the application or the determination by any Department official.

(b) *De novo hearing.* (1) *Request for hearing; conduct of hearing.* Whenever an employer has requested a de novo hearing before an administrative law judge of a decision by the CO not to accept for consideration an *Application for Temporary Employment Certification,* to deny an *Application for Temporary Employment Certification,* or to revoke a certified *Application for Temporary Employment Certification,* the CO shall send a certified copy of the ETA case file to the Chief Administrative Law Judge by means normally assuring next-day delivery. The Chief Administrative Law Judge shall immediately assign an administrative law judge (which may be a panel of such persons designated by the Chief Administrative Law Judge from the Board of Alien Labor Certification Appeals established by 20 CFR part 656 of this chapter, but which shall hear and decide the appeal as set forth in this section) to conduct the de novo hearing. The procedures contained in 29 CFR part 18 shall apply to such hearings, except that:

(i) The appeal shall not be considered to be a complaint to which an answer is required;

(ii) The administrative law judge shall ensure that, at the request of the employer, the hearing is scheduled to take place within five business days after the administrative law judge's receipt of the ETA case file; and

(iii) The administrative law judge's decision shall be rendered within10 business days after the hearing.

(2) *Decision.* After a *de novo* hearing, the administrative law judge shall either affirm, reverse, or modify the CO's determination, and the administrative law judge's decision shall be provided immediately to the employer, CO, Administrator, and DHS by means normally assuring next-day delivery. The administrative law judge's decision shall be the final decision of the Secretary, and no further review shall be given to the application or the determination by any Department official.

§ 655.116 Job Service Complaint System; enforcement of work contracts.

(a) Complaints arising under this subpart may be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E, of this chapter. Complaints which involve worker contracts shall be referred by the SWA to the ESA for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process,

the ESA may report the results of its investigation to the Administrator for consideration of employer penalties or such other action as may be appropriate.

(b) Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same, shall be referred to the U.S. Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices (OSC), in addition to any activity, investigation, and/or enforcement action taken by ETA or an SWA. Likewise, if OSC becomes aware of a violation of these regulations, it shall provide such information to the appropriate SWA and the CO.

§ 655.117 Revocation of approved labor certifications.

(a) *Basis for DOL revocation.* The CO, in consultation with the Administrator, may revoke a temporary agricultural labor certification approved under this subpart, if:

(1) The CO finds that issuance of the temporary agricultural labor certification was not justified based on criteria set forth under the INA and enumerated at 8 CFR 214.2(h)(5);

(2) The CO finds that the employer violated the terms and conditions of the approved temporary agricultural labor certification; or

(3) Upon recommendation of the ESA WHD of the Department.

(b) *DOL procedures for revocation.* (1) The CO shall send to the employer a *Notice of Intent to Revoke* an approved temporary agricultural labor certification, which contains a detailed statement of the grounds for the proposed revocation and the time period allowed for the employer's rebuttal. The employer may submit evidence in rebuttal within 14 calendar days of the date the notice is issued. The CO must consider all relevant evidence presented in deciding whether to revoke the temporary agricultural labor certification.

(2) If rebuttal evidence is not timely filed by the employer, the *Notice of Intent to Revoke* shall become the final decision of the Secretary and take effect immediately at the end of the 14-day window.

(3) If, notwithstanding the employer's timely filed rebuttal evidence, and if the CO determines the temporary agricultural labor certification should be revoked, the CO shall promptly notify the employer of this final determination and of the employer's right to appeal. The revocation takes effect immediately upon issuance of this notice and remains in place pending the outcome of any subsequent appeal proceedings. The employer may file an administrative appeal under § 655.115 within 10 calendar days after the date of revocation.

(4) The CO will inform the employer of the CO's final determination on the revocation within 14 calendar days of receiving timely rebuttal evidence.

(5) If the temporary agricultural labor certification is revoked, the CO will also send a copy of the notification to DHS and DOS.

§ 655.118 Debarment.

(a) No later than 2 years after an employer has substantially violated a material term or condition of its temporary agricultural labor certification, the Administrator may on that basis make a determination denying the employer and any successor in interest to the debarred employer future labor certifications under this subpart for a period of up to 3 years from the date of the determination.

(b) For the purposes of this section, a substantial violation includes, but is not limited to:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which:

(i) Are significantly injurious to the wages, benefits, or working conditions of 10 percent or more of an employer's U.S. or H–2A workforce or of a substantial number of U.S. workers similarly employed in the area of intended employment;

(ii) Reflect a significant failure to offer employment to all qualified domestic workers who applied for the job opportunity for which certification was being sought, except for lawful job-related reasons;

(iii) Reflect a willful failure to comply with the employer's obligations to recruit domestic workers as set forth in this subpart;

(iv) Reflect a failure to comply with one or more sanctions or remedies imposed by the ESA for violation(s) of obligations found by that agency (if applicable), or with one or more decisions or orders of the Secretary or a court pursuant to § 218 of the INA (8 U.S.C. 1188), this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations);

(v) Reflect action(s) impeding an investigation of an employer pursuant to § 218 of the INA (8 U.S.C. 1188), this subpart, or 29 CFR part 501 (ESA enforcement of contractual obligations); or

(vi) Reflect the employment of an H–2A worker outside the area of intended employment, or in an activity not listed on the job order, or after the expiration of the job order and any approved extension;

(2) The employer's failure to pay the necessary fee in a timely manner; or

(3) Fraud involving the *Application for Temporary Employment Certification* or the employer making a material misrepresentation of fact during the application process.

(c) The *Notice of Debarment* shall be in writing; shall state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and shall identify administrative appeal rights under § 655.115 and a timeframe under which such rights must be exercised. The debarment shall take effect on the start date identified in the *Notice of Debarment,* unless an administrative appeal request for review is properly filed. The timely filing of an administrative appeal stays the debarment pending the outcome of those appeal proceedings.

(d) *Debarment involving members of associations.* If, after consultation with the Administrator, the CO determines a substantial violation has occurred, and if an individual producer member of a joint employer association is determined to have committed the violation, the determination to deny future labor certifications under this subpart for a period of up to three years from the date of the determination shall apply only to that member of the association unless the Administrator determines that the association or other association members participated in, had knowledge of, or had reason to know of the violation, in which case the debarment shall be invoked against the complicit association or other association members as well.

(e) *Debarment involving associations acting as joint employers.* If, after consultation with the Administrator, the CO determines a substantial violation has occurred, and if an association acting as a joint employer with its members is determined to have committed the violation, the determination to deny future labor certifications under this subpart for a period of up to three years from the date of the determination shall apply only to the association, and shall not be applied to any individual producer member of the association unless the Administrator determines that the member participated in, had knowledge of, or reason to know of the violation, in which case the debarment shall be invoked against any complicit association members as well. Associations debarred from the H–2A

temporary labor certification program will not be permitted to continue to file as joint employers with their members.

(f) *Debarment involving associations acting as sole employers.* If the Administrator determines a substantial violation has occurred, and if an association acting as a sole employer is determined to have committed the violation, the determination to deny future labor certifications under this subpart for a period of up to 3 years from the date of the determination shall apply only to the association and any successor in interest to the debarred association.

Subpart C—[Removed]

5. Subpart C is removed and reserved.

Title 29—Labor

PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY ALIEN AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

6. The authority citation for part 501 continues to read as follows:

Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.

§§ 501.0, 501.1, 501.3, 501.4, 501.5, 501.10, and 501.15 [Amended]

7. In part 501 all references to ''Section 216'' are revised to read ''Section 218'' in the following places:

a. Section 501.0;

b. Section 501.1(a), (b), (c)(1), and (c)(2);

c. Section 501.3(a), (b), (c), (d), and (e);

d. Section 501.4;

e. Section 501.5(a) and (d);

f. Section 501.10(a) and (s);

g. Section 501.15.

8. Section 501.0 is amended by revising the second sentence to read as follows:

§ 501.0 Introduction.

* * * These regulations are also applicable to the employment of U.S. workers newly hired by employers of H–2A workers in the occupations during the period of time set forth in the labor certification approved by ETA as a condition for granting H–2A certification, including any extension thereof. * * *

9. Section 501.1 is amended by revising paragraphs (b) and (c) to read as follows:

§ 501.1 Purpose and scope.

* * * * *

(b) *Role of the ETA.* The issuance and denial of labor certification under section 218 of the INA has been delegated by the Secretary of Labor to the Employment and Training Administration (ETA). In general, matters concerning the obligations of an employer of H–2A workers related to the labor certification process are administered and enforced by ETA. Included within ETA's jurisdiction are issues such as whether U.S. workers are available, whether positive recruitment has been conducted, whether there is a strike or lockout, the methodology for establishing adverse effect wage rates, whether workers' compensation insurance has been provided, and other similar matters. The regulations pertaining to the issuance and denial of labor certification for temporary alien workers by the ETA are found in Title 20 CFR, part 655.

(c) *Role of ESA, Wage and Hour Division.* (1) The Secretary of Labor may take actions that assure compliance with the terms and conditions of employment under the H–2A, including the assessment of civil money penalties and seeking injunctive relief and specific performance of contractual obligations. (see 8 U.S.C. 1188(g)(2).)

(2) Certain investigatory, inspection, and law enforcement functions to carry out the provisions of section 218 of the INA have been delegated by the Secretary of Labor to the ESA (ESA), Wage and Hour Division. In general, matters concerning the obligations under a work contract between an employer of H–2A workers and the H–2A workers and U.S. workers hired in corresponding employment by H–2A employers are enforced by ESA. Included within the enforcement responsibility of ESA, Wage and Hour Division are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. The Wage and Hour Division has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances impose penalties, recommend revocation of existing certification(s), debar from future certifications, and seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages (either directly from the employer or in the case of an FLC, from the FLC directly or from the insurer who issued the surety bond to the FLC as required by 20 CFR part 655, subpart B).

* * * * *

10. Section 501.2 is revised to read as follows:

§ 501.2 Coordination of intake between DOL agencies.

Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H–2A labor standards between the employer and the employee will be immediately forwarded to the appropriate Wage and Hour Division office for appropriate action under these regulations.

11. Section 501.3 is amended by redesignating the introductory text as paragraph (a) introductory text, existing paragraphs (a) through (e) as paragraphs (a)(1) through (5), revising newly designated paragraph (a)(5), and designating the undesignated paragraph at the end of the section as paragraph (b) and revising it.

The revisions read as follows:

§ 501.3 Discrimination prohibited.

* * * * *

(a) * * *

(5) Consulted with an employee of a legal assistance program or an attorney on matters related to section 218 of the INA, or to this subpart or any other Department regulation promulgated pursuant to section 218 of the INA.

(b) Allegations of discrimination in employment against any person will be investigated by the Wage and Hour Division. Where the Wage and Hour Division has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. The Wage and Hour Division may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the employee whole as a result of the discrimination, as appropriate, and may initiate action to debar any such violator from future labor certification. Complaints alleging discrimination against U.S. workers and immigrants based on citizenship or immigration status will be forwarded by the Wage and Hour Division to the Department of Justice, Civil Rights Division, Office of Special Counsel for Immigration-Related Unfair Employment Practices.

12. Section 501.4 is revised to read as follows:

§ 501.4 Waiver of rights prohibited.

No person shall seek to have an H–2A worker, or other U.S. worker hired in corresponding employment by an H–2A employer, waive rights conferred under Section 218 of the INA or under these regulations.

13. Section 501.5 is amended by revising paragraphs (b) and (d) to read as follows:

§ 501.5 Investigation authority of Secretary.

* * * * *

(b) *Failure to cooperate with an investigation.* Where any employer using the services of an H–2A worker does not cooperate with an investigation concerning the employment of H–2A workers or U.S. workers hired in corresponding employment, the Wage and Hour Division shall report such occurrence to ETA and may recommend that ETA revoke the existing certification, and the Wage and Hour Division may debar the employer from future certification for up to three years. In addition, the Wage and Hour Division may take such action as may be appropriate, including the seeking of an injunction and/or assessing civil money penalties, against any person who has failed to permit the Wage and Hour Division to make an investigation.

* * * * *

(d) *Report of Violations.* Any person may report a violation of the work contract obligations of section 218 of the INA or these regulations to the Secretary by advising any local office of the State Workforce Agency, the ETA, the U.S. DOL's Wage and Hour Division, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of the U.S. DOL, Wage and Hour Division for the area in which the reported violation is alleged to have occurred.

14. Section 501.6 is revised to read as follows:

§ 501.6 Prohibition on interference with DOL officials.

No person shall interfere with any official of the DOL assigned to perform an investigation, inspection, or law enforcement function pursuant to the INA and these regulations during the performance of such duties. The Wage and Hour Division will take such action as it deems appropriate, including seeking an injunction to bar any such interference with an investigation and/or assessing a civil money penalty therefor. In addition, the Wage and Hour Division will report the matter to ETA, and the Wage and Hour Division may debar the employer from future certification and/or may make a recommendation that the person's existing labor certification be revoked. (Federal statutes that prohibit persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 1114.)

15. Add new section 501.8 to read as follows:

§ 501.8 Surety bond.

(a) Farm Labor Contractors (FLCs) shall obtain a surety bond to assure compliance with the provisions of this part and 20 CFR part 655 Subpart B for each labor certification being sought. The FLC shall attest on the application for labor certification that such a bond meeting all the requirements of this section has been obtained and shall provide on the labor certification application form information that fully identifies the surety, including the name, address and phone number of the surety, and which identifies the bond by number or other identifying designation.

(b) The bond shall be payable to the Administrator, Wage and Hour Division, U.S. DOL. It shall obligate the surety to pay any sums owed to the Administrator, for wages and benefits owed to H–2A and U.S. workers, based on a final decision finding a violation or violations of this part or 20 CFR part 655 subpart B for the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond shall be written to cover liability incurred during the term of the period listed in the application for labor certification made by the FLC, and shall be amended to cover any extensions of the labor certification requested by the FLC. Surety bonds may not be canceled or terminated unless thirty days' notice is provided by the surety to the Administrator.

(c) The bond shall be in the amount of $10,000 for a labor certification for which an FLC will employ fewer than 50 employees and $20,000 for a labor certification for which an FLC will employ 50 or more employees. The amount of the bond may be increased by the Administrator after notice and an opportunity for hearing when it is shown that the amount of the bond is insufficient to meet potential liabilities.

16. Section 501.10 is revised to read as follows:

§ 501.10 Definitions.

(a) *Act* and *INA* mean the Immigration and Nationality Act, as amended (8 U.S.C. 1101 et seq.), with reference particularly to section 218.

(b) *Administrative Law Judge (ALJ)* means a person within the Department of Labor Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

(c) *Administrator* means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and such authorized representatives as may be designated to perform any of the functions of the Administrator under this part.

(d) *Work contract* means all the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those terms and conditions attested to by the H–2A employer and required by the applicable regulations in subpart B of 20 CFR part 655, Labor Certification for Temporary Agricultural Employment of H–2A Aliens in the United States (H–2A Workers), and those contained in the Application for Temporary Employment Certification and job offer under that subpart, which contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, entered into between the employer and the worker, the work contract at a minimum shall be the terms of the job order included in the application for temporary labor certification, and shall be enforced in accordance with these regulations.

(e) *Adverse effect wage rate (AEWR)* means the minimum wage rate that the ETA Office of Foreign Labor Certification Administrator has determined must be offered and paid to every H–2A worker employed in a particular occupation and/or area to ensure that the wages of similarly employed U.S. workers will not be adversely affected.

(f) *Agent* means a legal entity or person, such as an association of agricultural employers, or an attorney for an association, that

(1) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes, and

(2) Is not itself an employer, or a joint employer, as defined in this section.

(g) *Agricultural association* means any non-profit or cooperative association of farmers, growers, or ranchers, incorporated or qualified under applicable state law, that recruits, solicits, hires, employs, furnishes, or transports any H–2A worker. Agricultural associations may act as agents of an employer for purposes of filing an H–2A temporary labor certification application.

(h) *Agricultural employer* means any person who owns or operates a farm or ranch, or otherwise engages in agriculture as defined in this part, and who either recruits, solicits, hires, employs, furnishes, or transports any H–2A worker. Agricultural employers may file H–2A applications either directly or through their agents or other legal representatives.

(i) *Application for Temporary Employment Certification* means the form submitted by an employer to secure a temporary agricultural labor certification determination from the DOL.

(j) *Department of Homeland Security (DHS)* through the *United States Citizenship and Immigration Services (USCIS)* means the Federal agency making the determination under the INA on whether to grant visa petitions filed by employers seeking H–2A workers to perform temporary agricultural work in the United States.

(k) *DOL* means the United States Department of Labor.

(l) *Eligible worker* means, with respect to employment, an individual who is not an unauthorized alien (as defined in Section 274A(h)(3) of the Immigration and Nationality Act, 8 U.S.C. 1324a(h)(3), or in this part) with respect to that employment.

(m) *Employ* means to suffer or permit to work.

(n) *Employee* means ''employee'' as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors should be considered and no one factor is dispositive.

(o) *Employer* means a person, firm, corporation or other association or organization:

(1) Which has a location within the U.S. to which U.S. workers may be referred for employment, or qualifies as a farm labor contractor (FLC) under this part;

(2) Which has an employer relationship with respect to employees under this part as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee; and

(3) Which possesses a valid Federal Employer Identification Number (FEIN).

(4) Where two or more employers each have the definitional indicia of employment with respect to an employee, those employers shall be considered to jointly employ that employee.

(5) FLCs, for purposes of this part, shall be considered to be employers.

(p) *Employment Service (ES)* refers to the system of Federal and state entities responsible for administration of the labor certification process for temporary and seasonal agricultural employment of nonimmigrant foreign workers. This includes the State Workforce Agencies (SWAs) and the Office of Foreign Labor Certification (OFLC), including the National Processing Centers (NPCs).

(q) *Employment Standards Administration (ESA)* means the agency within the Department of Labor (DOL) that includes the Wage and Hour Division, and which is charged with carrying out certain investigative and enforcement functions of the Secretary under the INA.

(r) *Employment and Training Administration (ETA)* means the agency within the Department of Labor (DOL) that includes the Office of Foreign Labor Certification (OFLC).

(s) *Federal holiday* means a legal public holiday as defined at 5 U.S.C. 6103.

(t) *Farm labor contracting activity* means recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker as those terms are used in 29 U.S.C. 1801 et seq. and 29 CFR part 500 with the intent to contract those workers to fixed-site employers.

(u) *Farm labor contractor* means any person—other than an agricultural association, or an employee of an agricultural association—who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

(v) *H–2A worker* means any nonimmigrant admitted to the United States for agricultural labor or services of a temporary or seasonal nature under section 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)).

(w) *Job offer* means the offer made by an employer or potential employer of H–2A workers to eligible workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

(x) *Job opportunity* means a job opening for temporary, full-time employment at a place in the United States to which U.S. workers can be referred.

(y) *Office of Foreign Labor Certification (OFLC)* means the organizational component of the Employment and Training Administration that provides national leadership and policy guidance and develops regulations and procedures to carry out the responsibilities of the Secretary of Labor under the Immigration and Nationality Act, as amended, concerning the admission of foreign workers to the United States in order to work under section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, as amended.

(z) *Positive recruitment* means the active participation of an employer or its authorized hiring agent in recruiting and interviewing qualified and eligible individuals in the area where the employer's establishment is located and any other area designated by the Secretary as a multistate area of traditional or expected labor supply with respect to the area where the employer's establishment is located in an effort to fill specific job openings with U.S. workers.

(aa) *Prevailing* means with respect to certain benefits other than wages provided by employers and certain practices engaged in by employers, that practice or benefit which is most commonly provided by employers (including H–2A and non H–2A employers) for the occupation in the area of intended employment.

(bb) *Representative* means the official employed by or authorized to act on behalf of the employer with respect to activities entered into for and/or attestations made with respect to the *Application for Temporary Employment Certification.* In the case of an attorney who acts as an employer's representative and who interviews and/or considers U.S. workers for the job offered to the foreign worker(s), such individual must be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered in the application, but which do not involve labor certifications.

(cc) *Secretary* means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

(dd) *State Workforce Agency (SWA),* formerly known as the State Employment Security Agency (SESA), means the State government agency that receives funds pursuant to the Wagner-Peyser Act to administer the public labor exchange delivered through the state's one-stop delivery system in accordance with the Wagner-Peyser Act. 29 U.S.C. 49, *et seq.* Separately, SWAs receive ETA grants, administered by the Office of Foreign Labor Certification, to assist them in performing certain activities related to foreign labor certification—including the conducting housing inspections.

(ee) *Temporary agricultural labor certification* means the certification made by the Secretary of Labor with respect to an employer seeking to file with DHS a visa petition to employ a foreign national as an H–2A worker, pursuant to sections 101(a)(15)(H)(ii)(a), 214(a) and (c), and 218 of the INA that

(1) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the

agricultural labor or services involved in the petition, and

(2) The employment of the foreign worker in such agricultural labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed (8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1188).

(ff) *Temporary agricultural labor certification determination* means the written determination made by the OFLC Administrator to approve or deny, in whole or in part, an application for a temporary agricultural labor certification to import a foreign worker(s).

(gg) *United States, when used in a geographic sense,* means the continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam and the Virgin Islands of the United States.

(hh) *United States worker* means any worker who is:

(1) A citizen or national of the United States, or;

(2) An alien who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under § 207 of the INA, is granted asylum under § 208 of the INA, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the United States.

(ii) *Wages* means all forms of cash remuneration to a worker by an employer in payment for personal services.

(jj) *Definition of agricultural labor or services of a temporary or seasonal nature.* For the purposes of this part, ''agricultural labor or services of a temporary or seasonal nature'' means the following:

(1) *''Agricultural labor or services.''* Pursuant to § 101(a)(15)(H)(ii)(a) of the INA (8 U.S.C. 1101(a)(15)(H)(ii)(a)), ''agricultural labor or services'' is defined for the purposes of this part as:

(i) ''Agricultural labor'' as defined and applied in § 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g));

(ii) ''Agriculture'' as defined and applied in § 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f));

(iii) The pressing of apples for cider on a farm;

(iv) Logging employment; or

(v) Handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity while in the employ of the operator of a farm; or

(vi) Other work typically performed on a farm that is incidental to the agricultural labor or services for which the worker was sought.

(2) An occupation included in either of the statutory definitions cited in paragraphs (jj)(1)(i) and (ii) of this section shall be ''agricultural labor or services'', notwithstanding the exclusion of that occupation from the other statutory definition.

(i) *''Agricultural labor''* for purposes of paragraph (jj)(1)(i) of this section means all services performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act, as amended (12 U.S.C. 1141j), or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D)*(1)* In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(2) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (jj)(2)(i)(A) of this section, but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph (jj)(2)(i)(D)(*2*), any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which such service is performed;

(3) The provisions of paragraphs (jj)(2)(i)(A) and (B) of this section shall not be deemed to be applicable with respect to services performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(4) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(E) As used in this subsection, the term ''farm'' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. (See Section 3121(g) of the Internal Revenue Code of 1986 (26 U.S.C. 3121(g).)

(ii) *''Agriculture.''* For purposes of paragraph (jj)(1)(ii) of this section agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. (See Section 203(f) of title 29, U.S.C. (§ 3(f) of the FLSA of 1938, as amended.).

(iii) *''Agricultural commodity''.* For purposes of paragraph (jj)(1)(ii) of this section, ''agricultural commodity'' includes, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and gum spirits of turpentine and gum rosin as processed by the original producer of the crude gum (oleoresin) from which derived. ''Gum spirits of turpentine'' means spirits of turpentine made from gum (oleoresin) from a living tree and ''gum rosin'' means rosin remaining after the distillation of gum spirits of turpentine. (See Section 1141j(g) of title 12, U.S.C.(§ 15(g) and 7 U.S.C. 92.)

(3) *''Of a temporary or seasonal nature''*

(i) *''On a seasonal or other temporary basis''.* For the purposes of this part, ''of

a temporary or seasonal nature'' means ''on a seasonal or other temporary basis'', as defined in the ESA's WHD's regulation at 29 CFR 500.20 under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

(ii) *MSPA definition.* The definition of ''on a seasonal or other temporary basis'' found in MSPA, summarized as follows, is:

(A) Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or performing agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.

(B) A worker is employed on ''other temporary basis'' where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment which is contemplated to continue indefinitely is not temporary.

(C) ''On a seasonal or other temporary basis'' does not include the employment of any foreman or other supervisory employee who is employed by a specific agricultural employer or agricultural association essentially on a year round basis.

(D) ''On a seasonal or other temporary basis'' does not include the employment of any worker who is living at his permanent place of residence, when that worker is employed by a specific agricultural employer or agricultural association on essentially a year round basis to perform a variety of tasks for his employer and is not primarily employed to do field work.

(iii) *''Temporary''.* For the purposes of this part, the definition of ''temporary'' in paragraph (c)(2)(ii) of this section refers to any job opportunity covered by this part where the employer needs a worker for a position for a limited period of time, which shall be for less than 1 year, unless the original temporary agricultural labor certification is extended based on unforeseen circumstances, pursuant to 20 CFR 655.110 subpart B.

16. Section 501.15 is amended by revising the first and last sentences of the section to read as follows:

§ 501.15 Enforcement.

The investigation, inspections and law enforcement functions to carry out the provisions of section 218 of the INA, as provided in these regulations for enforcement by the Wage and Hour Division, pertain to the employment of any H–2A worker and any other U.S. worker hired in corresponding employment by an H–2A employer. * * * The work contract enforced includes the employment benefits which must be stated in the job offer, as prescribed in 20 CFR part 655, subpart B.

17. Section 501.16 is amended by revising the section heading and paragraphs (a) and (b) to read as follows:

§ 501.16 Sanctions and Remedies—General.

* * * * *

(a) Impose denial of labor certification against any person for a violation of the H–2A obligations of the INA or the regulations. ETA shall make all determinations regarding the issuance or denial of a labor certification in connection with the attestation process. The Wage and Hour Division shall make all determinations regarding the enforcement functions listed in paragraphs (b) through (d) of this section.

(b) Institute appropriate administrative proceedings, including the recovery of unpaid wages (whether directly from the employer, or in the case of an FLC by claim against any surety who issued a bond to the farm labor contractor), the enforcement of any other contractual obligations, the assessment of a civil money penalty or denial of future certification(s) for up to three years against any person for a violation of the H–2A work contract obligations of the Act or these regulations. In the event of a denial of future certification, notice is provided to OFLC.

* * * * *

18. Section 501.19 is amended by revising paragraph (c) to read as follows:

§ 501.19 Civil money penalty assessment.

* * * * *

(c) A civil money penalty for violation of the work contract will not exceed $1,000 for each violation committed against each worker, with the following exceptions:

(1) For a willful failure to meet a condition of the work contract, or for discrimination, the civil money penalty shall not exceed $5,000 for each worker affected by the violation;

(2) For a violation of a housing or transportation safety and health provision of the work contract that causes the death or serious injury of any worker, the civil money penalty shall not exceed $50,000 per worker, unless the violation is a repeated or willful violation, in which case the penalty shall not exceed $100,000 per worker.

(3) For purposes of paragraph (c)(3) of this section, the term ''serious injury'' means:

(i) Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) Permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) Permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(d) A civil money penalty for interference with a Wage and Hour Division investigation shall not exceed $5,000 per investigation;

(e) For a willful layoff or displacement of any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 75 days before the date of need, except that such layoff shall be permitted where the employer also attests that it offered the opportunity to the laid-off U.S. worker(s) and said U.S. worker(s) either refused the job opportunity or were rejected for the job opportunity for lawful, job-related reasons, the civil penalty shall not exceed $15,000 per violation per worker.

19. Section 501.20 is revised to read as follows:

§ 501.20 Debarment.

(a) As a result of the Wage and Hour Division's authority to conduct investigations, inspections, and law enforcement functions to carry out the provisions of section 218 of the INA, if the Wage and Hour Division determines that an employer has substantially violated a material term or condition of a work contract, the Wage and Hour Division Administrator may debar the employer from future labor certifications for a period of up to three years from the date of the determination.

(b) For the purposes of this section, a substantial violation includes but is not limited to:

(1) Violations that through investigation by the Wage and Hour Division were determined to be significantly injurious to the wages, benefits, or working conditions of 10 percent or more of the employer's workforce of H–2A and U.S. workers hired in corresponding employment;

(2) Reflect a failure to comply with one or more penalties imposed by the Employment Standards Administration Wage and Hour Division for violation(s) of contractual obligations, or with one or more decisions or orders of the Secretary or a court pursuant to § 218 of the INA (8 U.S.C. 1188), 20 CFR part 655, subpart B, or 29 CFR part 501; or

(3) Employment of an H–2A worker outside the area of intended employment, or in an activity not listed in the job order, or after the expiration of the job order and any approved extension.

(c) The Notice of Debarment shall be in writing, shall state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and shall identify appeal opportunities under 29 CFR part 501.33. The debarment shall take effect on the start date identified in the Notice of Debarment, unless a timely request for review is filed. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal proceedings.

(d) *Debarment involving members of associations.* If after investigation, the Wage and Hour Division determines a substantial violation has occurred, and if an individual producer member of a joint employer association is determined to have committed the violation, the determination to debar the employer from future labor certifications for a period of up to three years from the date of the determination shall apply only to that member of the association unless the Wage and Hour Division Administrator determines that the association or other association member participated in, had knowledge of, or had reason to know of the violation, in which case the debarment shall be invoked against the complicit association or other association members as well.

(e) *Debarment involving associations acting as joint employers.* If after investigation, the Wage and Hour Division determines a substantial violation has occurred, and if an association acting as a joint employer with its members is determined to have committed the violation, the determination to debar the association from future labor certifications for a period of up to three years from the date of the determination shall apply only to the association, and shall not be applied to any individual producer member of the association unless the Wage and Hour Division Administrator determines that the member participated in, had knowledge of, or reason to know of the violation, in which case the debarment shall be invoked against the complicit association member as well.

(f) *Debarment involving associations acting as sole employers.* If after investigation, the Wage and Hour Division determines a substantial violation has occurred, and if an association acting as a sole employer is determined to have committed the violation, the determination to deny future labor certifications under this part for a period of up to three years from the date of the determination shall apply only to the association and any successor in interest to the debarred association.

20. Section 501.21 is revised to read as follows:

§ 501.21 Referral to ETA of interference with or refusal to permit investigation.

Sections 501.5 through 501.7 of this part describe the investigation authority conferred by the Secretary upon the Wage and Hour Division for the purpose of enforcing the contractual obligations relating to wages, benefits, and working conditions of employers of H–2A workers and U.S. workers hired in corresponding employment. The following sections describe the actions which may be taken by the Wage and Hour Division when an employer fails to cooperate with an investigation concerning the employment of H–2A workers or U.S. workers hired in corresponding employment. The Wage and Hour Division shall report such occurrence to ETA and may recommend revocation of an existing labor certification. No person shall interfere with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority. As stated in §§ 501.5, 501.6 and 501.19 of this part, a civil money penalty may be assessed for each failure to permit an investigation or interference therewith, and other appropriate relief may be sought. In addition, the Wage and Hour Division shall report each such occurrence to ETA, and the Wage and Hour Division may debar the employer from future certification and recommend to ETA revocation of existing certification. The taking of any one action shall not bar the taking of any additional action.

21. Section 501.30 is revised to read as follows:

§ 501.30 Applicability of procedures and rules.

The procedures and rules contained herein prescribe the administrative process that will be applied with respect to a determination to impose an assessment of civil money penalties or debarment, and which may be applied to the enforcement of contractual obligations, including the collection of unpaid wages due as a result of any violation of the H–2A provisions of the Act or of these regulations. Except with respect to the imposition of civil money penalties or debarment, the Secretary may, in the Secretary's discretion, seek enforcement action in Federal court without resort to any administrative proceedings.

22. Section 501.31 is revised to read as follows:

§ 501.31 Written notice of determination required.

Whenever the Administrator determines to assess a civil money penalty, to debar, or to proceed administratively to enforce contractual obligations, including the recovery of unpaid wages, the person against whom such action is taken shall be notified in writing of such determination.

23. Section 501.32 is amended by revising paragraph (a) to read as follows:

§ 501.32 Contents of notice.

* * * * *

(a) Set forth the determination of the Administrator including the amount of any unpaid wages due or contractual obligations required, the amount of any civil money penalty assessment, whether to debar and the length of the debarment, and the reason or reasons therefor.

* * * * *

24. Section 501.33 is amended by revising paragraph (a) and adding (d) to read as follows:

§ 501.33 Request for hearing.

(a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the Wage and Hour Division address appearing on the determination notice, no later than 30 days after issuance of the notice referred to in § 501.32.

* * * * *

(d) The determination shall take effect on the start date identified in the determination, unless an administrative appeal request for review is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings.

25. Section 501.42 is amended by revising paragraph (a) to read as follows:

§ 501.42 Procedures for initiating and undertaking review.

(a) A respondent, the Administrator, or any other party wishing review,

including judicial review, of the decision of an administrative law judge shall, within 30 days of the decision of the administrative law judge, petition the Administrative Review Board (ARB) to review the decision. Copies of the petition shall be served on all parties and on the administrative law judge. If the ARB does not issue a notice accepting a petition for review within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the administrative law judge shall be deemed the final agency action. If a petition for review is filed, the decision of the administrative law judge shall be inoperative unless and until the ARB issues an order affirming the decision, or declining review.

* * * * *

§§ 501.22, 501.41 through 501.45 [Amended]

26. In § 501.22 and §§ 501.41 through 501.45 all references to ''Secretary'' are revised to read ''Administrative Review Board''.

PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT

27. The authority citation for part 780 continues to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

28. Section 780.115 is revised to read as follows:

§ 780.115 Forest products.

Trees grown in forests and the lumber derived therefrom are not ''agricultural or horticultural commodities,'' for the purpose of the FLSA (See § 780.205 regarding production of Christmas trees.) It follows that employment in the production, cultivation, growing, and harvesting of such trees or timber products is not sufficient to bring an employee within section 3(f) unless the operation is performed by a farmer or on a farm as an incident to or in conjunction with his or its farming operations. On the latter point, see §§ 780.160 through 780.164 discussing the question of when forestry or lumbering operations are incident to or in conjunction with farming operations so as to constitute ''agriculture.'' For a discussion of the exemption in section 13(b)(28) of the Act for certain forestry and logging operations in which not more than eight employees are employed, see part 788 of this chapter

29. Section 780.201 is revised to read as follows:

§ 780.201 Meaning of ''forestry or lumbering operations.''

The term ''forestry or lumbering operations'' refers to the cultivation and management of forests, the felling and trimming of timber, the cutting, hauling, and transportation of timber, logs, pulpwood, cordwood, lumber, and like products, the sawing of logs into lumber or the conversion of logs into ties, posts, and similar products, and similar operations. It also includes the piling, stacking, and storing of all such products. The gathering of wild plants and of wild Christmas trees is included. (See the related discussion in §§ 780.205 through 780.209 and in part 788 of this chapter which considers the section 13(b)(28) exemption for forestry or logging operations in which not more than eight employees are employed.) ''Wood working'' as such is not included in ''forestry'' or ''lumbering'' operations. The manufacture of charcoal under modern methods is neither a ''forestry'' nor ''lumbering'' operation and cannot be regarded as ''agriculture.''

30. Section 780.205 is revised to read as follows:

§ 780.205 Nursery activities generally and Christmas tree production.

(a) The employees of a nursery who are engaged in the following activities are employed in ''agriculture'':

(1) Sowing seeds and otherwise propagating fruit, nut, shade, vegetable, and ornamental plants or trees, and shrubs, vines, and flowers;

(2) Handling such plants from propagating frames to the field;

(3) Planting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop.

(b) Trees produced through the application of extensive agricultural or horticulture techniques to be harvested and sold for seasonal ornamental use as Christmas trees are considered to be agricultural or horticultural commodities. Employees engaged in the application of agricultural and horticultural techniques to produce Christmas trees as ornamental horticultural commodities such as the following are employed in ''agriculture'':

(1) Planting seedlings in a nursery; on-going treatment with fertilizer, herbicides, and pesticides as necessary;

(2) After approximately three years, re-planting in lineout beds;

(3) After two more seasons, lifting and re-planting the small trees in cultivated soil with continued treatment with fertilizers, herbicides, and pesticides as indicated by testing to see if such applications are necessary;

(4) Pruning or shearing yearly;

(5) Harvesting of the tree for seasonal ornamental use, typically within seven to ten years of planting.

(c) Trees to be used as Christmas trees which are gathered in the wild such as from forests or uncultivated land and not produced through the application of agricultural or horticultural techniques are not agricultural or horticultural commodities for purposes of section 3(f). (*See USDOL* v. *North Carolina Growers Association, Inc., et. al.,* 377 F.3d 345.)

31. Section 780.208 is revised to read as follows:

§ 780.208 Forestry activities.

Operations in a forest tree nursery such as seeding new beds and growing and transplanting forest seedlings are not farming operations. For such operations to fall within section 3(f), they must qualify under the second part of the definition dealing with incidental practices. (*See* § 780.201.)

PART 788—FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED

32. The authority citation for part 788 continues to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended; 29 U.S.C. 201–219.

33. Section 788.10 is revised to read as follows:

§ 788.10 ''Preparing * * * other forestry products.''

As used in the exemption, ''other forestry products'' mean plants of the forest and the natural properties or substances of such plants and trees. Included among these are decorative greens such as holly, ferns, roots, stems, leaves, Spanish moss, wild fruit, and brush. Christmas trees are only included where they are gathered in the wild from forests or from uncultivated land and not produced through the application of extensive agricultural or horticultural techniques. (See 29 CFR 780.205 for further discussion.) Gathering and preparing such forestry products as well as transporting them to the mill, processing plant, railroad, or other transportation terminal are among the described operations. Preparing such forestry products does not include operations that change the natural physical or chemical condition of the products or that amount to extracting (as distinguished from gathering) such as shelling nuts, or that mash berries to obtain juices.

Signed in Washington, DC, this 7th day of February, 2008.

Douglas F. Small,

Deputy Assistant Secretary, Employment and Training Administration.

Alexander Passantino,

Acting Administrator, Wage and Hour Division, Employment Standards Administration.

[FR Doc. E8–2525 Filed 2–12–08; 8:45 am]

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S. 2110/P.L. 110–184

To designate the facility of the United States Postal Service located at 427 North Street in Taft, California, as the ''Larry S. Pierce Post Office''. (Feb. 6, 2008; 122 Stat. 612)

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