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Contents

Federal Register

Vol. 73, No. 70

Thursday, April 10, 2008

Agriculture Department

See Commodity Credit Corporation

See Cooperative State Research, Education, and Extension Service

See Forest Service

See Natural Resources Conservation Service

See Rural Housing Service

NOTICES

Intent to Establish the 2010 Dietary Guidelines Advisory Committee and Solicitation of Nominations for Membership, 19454–19455

Air Force Department

NOTICES

Privacy Act; Systems of Records, 19476–19477

Alcohol, Tobacco, Firearms, and Explosives Bureau

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19529

Army Department

See Engineers Corps

Centers for Disease Control and Prevention

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19504–19508

Commerce Department

See International Trade Administration

See National Oceanic and Atmospheric Administration

Commodity Credit Corporation

NOTICES

Conservation Security Program; Correction, 19456–19458

Cooperative State Research, Education, and Extension Service

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19455

Defense Department

See Air Force Department

See Defense Intelligence Agency

See Defense Logistics Agency

See Engineers Corps

See Navy Department

Defense Intelligence Agency

NOTICES

Privacy Act; Systems of Records, 19477–19479

Defense Logistics Agency

NOTICES

Privacy Act; Systems of Records, 19479

Education Department

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19491–19493

Energy Department

See Federal Energy Regulatory Commission

Engineers Corps

RULES

Compensatory Mitigation for Losses of Aquatic Resources, 19594–19705

Environmental Protection Agency

RULES

Compensatory Mitigation for Losses of Aquatic Resources, 19594–19705

Federal Communications Commission

RULES

Rural Health Care Support Mechanism, 19437–19438

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19499–19503

Federal Emergency Management Agency

NOTICES

Disaster Declaration:

California; Amendment, 19524

Kentucky; Amendment, 19524

Missouri; Amendment, 19524–19525

Federal Energy Regulatory Commission

RULES

Revisions to Forms, Statements, and Reporting

Requirements for Natural Gas Pipelines, 19389–19431

NOTICES

Applications:

Cinnamon Ranch, 19493–19494

Transfer of License, and Soliciting Comments, Motions to Intervene, and Protests, 19494–19495

Blanket Authorization Request:

Northern Natural Gas Co., 19495

Combined Notice of Initial Market-Based Rate

Authorization Filings, 19495

Complaint:

California Independent System Operator Corp., 19496

Filing:

City of Watervliet, NY, 19496–19497

Mason, Michael D., 19497–19498

North American Electric Reliability Corp., 19498–19499

Meetings:

Southwest Power Pool Board of Directors/Members

Committee et al.; FERC Employee Attendance, 19499

Regulations for Filing Applications for Permits to Site

Interstate Electric Transmission Facilities, 19499

Federal Highway Administration

NOTICES

Environmental Statements; Availability, etc.:

Salt Lake and Davis Counties, UT, 19581–19582

Proposed Memorandum of Understanding Assigning

Environmental Assigning Responsibilities to the State of Utah, 19582–19583

Federal Reserve System**NOTICES**

Formations, Acquisitions, and Mergers of Bank Holding Companies, 19503

Fish and Wildlife Service**RULES**

Subsistence Management Regulations for Public Lands in Alaska; Federal Subsistence Regional Advisory Council Membership, 19433–19437

NOTICES

Incidental Take Permit for Residential Construction in Charlotte County, FL; Application, 19525
Post-delisting Monitoring Plan for the Western Great Lakes Distinct Population Segment of the Gray Wolf, 19525–19526

Food and Drug Administration**RULES**

New Animal Drugs for Use in Animal Feed; Zilpaterol, 19432

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19508–19511
Guidance for Food and Drug Administration Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control Information for Human Somatic, 19511–19513
Guidance for Industry on Blue Bird Medicated Feed Labels; Availability, 19513–19514

Forest Service**RULES**

Subsistence Management Regulations for Public Lands in Alaska; Federal Subsistence Regional Advisory Council Membership, 19433–19437

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19456

Health and Human Services Department

See Centers for Disease Control and Prevention
See Food and Drug Administration
See Health Resources and Services Administration
See National Institutes of Health

PROPOSED RULES

Developmental Disabilities Program, 19708–19741

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19504
Intent to Establish the 2010 Dietary Guidelines Advisory Committee and Solicitation of Nominations for Membership, 19454–19455

Health Resources and Services Administration**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19516–19517
Low Income Levels Used for Various Health Professions and Nursing Programs Included, etc., 19517
Meetings:
Advisory Committee on Interdisciplinary, Community-Based Linkages, 19517–19518
Advisory Committee on Training in Primary Care Medicine and Dentistry, 19518
Bureau of Health Professions All Advisory Committee, 19518
Council on Graduate Medical Education, 19519

National Advisory Council on Nurse Education and Practice, 19519

Privacy Act; Systems of Records, 19519–19521
Statement of Organization, Functions and Delegations of Authority, 19521–19522

Homeland Security Department

See Federal Emergency Management Agency

Interior Department

See Fish and Wildlife Service
See Land Management Bureau

Internal Revenue Service**PROPOSED RULES**

Guidance Regarding Deduction and Capitalization of Expenditures Related to Tangible Property; Correction, 19450–19451
Multiemployer Plan Funding Guidance; Correction, 19451

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19584–19590

International Trade Administration**NOTICES**

North American Free Trade Agreement:
Amendments to Rules of Procedure for Article 1904 Binational Panel Reviews, 19458–19474
Polyethylene Terephthalate Film, Sheet, and Strip From India:
Partial Rescission of Administrative Review of the Countervailing Duty Order, 19474

Justice Department

See Alcohol, Tobacco, Firearms, and Explosives Bureau

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19528
Lodging of Proposed Consent Decree, 19528–19529

Labor Department**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 19529–19530
Job Corps:
Final Finding of No Significant Impact for the Proposed Job Corps Center, etc., 19530–19531
No Significant Impact for the Proposed Job Corps Center, etc., 19531
Providing Job Training for People With Disabilities, 19531
Strengthening Labor Law Compliance in the Agricultural Sector in Guatemala, 19531–19532

Land Management Bureau**NOTICES**

Alaska Native Claims Selection, 19526–19527
East Alaska Resource Management Plan Amendment; Intent:
Delta River Special Recreation Management Area, 19527–19528

National Institutes of Health**NOTICES**

Meetings:
National Human Genome Research Institute, 19522
National Institute of Allergy and Infectious Diseases, 19522–19523
National Institute of Biomedical Imaging and Bioengineering, 19523

National Institute of Neurological Disorders and Stroke,
19522–19524
National Institute on Deafness and Other Communication
Disorders, 19523

National Oceanic and Atmospheric Administration

RULES

Fisheries of the Exclusive Economic Zone Off Alaska:
Northern Rockfish, Pacific Ocean Perch, and Pelagic
Shelf Rockfish in the Western Regulatory Area and
West Yakutat District of the Gulf of Alaska, 19442
Magnuson-Stevens Act Provisions:
Fisheries of the Northeastern United States; Northeast
Multispecies Fishery, etc., 19439–19441

NOTICES

Meetings:
Caribbean Fishery Management Council, 19474–19475
New England Fishery Management Council, 19475
Western Pacific Fishery Management Council, 19475–
19476

National Transportation Safety Board

NOTICES

Meetings; Sunshine Act, 19532

Natural Resources Conservation Service

NOTICES

Conservation Security Program; Correction, 19456–19458

Navy Department

NOTICES

Privacy Act; Systems of Records, 19479–19491
Record of Decision:
Fort Rosecrans National Cemetery Annex, San Diego, CA,
19590–19592

Nuclear Regulatory Commission

PROPOSED RULES

Power Reactor Security Requirements, 19443–19450

Pipeline and Hazardous Materials Safety Administration

NOTICES

Delays in Processing of Special Permits Applications,
19583–19584

Rural Housing Service

PROPOSED RULES

Income Limit Modification, 19443

Securities and Exchange Commission

NOTICES

Self-Regulatory Organizations; Proposed Rule Changes:
Boston Stock Exchange, Inc., 19532–19535
Chicago Board Options Exchange, Inc., 19535–19537
Fixed Income Clearing Corp., 19537–19539
NASDAQ Stock Market LLC, 19539–19542
New York Stock Exchange LLC, 19542–19544
NYSE Arca, Inc., 19544–19550

State Department

NOTICES

Bureau of Educational and Cultural Affairs Request for
Cooperative Agreement Proposals:
Arts Exchanges on International Issues, 19556–19565
English Language Fellow Program for Academic Year
2009–2010, 19550–19556
National Security Language Initiative Youth Program,
19565–19574
Youth Exchange and Study Program, 19574–19581

Surface Transportation Board

NOTICES

R.J. Corman Railroad Co./Central Kentucky Lines, LLC,
Trackage Rights Exemption; CSX Transportation, Inc.,
19584

Transportation Department

See Federal Highway Administration
See Pipeline and Hazardous Materials Safety
Administration
See Surface Transportation Board

Treasury Department

See Internal Revenue Service

PROPOSED RULES

Withdrawal of Proposed Rulemaking against First Merchant
Bank Finding of Primary Money Laundering, etc.,
19452–19453

Veterans Affairs Department

NOTICES

Record of Decision:
Fort Rosecrans National Cemetery Annex, San Diego, CA,
19590–19592

Separate Parts In This Issue

Part II

Army Department, Engineers Corps; Environmental
Protection Agency, 19594–19705

Part III

Health and Human Services Department, 19708–19741

Reader Aids

Consult the Reader Aids section at the end of this issue for
phone numbers, online resources, finding aids, reminders,
and notice of recently enacted public laws.

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LISTSERV electronic mailing list, go to <http://listerv.access.gpo.gov> and select Online mailing list
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settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

7 CFR**Proposed Rules:**

1980.....19443

10 CFR**Proposed Rules:**

50.....19443

18 CFR

158.....19389

260.....19389

21 CFR

558.....19432

26 CFR**Proposed Rules:**

1 (2 documents) 19450,
19451

31 CFR**Proposed Rules:**

103.....19452

33 CFR

325.....19594

332.....19594

36 CFR

242.....19433

40 CFR

230.....19594

45 CFR**Proposed Rules:**

1385.....19708

1386.....19708

1387.....19708

1388.....19708

47 CFR

54.....19437

50 CFR

100.....19433

648.....19439

679.....19442

Rules and Regulations

Federal Register

Vol. 73, No. 70

Thursday, April 10, 2008

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

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 158 and 260

[Docket No. RM07-9-000; Order No. 710]

Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines

Issued March 21, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: In this Final Rule, the Federal Energy Regulatory Commission (Commission) is revising its financial forms, statements, and reports for natural gas companies, contained in FERC Form Nos. 2, 2-A and 3-Q. The revisions are designed to enhance the forms' usefulness by updating them to reflect current market and cost information relevant to interstate natural gas pipelines and their customers. The changes will provide additional information that the Commission needs to carry out its responsibilities under the Natural Gas Act (NGA).

DATES: This Final Rule is effective April 10, 2008. The revisions to FERC Form Nos. 2, 2-A, and 3-Q are applicable on January 1, 2008, and the termination of FERC Form No. 11 is applicable on February 28, 2009.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: Before Commissioners: Joseph T. Kelliher, Chairman; Suede G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellingshoff.

I. Introduction

1. The Federal Energy Regulatory Commission (Commission) is revising Parts 158 and 260 of its regulations to effect changes to its FERC Form No. 2 (Form 2), Annual report for major natural gas companies, FERC Form No. 2-A (Form 2-A), Annual report for nonmajor natural gas companies, and FERC Form No. 3-Q (Form 3-Q), Quarterly financial report of electric utilities, licensees and natural gas companies to expand and update the forms to reflect current market and cost information relevant to interstate natural gas pipelines and their customers.¹ The Commission is revising these financial forms to provide, in greater detail, the information the Commission needs to carry out its responsibilities under the NGA to ensure that rates are just and reasonable, and to provide pipeline customers and the public the information they need to assess the justness and reasonableness of pipeline rates.

II. Background

2. Before the restructuring of pipeline services promulgated by the Commission's Order No. 636, interstate natural gas pipelines offered both sales and transportation services.² Gas costs

were charged to a purchased gas adjustment (PGA) account and were periodically adjusted and passed through to customers. The quid pro quo for the ability to recover the gas costs through a PGA tracker was the requirement that the pipelines file to restate their rates every three years. Order No. 636 eliminated the PGA regulations and the triennial filing requirement. Subsequently, the Commission issued a final rule that changed pipeline filing and reporting requirements in the post-Order No. 636 unbundled environment.³

3. The financial reporting forms for natural gas companies were again revised in 1995, in Order No. 581, to reflect the changed regulatory environment of unbundled pipeline sales for resale at market-based prices and open-access transportation of natural gas.⁴ Order No. 637, issued in 2000, among other things, revised the Commission's regulatory approach to pipeline pricing by permitting pipelines to propose peak/off peak and term differentiated rate structures.⁵

4. Since the Commission eliminated the triennial restatement of rates filing requirement in Order No. 636, there has been a decline in filings under NGA section 4.⁶ As stated in the NOPR, the records indicate that as many as 15 major and 20 nonmajor gas pipelines have not filed a section 4 rate case in

Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, FERC Stats. & Regs. ¶ 30,939, order on reh'g, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, order on reh'g, Order No. 636-B, 61 FERC ¶ 61,272 (1992), order on reh'g, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), order on remand, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

³ See *Filing and Reporting Requirements for Interstate Natural Gas Company Rate Schedules and Tariffs*, FERC Stats. & Regs. ¶ 31,025 (1995).

⁴ *Revisions to Uniform System of Accounts, Forms, Statements, and Reporting Requirements for Natural Gas Companies*, Order No. 581, FERC Stats. & Regs. ¶ 31,026 (1995), order on reh'g, Order No. 581-A, FERC Stats. & Regs. ¶ 31,032 (1996).

⁵ *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), order on remand, 101 FERC ¶ 61,127 (2002), order on reh'g, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

⁶ 15 U.S.C. 717c.

¹ Section 10 of the Natural Gas Act (NGA), 15 U.S.C. 717g, authorizes the Commission to prescribe rules and regulations concerning annual and other periodic or special reports, as necessary or appropriate for purposes of administering the NGA. The Commission may prescribe the manner and form in which such reports are to be made, and require from natural gas companies specific answers to all questions on which the Commission may need information.

² See *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing*

more than a decade.⁷ While the Commission may, on its motion, institute a section 5 investigation, it relies also on section 5 complaints filed by pipeline customers or state public utility commissions, to review a pipeline company's rates outside of a section 4 proceeding.⁸ A section 5 complaint may rely on Forms 2, 2-A, and 3-Q financial data to support a complaint.

5. In 2006, two section 5 complaints were filed with the Commission, both relying on data provided in Forms 2 and 2-A to support allegations that the pipeline's rates were unjust and unreasonable.⁹ In *National Fuel*, the pipeline responded that the Form 2 data relied upon by the complainants was not sufficient to support a complaint and that only a detailed cost and revenue study could provide the necessary justification for a section 5 investigation. In setting the complaint for hearing, the Commission rejected *National Fuel's* contention, noting that the Form 2 data relied upon by complainants was sufficient to raise serious questions about the pipeline's rates.¹⁰ The *National Fuel* complaint was followed by a section 5 action filed by a group of Southwest Gas customers alleging unjust and unreasonable rates and relying, in that instance, on Form 2-A data.¹¹

6. The question of whether the Commission's financial forms provide data sufficient to support a complaint resulted in a review of Forms 1, 1-F, 2, 2-A, and 3-Q data in the fall of 2006. Staff met with both form filers and users to discuss the need for additional information or other clarifications. Thereafter, on February 15, 2007, the Commission issued a Notice of Inquiry (NOI).¹²

7. The NOI sought comments on the need for changes to the financial forms. The Commission received 35 comments and 15 reply comments in response to the NOI. Eleven initial comments and

two reply comments specifically addressed Forms 2, 2-A, and 3-Q data, with most pipeline customers seeking expanded information and pipelines opposing additional filing requirements.

8. Following a careful review of the comments and reply comments, the Commission issued a Notice of Proposed Rulemaking (NPR) on September 20, 2007, proposing revisions to Forms 2, 2-A, and 3-Q, and the elimination of Form 11.¹³ The NPR proposed to add several new schedules, requiring pipelines to report: (1) The disposition of shipper-supplied gas; (2) transactions between the pipeline and its affiliates; (3) revenues and volumes applicable to discount and negotiated rate services; and (4) identification of rate treatment afforded new pipeline projects. In addition, the NPR proposed modifications to existing schedules to require more detail regarding: (1) Sales data; (2) deferred income taxes; (3) state income tax expense; (4) regulatory assets and liabilities; (5) distribution of salaries and wages; and (6) employee pensions and benefits.

9. The Commission received 17 comments in response to the proposed reporting requirements which ranged from favorable to those seeking yet more detailed information, and a few who argued that the proposed modifications were unnecessary or burdensome.¹⁴ In general, most commenters applauded the Commission's efforts to improve the quality of the financial forms. After careful consideration of the comments received, the Commission is adopting the changes and revisions as proposed in the NPR with certain modifications and clarifications as discussed below. If no comments were received on a particular issue and it is not discussed below, the proposal is adopted as set forth in the NPR.

III. Discussion

A. General

10. The NPR discussed a concern raised by the Interstate Natural Gas Association of America (INGAA) that the proposed changes to reporting requirements could blur the distinction between sections 4 and 5 of the NGA, and invited comments on this issue.¹⁵ A few commenters addressed this issue. Dominion Resources, Inc. (Dominion) commends the Commission for recognizing this concern and requests that the Commission keep the concern

in mind when finalizing the rule.¹⁶ The Michigan Public Service Commission (MPSC) urges the Commission to reject any argument that the reporting requirements proposed in the NPR would improperly shift the burden of proof under section 5 of the NGA by requiring pipelines to justify their existing rates outside the context of a section 4 rate case.¹⁷ The MPSC states that the NGA explicitly gives the Commission the authority to require periodic reporting as necessary for purposes of administering the NGA.¹⁸ The Process Gas Consumers Group (PGC) states that the NPR is proposing greater transparency and accuracy, which are essential to the Commission's oversight obligations and neither of which could reasonably impact the burden of proof in section 5 proceedings.¹⁹

11. The Kansas Corporation Commission (KCC) and Apache Corporation (Apache) express concern that the ability of a pipeline to file a section 4 rate case even after parties have filed a section 5 complaint, as transpired in the recent *Southwest Gas* proceeding, may serve as a disincentive for some parties to file section 5 complaints.²⁰ Apache recommends that the Commission add to the Form 2 and 2-A a cost and revenue summary page that would provide the Commission and interested parties a clear view of whether a pipeline's filed rates are just and reasonable.²¹ The KCC agrees that the possibility that a pipeline may file a section 4 rate case after a complaint has been lodged will make potential complainants hesitant about incurring the costs of a section 5 complaint.²² The KCC further notes the fact that any relief under a section 5 proceeding is limited since it is prospective only and urges the Commission to reinstate a periodic rate-refiling requirement as a condition to approval of pipeline blanket certificates.²³

12. As an initial matter, the Commission has no intention of obscuring the distinction between sections 4 and 5 of the NGA by any changes implemented here to the financial forms filed by natural gas companies. Therefore, the Commission will not reinstate a periodic rate review absent a concomitant benefit as was the case when, in exchange for recovering

⁷ *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, 72 FR 54860 (Sept. 27, 2007), FERC Stats. & Regs. ¶ 32,623, at note 60 (2002). (NPR).

⁸ 15 U.S.C. 717d.

⁹ See *Public Service Commission of New York, Pennsylvania Public Utility Commission and Pennsylvania Office of Consumer Advocate v. National Fuel Gas Supply Corp.*, 115 FERC ¶ 61,299 (2006), (*National Fuel*), order approving uncontested settlement, 118 FERC ¶ 61,091 (2007); *Panhandle Complainants v. Southwest Gas Storage Co.*, 117 FERC ¶ 61,318 (2006) (*Southwest Gas*).

¹⁰ *National Fuel* at P 37.

¹¹ *Southwest Gas*, 117 FERC at P 1.

¹² *Assessment of Information Requirements for FERC Financial Forms, Notice of Inquiry*, 72 FR 8316 (Feb. 26, 2007), FERC Stats. & Regs. ¶ 35,554 (2007). The NOI also invited comments from filers and users of Form 6 and 6-Q.

¹³ See NPR.

¹⁴ A list of commenters is attached as Appendix B.

¹⁵ NPR at P 28.

¹⁶ Dominion NPR Comments at 4.

¹⁷ MPSC NPR Comments at 4.

¹⁸ MPSC NPR Comments at 4.

¹⁹ PGC NPR Comments at 5.

²⁰ KCC NPR Comments at 15-16; Apache NPR Comments at 2.

²¹ Apache NPR Comments at 2.

²² KCC NPR Comments at 17.

²³ KCC NPR Comments at 17-18.

purchased gas costs through a tracker, pipelines were required to restate their rates every three years.²⁴ In addition, the Commission rejects the proposal to order companies to file cost and revenue studies as part of these forms. Also, the changes being implemented here do not affect existing rates nor change any rate on file. In like vein, the Commission cannot alter the rights and obligations of pipelines and their customers under sections 4 and 5 of the NGA. Under section 4 of the NGA, a pipeline has the right to file a rate case at any time. The Commission cannot compel a pipeline to file under section 4, nor can it preclude it from filing under section 4 for any reason, including the presence of a section 5 complaint. The pipeline can agree to bind itself, for example through an agreement to a rate moratorium in a rate case settlement, but the Commission does not have the power to prohibit a pipeline from filing a rate case. The requested data is designed to provide the Commission and pipeline customers with information that will aid their ability to make a reasonable assessment of a pipeline's cost of service. Greater transparency is essential to the Commission's oversight responsibilities and, as implemented here, will not affect the burden of proof in section 5 proceedings. A party filing a section 5 complaint would still have the burden to show why the information in the Commission's financial forms support an allegation that the pipeline's existing rates are unjust and unreasonable. Stated briefly, the changes adopted in the final rule will not be used to limit an entity's right under the NGA and our regulations. Nor will the changes to the forms change the Commission's obligation to rule on complaints, petitions, or other requests for relief based on a full record and substantial evidence.

B. Acquisition and Disposition of Gas: Shipper-Supplied Gas

1. Financial Forms NOPR

13. In the NOPR, the Commission noted that despite current accounting and reporting requirements for gas used in operations, gas lost, and gas sold, Forms 2 and 2-A users cannot readily determine the disposition and value of any shipper-supplied gas that exceeds the pipeline's operational needs or the source and cost of any gas acquired to meet deficiencies in shipper-supplied gas.²⁵ Comments on the NOI identified

information regarding the pipeline's fuel retainage percentage as particularly lacking in detail. The complainants in the *National Fuel* case, referenced above, asserted that the principal reason for the pipeline's alleged excess revenue was due to its retention of more than twice as much fuel from shippers than is necessary to operate the system and that it then sold and retained all revenues from those sales.²⁶ In light of these concerns, the Commission proposed the addition of a new schedule to Forms 2, 2-A, and 3-Q, which would require the pipeline to report the following: (1) The difference between the volume of gas received from shippers and the volume of gas consumed in pipeline operations each month; (2) the disposition of any excess and the accounting recognition given to such disposition, including the basis of valuing the gas and the specific accounts charged or credited; and (3) the source of gas used to meet any deficiency, including the accounting basis of the gas and the specific account(s) charged or credited.²⁷ In addition, the NOPR proposed to add page 520 (Gas Account-Natural Gas) to Form 3-Q in order to provide more timely reporting of the quantity of natural gas received and delivered by the pipeline.²⁸ The NOPR also proposed to require pipelines to provide in a footnote to page 520, the volumes of gas purchased applicable to each of the gas pipeline expense accounts.²⁹

2. Commenters

14. Most commenters support the addition of this information to Forms 2, 2-A, and 3-Q. INGAA and Williston Basin Interstate Pipeline Company (Williston), however, request that the Commission revise pages 521a and 521b to remove the monthly reporting requirement and replace it with a quarterly reporting requirement.³⁰ INGAA also requests that the Commission revise its proposal to remove the requirement that pipelines categorize the discrete offsetting gas transactions of any excess or deficiency related to shipper supplied gas.³¹ Dominion requests that the Commission modify the proposal to require the new reporting on shipper-supplied gas on only an annual basis and not in quarterly reports.³²

²⁶ See *National Fuel*, 115 FERC ¶ 61,299 at P 8.

²⁷ NOPR at P 39.

²⁸ *Id.*

²⁹ *Id.* See 18 CFR Part 201, Account Nos. 800-05.

³⁰ INGAA NOPR Comments at 5; Williston NOPR Comments at 5-6.

³¹ INGAA NOPR Comments at 5.

³² Dominion NOPR Comments at 7.

15. The American Gas Association (AGA) supports the NOPR's proposal to require this information but believes that greater clarity can be achieved if the Commission requires the information to be broken out by function (e.g., transportation, storage, gathering, etc.) and to include, by function, the amount of fuel that has been waived, discounted or reduced as part of a negotiated rate agreement.³³ The Natural Gas Supply Association (NGSA) requests that a column be added to proposed page 521 to require pipelines to identify the specific accounts being used to record the various sources and disposition of fuel gas.³⁴ In NGSA's view, this information would enable users to reconcile the volumes broken out by account reported on proposed page 521 to data recorded elsewhere in Forms 2, 2-A and 3-Q.³⁵ Calpine Corporation (Calpine) requests that the Commission require the fuel gas accounts to be broken down by month so that these costs can be reconciled with those reported in other filings such as annual fuel tracker reports.³⁶

3. Commission Determination

16. As stated in the NOPR, the Commission is concerned about the increased impact on the pipeline's cost of service resulting from rising gas prices.³⁷ The escalation of gas prices coupled with the decline of section 4 rate reviews has made this an important issue in the pipeline's cost of transportation. Currently, Forms 2 and 2-A users cannot determine the disposition and value of any shipper-supplied gas that exceeds the pipeline's operational needs or the source and cost of any gas acquired to meet deficiencies in shipper-supplied gas. While we recognize INGAA's desire that the data be reported on a quarterly, and not monthly basis, we agree with Calpine that monthly data is necessary for the purpose of comparing and attempting to reconcile these costs with other routine pipeline filings such as annual fuel tracker reports. In addition, INGAA objects to the requirement that pipelines categorize the discrete offsetting gas transactions relating to any excess or deficiency in shipper-supplied gas. The Commission deems this information critical to the clarity and transparency needed to support a reasonable analysis of gas costs. The information broken out by function (e.g., transportation, storage, gathering, etc.) sought by AGA is

³³ AGA NOPR Comments at 5.

³⁴ NGSA NOPR Comments at 5.

³⁵ *Id.*

³⁶ Calpine NOPR Comments at 5.

³⁷ See NOPR at P 38.

²⁴ See *Public Service Commission of the State of New York v. FERC*, 866 F.2d 487, 492 (D.C. Cir. 1989).

²⁵ NOPR at P 37.

available in Form 2 at page 520. On page 520 (Gas Account), pipelines are required to provide detailed information regarding gas received and delivered by the pipeline, identified by function and account number. Regarding NGSA's request that a column be added to page 521 to require pipelines to identify the specific accounts being used to record the various sources and disposition, we reject it as unnecessary. Pages 521a and 521b already require in columns (d) and (e) that the specific account(s) be identified. The NOPR's proposals are designed to provide needed transparency but also to reflect a fair balance between the need for the information and the additional burden on the pipeline. We believe that the new schedules (pages 521a and 521b) proposed in the NOPR reflect this balance. Accordingly, the proposal is adopted as outlined in the NOPR.

C. Other Gas Dispositions

1. Financial Forms NOPR

17. The NOPR proposed to expand the detail provided on pages 300–01 of Forms 2 and 2–A (Gas Operating Revenues) to require filers to report sales amounts reported in Account 480 (Residential Sales); Account 481 (Commercial and Industrial Sales); Account 482 (Other Sales to Public Authorities); Account 483 (Sales for Resale); and Account 484 (Interdepartmental Sales). Currently this schedule, entitled “Gas Operating Revenues,” aggregates on one line all sales data for these separate accounts. Providing this data by account, rather than in an aggregated number, will enable users to identify the dispositions of gas acquired by or tendered to the pipeline and how those transactions may affect the pipeline's cost of service. In addition, the NOPR proposed to modify the schedule for Account 495, Other Gas Revenues, on page 308 of Form 2 and add a new page to Form 2–A to specify that the following types of revenues must be separately reported on the schedule: (1) Commissions on sale or distribution of gas of others; (2) compensation for minor or incidental services provided for others; (3) profit or loss on sale of material and supplies not ordinarily purchased for resale; (4) sales of steam, water, or electricity, including sales or transfers to other departments; (5) miscellaneous royalties; (6) revenues from dehydration and other processing of gas of others except as provided for in the instructions to Account 495; (7) revenues for rights and/or benefits received from others which are realized through research, development, and demonstration ventures; (8) gains on

settlements of imbalances receivable and payables; (9) revenues from penalties earned pursuant to tariff provisions, including penalties associated with cash-out settlements; and (10) revenues from shipper-supplied gas.

2. Commenters

18. NGSA states that the information on pages 300–01 of the forms could be made more useful by requiring pipelines that use these accounts to add footnotes detailing the type of transaction(s) being reported.³⁸ NGSA argues that the activities listed under these accounts are outdated and the Commission should require additional detail.³⁹ NGSA also requests that to the extent a pipeline has revenues associated with items not listed for Account 495 on page 308 of Form 2, the pipeline be required to specify each such type and amount of revenue on a separate line under line 11 and provide sufficient detail for customers to identify the accounts to which these revenues are attributable.⁴⁰ The Independent Petroleum Association of America (IPAA) and the Texas Independent Producers and Royalty Owners Association (TIPRO) also request that pipelines that continue to use Account Nos. 480–484 be required to add footnotes on revised pages 300–301 of Form 2 detailing the type of transaction(s) reported.⁴¹ Finally, Calpine suggests the addition of a revenue category to page 308 for purposes of capturing any environmental credits earned by the pipeline.⁴²

3. Commission Determination

19. The NOPR proposed the disaggregation of this revenue data to enable the Commission and the forms' users to achieve a meaningful understanding of the nature of the business activities from which the revenues are derived. The Commission recognized that greater detail concerning these revenue accounts could provide data that would enable the Commission and pipeline customers to identify the dispositions of gas acquired by or tendered to the pipeline and how these transactions may affect the pipeline's cost of service. To that end, the NOPR proposed a new schedule which requires a breakdown of revenue into ten categories. The NOPR addressed many of the issues raised by NGSA, IPAA and TIPRO and we believe

that the additional detail sought by these parties would add unnecessary burden to this new reporting requirement. We agree with Calpine that identifying environmental credits received by the pipeline is useful and important information. Rather than add a new revenue category to page 308, we will require pipelines that receive environmental credits to list those credits in a footnote to the Financial Statements.

D. Affiliate Transactions

1. Financial Forms NOPR

20. The NOPR proposed that pipelines be required to provide detailed information regarding affiliate transactions. The Commission agreed with the form users' assertions that currently, Forms 2 and 2–A do not require any reporting of affiliate transactions and that disclosures of affiliate transactions are needed to prevent cross-subsidization between regulated and unregulated companies. The NOPR proposed to add a new schedule, page 358, to both Forms 2 and 2–A entitled “Transactions with Associated (Affiliated) Companies” that would require filers to report affiliate transactions. The NOPR proposed that filers be required to report the following: (1) A description of the good or service transacted; (2) the name of the associated (affiliated) company; (3) the FERC account charged or credited; and (4) the amount charged or credited. The NOPR proposed that where amounts billed to or from an affiliate are based on an allocation process, filers be required to explain the basis of the allocation in a footnote. The NOPR also proposed to amend the existing instructions for page 357, Charges for Outside Professional and Other Consultative Services, to exclude affiliate transactions, and remove the existing \$250,000 threshold for reporting services.

2. Commenters

21. INGAA, AGA, Williston, Kinder Morgan Interstate Pipelines (Kinder Morgan) and other commenters ask the Commission to reconsider the proposed removal of the \$250,000 cost threshold for the reporting of non-affiliated “Charges for Outside Professional and Other Consultative Services” on page 357 of Form 2.⁴³ INGAA and Williston assert that eliminating the threshold will add a significant burden to Form 2

³⁸ NGSA NOPR Comments at 5.

³⁹ *Id.* at 6.

⁴⁰ NGSA NOPR Comments at 6.

⁴¹ IPAA and TIPRO NOPR Comments at 4.

⁴² Calpine NOPR Comments at 6.

⁴³ INGAA NOPR Comments at 3–4; AGA NOPR Comments at 6; Williston NOPR Comments at 3; Kinder Morgan NOPR Comments at 3–4; Enbridge Energy Partners (Enbridge) NOPR Comments at 7–9; Dominion NOPR Comments at 11.

filers without adding a significant benefit to the form's users.⁴⁴ For similar reasons, AGA and Williston also recommend that the \$250,000 cost threshold be applied to the new schedule for affiliate transactions.⁴⁵ AGA requests that the Commission clarify that the required affiliate information be limited to transactions between a jurisdictional entity and its affiliates and not include transactions solely between affiliated entities that are not subject to the Commission's reporting requirements.⁴⁶ Dominion asks the Commission to clarify that when an affiliate provides a service on an on-going basis, only a single line entry describing that service is required.⁴⁷

3. Commission Determination

22. The Commission agrees that elimination of the \$250,000 cost threshold for page 357 of Forms 2 and 2-F and the absence of a similar threshold for the new schedule for reporting affiliate transactions may add a substantial burden to the forms' filers. Accordingly, we will reinstate the \$250,000 cost threshold on page 357 (Charges for Outside Professional and Other Consultative Services) and add an instruction to the new schedule on page 358 (Transactions with Associated (Affiliated) Companies) to require reporting of amounts in excess of \$250,000. However, in order to ensure full reporting of these expenses, we will add a requirement for pages 357 and 358 that the filer must provide the total amount of all services amounting to \$250,000 or less. As requested by AGA, we clarify that affiliate transactions reported are limited to transactions between a jurisdictional entity and its affiliates. Finally, in response to Dominion's request, we clarify that when an affiliate provides an on-going service, only a single line entry describing that service is required.

E. Incremental Pricing Policy

1. Financial Forms NOPR

23. The NOPR proposed to add a new schedule to Forms 2 and 2-A (page 217), entitled "Non-Traditional Rate Treatment Afforded New Projects," to collect information regarding a company's individual rate treatments for services. The necessity for more information regarding rate treatment for new pipeline construction arose as a

result of the evolution of the Commission's pricing policy for pipeline capacity expansions, due in part to the changes in the industry brought by Order No. 636. The "rolled-in" rate treatment approach for pipeline capacity pricing, where added facilities were integrated into the pipeline's mainline system to the benefit of all customers, has changed as Commission policy now requires that a pipeline be prepared to financially support expansion projects without relying on subsidization from existing customers.⁴⁸ Where incremental rates for new capacity have been approved, the Commission has required pipelines to maintain their accounting records so as to be able to identify the facilities and related costs used to provide service to the incremental rate customers.⁴⁹ To date, however, the Commission has not required the disaggregation of these costs in Forms 2 and 2-A. The NOPR proposed that a proper rate assessment would be enhanced by providing a breakdown of costs related to these separate facilities. The NOPR proposed to add a new schedule to Forms 2 and 2-A, at page 217, entitled "Non-Traditional Rate Treatment Afforded New Projects," to report the following: (1) The name of the facility; (2) the docket number under which the facility was approved; (3) the type of rate treatment (e.g., incremental or another rate treatment); (4) the amount of plant in service; (5) the amount of accumulated depreciation; (6) the amount of accumulated deferred income taxes; (7) amount of operating expenses; (8) the amount of maintenance expenses; (9) the amount of depreciation expense; (10) incremental revenues; and (11) other expenses.

2. Commenters

24. Most commenters supported the addition of this requirement. Calpine requests that the list of required information be expanded to include other items such as incremental fuel treatment and project financing.⁵⁰ Calpine asserts that this separate recording of incremental costs and functions should be expanded throughout the proposed modifications to Forms 2 and 2-A.⁵¹ Dominion states that the Commission should exempt from these new reporting requirements LNG import projects authorized on a

"proprietary" basis with deregulated rates under the Energy Policy Act of 2005 (EPAct 2005) and the Commission's "Hackberry" policy.⁵²

3. Commission Determination

25. Calpine's request for additional information is granted in part. We agree that if incremental projects charge a separate fuel rate rather than using the systemwide fuel rate, the pipeline should identify the volumes received and used for a particular incremental project. We will require this information to be provided in a footnote to the report with the information identified for each incremental project to which the requirement applies. Further, we deny Calpine's request for information related to project financing. The Commission generally approves rates for incremental projects designed on the rate of return approved in the pipeline's last rate case; thus, the information is not necessary.⁵³ With that addition, we adopt the new requirements proposed in the NOPR. Further, we clarify that this rule does not affect any waivers or exemptions from filing requirements granted previously by the Commission.

F. Discounted and Negotiated Rate Services

1. Financial Forms NOPR

26. The NOPR proposed to add a new schedule, page 313, entitled "Discounted Rate Services and Negotiated Rate Services," to Forms 2 and 2-A to require pipelines to report the revenues and volumes applicable to discounted and negotiated rate services provided during the reporting period. Currently, Form 2 filers report the dollar amounts and volumes associated with the type of transportation provided. These are pages 300-01, Gas Operating Revenue; pages 302-03, Revenues from Gas Transportation of Others Through Gathering Facilities; pages 304-05, Revenues from Gas Transportation of Others Through Transmission Facilities; pages 306-07, Revenues from Storing Gas of Others; and page 308, Other Gas Revenues. However, the current schedules do not require filers to identify the volumes and revenues applicable to discounted, negotiated, or recourse rates. The Commission believes that since individual pipelines may provide services from the same facilities using different rates, it is important for

⁴⁴ INGAA NOPR Comments at 4; Williston NOPR Comments at 3-4.

⁴⁵ AGA NOPR Comments at 6; Williston NOPR Comments at 3-4.

⁴⁶ AGA NOPR Comments at 5-6.

⁴⁷ Dominion NOPR Comments at 10-11.

⁴⁸ See *Certification of New Interstate Natural Gas Pipeline Facilities, Statement of Policy*, 88 FERC ¶ 61,227 (1999), *order clarifying policy*, 90 FERC ¶ 61,128 (2000), *order clarifying policy*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

⁴⁹ See 18 CFR 154.309.

⁵⁰ Calpine NOPR Comments at 8.

⁵¹ *Id.*

⁵² Dominion NOPR Comments at 8-9. See *Hackberry LNG Terminal LLC*, 101 FERC ¶ 61,294 (2002) (*Hackberry*), *order issuing certificates and granting reh'g*, 104 FERC ¶ 61,269 (2003).

⁵³ See, e.g., *Texas Eastern, LP*, 99 FERC ¶ 61,383, at P 22 (2002); *Kern River Gas Transmission Co.*, 98 FERC ¶ 61,205, at 61,721-22 (2002); *Trailblazer Pipeline Co.*, 95 FERC ¶ 61,258, at 61,903 (2001).

the Commission and the pipeline customer to know the level of services provided under each rate schedule in order to protect against cross-subsidization and to ensure that recourse rates remain just and reasonable.

2. Commenters

27. One commenter, Calpine, requests that the Commission further clarify that filers of this schedule be required to complete a separate chart for each incremental vintage so that the revenues and volumes can be appropriately attributed.⁵⁴

3. Commission Determination

28. The Commission believes that the proposed schedule described in the NOPR, requiring filers to report the revenues and volumes associated with the types of transportation provided, is adequate for purposes of assessing rates to prevent cross-subsidization and to ensure the justness and reasonableness of recourse rates. The Commission finds that the additional information requested by Calpine would add unnecessary burden to the pipeline's reporting requirements. Accordingly, the modification is accepted as outlined in the NOPR.

G. Rate Base and Other Cost of Service Components—Deferred Income Taxes

1. Financial Forms NOPR

29. The NOPR proposed to add an instruction to each deferred income tax schedule, as listed below, requiring the pipeline to provide a summary of the type and amount of deferred income taxes reported in the beginning-of-year and end-of-year balances for deferred income taxes used to develop jurisdictional recourse rates. At present, Form 2 filers are required to report only a single line of data for the total deferred income tax balance related to gas operations on the following schedules: (1) Accumulated Deferred Income Taxes (Account 190), pages 234–35; (2) Accumulated Deferred Income Taxes—Other Property (Account 282), pages 274–75; and (3) Accumulated Deferred Income Taxes—Other (Account 283), pages 276–77. Deferred income tax balances are an important factor in determining rate base and evaluating a pipeline's earned rate of return. The level of detail now required in Form 2 for deferred income taxes related to gas operations does not provide sufficient information to enable customers to evaluate the pipeline's current rates. The NOPR also proposed to add these deferred tax reporting schedules to

Form 2–A to allow all pipeline customers access to this information.

2. Commenters

30. Calpine asks the Commission to clarify that the reporting of deferred income taxes should be done on a disaggregated basis when possible.⁵⁵ Williston, on the other hand, argues that due to the subjectivity of deferred income taxes, speculation on which deferred income taxes are included in rate base is a subject more appropriately addressed in a rate case.⁵⁶

3. Commission Determination

31. Contrary to Williston's concern, the NOPR's proposal does not require speculation on the part of the pipeline. The proposal would simply require the pipeline to provide an estimate for the deferred income tax accounts for the immediate reporting year, and to provide a summary of the end-of-year and beginning-of-year balances for the reported amounts. These estimates are not binding on the pipeline at such time as it may file a section 4 rate case. Customers need this information in order to assess the reasonableness of the rates currently paid. With respect to Calpine's request that reporting of deferred income taxes be done on a disaggregated basis when possible, we believe that the required summary of the type and amount of deferred income taxes reported in the beginning-of-year and end-of-year balances will provide adequate detail. Accordingly, the proposal as outlined in the NOPR is adopted.

H. State Income Tax Expense

1. Financial Forms NOPR

32. The NOPR proposed to add a new column Q to the Taxes Accrued, Prepaid and Charged During Year, Distribution of Taxes Charged schedule on pages 262–3 of Form 2 and to add the same schedule to Form 2–A to require pipelines to report state and local income tax rates. Currently, only the aggregate state deferred income tax for the entire reporting entity is required to be reported on Form 2. This information does not permit the Commission or the pipeline's customers to determine the amount of state income tax expense that should be associated with the before-tax net income generated from the sales of transportation services under more than one rate structure.

2. Commenters

33. The American Public Gas Association (APGA) requests that the

Commission add the requirement that pipelines include the property valuation used by taxing authorities.⁵⁷

3. Commission Determination

34. The Commission believes that the proposal to require pipelines to report the state and local income tax rates is sufficient to aid the forms' users in interpreting the data. We reject APGA's request that pipelines include the property valuation used by taxing authorities. We believe that access to disaggregated data will provide the necessary information. Accordingly, the proposed change outlined in the NOPR is adopted.

I. Regulatory Assets and Liabilities

1. Financial Forms NOPR

35. The NOPR proposed to revise the schedule entitled "Other Regulatory Assets," page 232, by adding footnote citations for each regulatory asset to record the item and adding a column to identify amounts written off during the period as non-recoverable. In addition, the NOPR proposed to revise the "Other Regulatory Liabilities" schedule, page 278, by adding footnote citations for each regulatory liability to identify the regulatory approval to refund the item and adding a column to identify amounts written off during the period as non-refundable. At present, Forms 2 and 2–A filers are required to report a breakout of regulatory assets and liabilities where future recovery/refunding from ratepayers is probable. These amounts, however, can be challenged in a section 4 rate case proceeding. The proposed revisions will allow the Commission and customers to determine which assets and liabilities have been written off or refunded during the reporting period.

2. Commenters

36. Dominion argues that the regulatory assets and liability information should not be included in the Form 3–Q, but only in the annual report.⁵⁸ The MPSC suggests that the Commission modify its proposal to require pipelines to report the asserted basis for recording a regulatory asset or liability, including, but not limited to, any regulatory approval to record the item.⁵⁹

3. Commission Determination

37. The Commission believes that the footnote citations proposed in the NOPR will provide a level of detail sufficient to enable the forms' users to assess the

⁵⁴ Calpine NOPR Comments at 8–9.

⁵⁵ Calpine NOPR Comments at 9.

⁵⁶ Williston NOPR Comments at 4–5.

⁵⁷ APGA NOPR Comments at 5.

⁵⁸ Dominion NOPR Comments at 5–7.

⁵⁹ MPSC NOPR Comments at 7.

pipeline's reporting for regulatory assets and liabilities. We believe it is unnecessary and burdensome to require the pipeline to report the basis for recording the asset or liability together with a citation to any regulatory approval. As drafted, the NOPR would require the pipeline to identify any regulatory approval to refund an item and to record such refund. We believe this data provides the forms' users with the information necessary to determine which pipeline assets have been written off or refunded during the relevant reporting period. Accordingly, the proposal as outlined in the NOPR is adopted.

J. Employee Pensions and Benefits

1. Financial Forms NOPR

38. The NOPR proposed to amend Instruction 3 to page 122.1 to require filers that participate in multi-employer post-retirement benefit plans to disclose the amount of cost recognized in the filer's financial statements for each plan for the period presented and the basis for determining the filer's share of the total plan costs. In addition, the NOPR proposed to add a schedule entitled "Employee Pensions and Benefits," page 352, to both Forms 2 and 2-A, to provide additional details about the types and costs of employee benefits. At present, this information is not readily available in Forms 2 and 2-A, due in part to the pipelines' participation in multi-employer benefit plans in which they are assigned a portion of the total cost, and the flexibility in the way in which information is described in a footnote disclosure. The NOPR would permit forms users to assess the cost of employee benefits and better compare this information between periods and entities.

2. Commenters

39. The MPSC requests that the Commission require pipelines to report the recommended/required contributions to pension and post-retirement benefits other than pensions (PBOP) funds identified by the pipelines' actuaries and reconcile any differences between these recommended contribution amounts and the cost recognized on the pipelines' financial statements.⁶⁰ Further, MPSC requests that pipelines also be required to reconcile any difference between the actuary's recommended contribution and the amounts reported in Account 926.⁶¹

⁶⁰ MPSC NOPR Comments at 8.

⁶¹ *Id.*

3. Commission Determination

40. The Commission believes that the proposed changes are reasonable and respond adequately to the request for additional information on pensions and benefits. The NOPR's proposal would require filers to disclose the amount of costs for benefit plans and the basis for determining the filer's share of the total cost. We believe this level of detail is sufficient and reject as burdensome MPSC's request that pipelines provide a reconciliation between costs recommended by an actuarial and costs adopted. The MPSC's request for reconciliation is the basis of review in a rate case for employer pension and PBOPs. Accordingly, the proposed change in the NOPR is adopted.

K. Other Issues

Source of Capital Structure

1. Financial Forms NOPR

41. The NOPR rejected requests that pipelines be required to provide additional detail on capital structure.⁶² The Industry Coalition's request for additional capital structure information included the requirement that if the pipeline believes an alternative capital structure should be used for rate purposes, the appropriate capital structure should be included in a footnote along with an explanation of why another capital structure is appropriate.⁶³ The NOPR rejected this request on the grounds that it would require the pipeline to speculate on a preferred capital structure.⁶⁴

2. Commenters

42. Several commenters, including NGS, APGA, Calpine, Enbridge, and Process Gas Consumers Group (PGC), urge the Commission to reconsider its ruling and to require pipelines to identify the specific entity used as the source for the capital structure figures reported on page 218a.⁶⁵ PGC, APGA, NGS and others observe that INGAA's reply comments in response to the NOI stated that it has no objection to identifying the entity whose capital structure is reported on page 218a of Form 2.⁶⁶

⁶² See NOPR at P 27.

⁶³ See Industry Coalition NOI Comments at 4.

⁶⁴ NOPR at P 27.

⁶⁵ See APGA NOPR Comments at 3-4; NGS NOPR Comments at 3-4; Enbridge NOPR Comments at 3-4; Calpine NOPR Comments at 12; PGC NOPR Comments at 3-4.

⁶⁶ NGS NOPR Comments at 3; PGC NOPR Comments at 3; APGA NOPR Comments at 3-4. See INGAA NOI Reply Comments at 11.

3. Commission Determination

43. In light of the comments on this issue, including the recognition that INGAA stated that it had no objection to identifying the entity whose capital structure is reported on page 218a of the form, the Commission will revise the instructions for page 218a of Form 2. The reporting pipeline will be required to provide, in a footnote, the name of the entity whose capital structure is reported. We reiterate, however, that the pipeline will not be required to identify whether it plans to use a different capital structure and an explanation of its appropriateness.

Reporting the Source of Return on Equity Figures

1. Financial Forms NOPR

44. The NOPR rejected proposals to add additional requirements to the current return on equity disclosure. At present, page 218a of Form 2 requires that the pipeline provide the rate of return granted in the last rate proceeding. If this rate of return is not available, the form requires the pipeline to use the average rate of return earned during the preceding three years. The NOPR expressed concern that adding additional disclosures, including the pipeline's calculation of the three year average rate of return, would be burdensome to the pipelines and could have the unintended effect of turning the Form 2 into a "mini" rate case.⁶⁷

2. Commenters

45. APGA, NGS, and PGC request that the Commission reconsider this decision.⁶⁸ At a minimum, PGC requests that the Commission require pipelines to document whether they have elected to use the FERC-approved rate of return on equity or a three-year average.⁶⁹ APGA requests that page 218a of Form 2 be amended to include a mandatory disclosure of whether the listed return on equity is from the pipeline's most recent rate proceeding (and if so, to identify such proceeding by docket number and reference to any applicable documents and/or Commission order), or if not, a description of the calculation used to derive the listed rate of return.⁷⁰ APGA asserts that this approach would provide the public with vital information while not encumbering pipelines with any additional burden.⁷¹ NGS states that INGAA's reply comments to the NOI indicated that it

⁶⁷ NOPR P 27.

⁶⁸ APGA NOPR Comments at 4; NGS NOPR Comments at 4; PGC NOPR Comments at 3.

⁶⁹ PGC NOPR Comments at 3.

⁷⁰ APGA NOPR Comments at 4-5.

⁷¹ *Id.*

did not object to providing which option was used for purposes of the rate of return, with the caveat that a "black box" settlement figure be viewed as an acceptable proxy for the pipeline's approved rate of return.⁷² NGSA urges the Commission to adopt INGAA's suggested compromise to document which option is reported.⁷³

3. Commission Determination

46. The Commission agrees that it would be a fair compromise to require that pipelines disclose the following information when reporting common equity at line (5), column (d), on page 218a: (1) Indicate if the rate of return was formally approved in a rate case; (2) indicate if the rate of return was a calculated black-box settlement approved rate; or (3) if the rate of return was an actual three-year average rate of return. This information should provide sufficient clarification for the form's users and will not, we believe, unduly burden the pipeline's reporting requirements.

Costs and Revenues Associated With Trackers or Special Surcharges

1. Commenters

47. The New York Public Service Commission (NYPSC) states that it supports the Commission's proposed amendments to Forms 2, 2-A, and 3-Q. NYPSC requests, however, that the Commission address its suggestions for additional reporting requirements on Form 2, including billing determinants for each rate schedule at the beginning and end of the year, as well as any revenues and costs associated with trackers or special surcharges.⁷⁴

2. Commission Determination

48. NYPSC's comments did not identify the items subject to tracking or special surcharges. The Commission does not believe that a specific cost and revenue analysis of these revenues is required since, with the exception of some timing differences, the transactions generally should be a wash, i.e., the reported revenues would include the surcharge recoveries and the pipeline's operation and maintenance expenses would reflect the costs incurred. We do agree that it would be beneficial to have a summary of the revenues and expenses for each tracked cost and special surcharge. Therefore, the Commission is adding this requirement to the final rule. We will require that the pipeline provide this

summary in the footnotes to the financial statements. We decline to grant NYPSC's request to require the pipeline to include billing determinants for each rate schedule at the beginning and end of the year. This information is available on the Index of Customers, filed by pipelines on a quarterly basis.

L. Elimination of Form 11

1. Financial Forms NOPR

49. The NOPR sought comments on whether the information in FERC No. 11, Natural Gas Pipeline Company Quarterly Statement of Monthly Data (Form 11) is relied upon by pipeline customers. The NOPR also asked whether the information reported in Form 11 could, alternatively, be incorporated into Form 3-Q. Form 11 is a quarterly filing made by natural gas companies whose gas transported or stored for a fee exceeded 50 million Dth in each of the three previous years.⁷⁵ In comments on the NOI, Williston had suggested that Form 11 be eliminated and that the information required in Form 11 be incorporated into Form 3-Q.⁷⁶

2. Commenters

50. Most commenters expressed a need for the information reported in Form 11. NGSA, Calpine, the IPPA and TIPRO oppose the elimination of the form unless the information reported is added to Forms 2 and 3-Q, with the assurance that this alternative would maintain the monthly volume detail currently provided in Form 11.⁷⁷ NGSA stated that the information reported in Form 11 is the only source of contract demand and volume information that enables customers to properly attribute costs to incremental services and design rates.⁷⁸ One commenter, Dominion, asserted that the information reported in Form 11 is unnecessary but stated that if the Commission deems that such information needs to be reported, Form 11 should be incorporated into Forms 2 and 3-Q.⁷⁹

3. Commission Determination

51. The comments indicate that Form 11 information is unique and useful for performing a reasonable rate assessment. We agree with NGSA and others that eliminating Form 11 without incorporating the detail in other forms would remove from consideration data that is not available elsewhere. We

believe that the most efficient way to collect the information now reported in Form 11 is to add a new schedule to Forms 2 and 3-Q, entitled "Monthly Quantity & Revenue Data by Rate Schedule," to require the reporting of information now contained in Form 11. An additional benefit of this change in reporting is that the data collected in Form 11 can now be filed using Commission issued software as part of the Form 2 filing rather than as a separate submission. Accordingly, FERC Form 11 will be terminated on February 29, 2009, the date that pipelines will be required to file a revised Form 3-Q.

M. Miscellaneous Issues

52. The Commission proposed to extend the filing date for the Certified Public Accountant Certification Statement until May 18 of the following calendar year for natural gas companies.⁸⁰ The Commission noted that this proposal would reduce the filing and administrative burden by allowing more time for the company and the certified public accountant to identify and resolve issues that may arise during the course of the examination.⁸¹ No comments were filed on this issue and, accordingly, the proposal is adopted as outlined in the NOPR.

53. The NOPR discussed two questions posed in the NOI: (1) Whether interstate pipelines should be required to notify the Commission when their total sales or transactions fall below the minimum thresholds established in the Commission's regulations such that the pipeline believes that it is no longer subject to the filing requirements; and (2) whether the Commission should require a showing of good cause before granting an extension of time in which to file the reports.⁸² Calpine supports the concept that a pipeline should advise the Commission if it believes it does not meet the threshold requirements for reporting.⁸³ The Commission agrees that notification of non-filing status would be helpful to the Commission and users of Forms 2 and 2-A. Accordingly, at such time as a pipeline now subject to the reporting requirements for either Form 2 or 2-A has, in three consecutive years, experienced volumes and transactions below the threshold levels specified in the Commission's regulations and believes that it is no longer required to file a Form 2 or 2-A, it must notify the Commission of this change. The

⁷² NGSA NOPR Comments at 4. See INGAA's Reply Comments to NOI at 12.

⁷³ NGSA NOPR Comments at 4.

⁷⁴ NYPSC NOPR Comments at 3.

⁷⁵ See 18 CFR 260.3.

⁷⁶ See Williston Basin NOI Comments at 6-7.

⁷⁷ NGSA NOPR Comments at 7-8; Calpine NOPR Comments at 11; ITPI NOPR Comments at 3-4.

⁷⁸ NGSA NOPR Comments at 7-8.

⁷⁹ Dominion NOPR Comments at 11-12.

⁸⁰ See 18 CFR 158.11.

⁸¹ NOPR at P 63.

⁸² See 18 CFR 260.1 and 260.2.

⁸³ Calpine NOPR Comments at 11.

pipeline must file the notification on the date that the form would otherwise be due. With respect to the requirement that a pipeline must provide good cause when requesting an extension of time in which to comply with the Commission's reporting regulations, the Commission believes that any request for an extension of time must show good cause. Without such a showing, the request may not be granted.

IV. Implementation

54. The NOPR proposed an effective date of January 1, 2008. Accordingly, companies subject to the new requirements would file their revised Form 3-Q beginning with the first quarter of 2009 and their revised Forms 2 and 2-A in 2009 for calendar year 2008. Form 11 data will continue to be collected through 2008 and pipelines will be required to file the form until February 28, 2009, when the revised 3-Q filings will commence. While INGAA did not object to the Commission's proposed effective date, it requests that the Commission recognize that meeting this deadline may be difficult for some pipeline companies.⁸⁴ INGAA states that although pipelines will not be required to file their new annual Forms 2 and 2-A reflecting revised data for 2008 until 2009, the changes will require modifications to accounting and computer systems that will need to be in place on January 1, 2008, to capture data for the full year 2008.⁸⁵ Enbridge requests that the effective date of the final rule be revised to the first day of the first full calendar quarter that falls at least 90 days after the Commission's issuance of a final rule.⁸⁶

55. The Commission proposed the January 1, 2008 effective date so that pipelines' revised Form 2 and 2-A filings, reflecting an entire year of data, could be filed in 2009. Enbridge's suggestion that the effective date be changed to a mid-year calendar quarter would mean that the new Form 2 data for filing year 2009 would be incomplete. The proposals contained in the September 20, 2007 NOPR have not changed substantially in the final rule. The reporting of some information, deemed burdensome by pipeline filers, has been modified. Most of this data will have been collected by the pipeline during the first quarter of 2008 and the Commission does not believe that the necessary changes warrant any delay in the filings required for 2009.

V. Regulatory Flexibility Act Certification

56. The Regulatory Flexibility Act of 1980 (RFA)⁸⁷ generally requires a description and analysis of final rules that will have a significant economic impact on a substantial number of small entities.⁸⁸ However, the RFA does not define "significant" or "substantial." Instead, the RFA leaves it up to an agency to determine the effect of its regulations on small entities. Most filing companies regulated by the Commission do not fall within the RFA's definition of small entity.

57. The Commission estimates that there are 74 Major natural gas pipeline companies and 44 Non-major companies that will be affected by the final rule.⁸⁹ As we stated in the NOPR, the rule will apply to all interstate natural gas companies subject to the Commission's jurisdiction. While we do not foresee that the Rule will have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, we will consider granting waivers in appropriate circumstances. In addition, the elimination of Form 11 will further reduce the economic impact on most entities.

58. Accordingly, the Commission certifies that the Rule will not have a significant impact on a substantial number of small entities. As a result, no regulatory flexibility analysis is required.

VI. Environmental Statement

59. Commission regulations require that an environmental assessment or an environmental impact statement be prepared for a Commission action that may have a significant effect on the human environment.⁹⁰ However, in 18 CFR 380.4(a)(5), we categorically excluded the type of information gathering required in this Rule from the requirement to prepare an environmental impact statement. Thus, we affirm the finding we made in the NOPR that this final rule does not

impose any requirements that might have a significant effect on the human environment and find that no environmental impact statement concerning this rule is required.

VII. Public Reporting Burden and Information Collection Statement

60. The following collections of information contained in this Final Rule have been submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the Paperwork Reduction Act of 1995.⁹¹ The Commission identifies the information provided under Parts 158 and 260 of the Commission's regulations. The Commission is revising the reporting requirements for interstate natural gas companies as contained in the above financial and operational information collections.

Information Collection Statement

Title: FERC Form No. 2, "Annual Report for Major natural gas companies;" FERC Form No. 2-A, "Annual Report for Nonmajor public utilities and licensees; FERC Form No. 3-Q, "Quarterly financial report of electric utilities, licensees, and natural gas companies."

FERC Form No. 11, "Natural gas pipeline quarterly statement of monthly data."

Action: Final Rule.

OMB Control Nos.: 1902-0028 (Form 2); 1902-0030 (Form 2-A); 1902-0205 (Form 3-Q), and 1902-0032 (Form 11).

Respondents: Business or other for profit.

Frequency of responses: Quarterly and Annually.

Necessity of the information: This Final Rule prescribes certain modifications to the Commission's financial reports for interstate natural gas companies, Form Nos. 2, 2-A, and 3-Q. The revisions adopted in this Final Rule will increase the forms' usefulness to both the public and the Commission. The Final Rule will improve the usefulness, accuracy and transparency of financial information submitted to the Commission. Expanding the detail of the financial data assists the Commission in carrying out its responsibilities under the NGA to ensure that rates are just and reasonable.

Burden Statement: There are an estimated 44 Nonmajor and 74 Major natural gas companies that will be affected by the Final Rule, for a total of 118 affected respondents.⁹² The change in annual public reporting burden per

⁸⁷ 5 U.S.C. 601-12.

⁸⁸ The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small business concern" as a business that is independently owned and operated and that is not dominant in its field of operation. 15 U.S.C. 632. The Small Business Size Standards component of the North American Industry Classification System defines a small natural gas pipeline company as one whose total annual revenues, including its affiliates, are \$6.5 million or less. 13 CFR 121.201.

⁸⁹ These numbers are based on the most recent filings.

⁹⁰ *Regulations Implementing National Environmental Policy Act*, Order No. 486, 52 FR 47897 (Dec. 17, 1987); FERC Stats. & Regs. ¶ 30,783 (Dec. 10, 1987) (*codified* at 18 CFR Part 380).

⁸⁴ INGAA NOPR Comments at 2.

⁸⁵ *Id.*

⁸⁶ Enbridge NOPR Comments at 10.

⁹¹ 44 U.S.C. 3507(d).

⁹² These numbers are based on the most recent filings.

respondent for Form 2, Form 2-A, and Form 3-Q for Major and Form 3-Q for Nonmajor natural gas companies is estimated to be 53, 135, 30, and 21 additional hours respectively. These estimates translate into 83 additional hours for Major natural gas companies annually and 156 additional hours for Nonmajor natural gas companies annually. The corresponding annual aggregate increase per form is: 3,922 additional hours annually for Form 2; 5,940 additional hours annually for Form 2-A; 2,200 additional hours annually for Form 3-Q for Major natural gas companies; and 924 additional hours annually for Form 3-Q for Nonmajor natural gas companies. While the Final Rule increases the estimated total annual burden by 13,006 hours, the Rule eliminates Form 11 which reduces the total annual reporting burden by an estimated 888 hours. If this change is taken into consideration, the annual burden increase would be 12,118 hours. One commenter, Dominion, stated that while it applauds the Commission for striving to achieve a balance between the benefits these revisions will achieve, in assessing pipeline rates, and the imposition of any additional burden on the pipeline, it believes the estimated hours may be too low.⁹³ No other commenters offered burden estimates. Dominion estimates that the annual report will require an additional 60 hours (the Commission estimates 53 hours) and that preparation of information for Form 3-Q would be about 23 hours per quarter (the Commission estimates seven hours).⁹⁴ Dominion also estimates that additional time will be required in the first year to implement, including the required computer programming, the changes in reporting requirements.⁹⁵ The Commission agrees that some time will be required to implement the changes, however, the Commission has provided the companies with the software to prepare the financial reports and we believe Dominion's estimates are excessive. Most of the data required by the Final Rule is information that is already collected by the pipeline company. Certain of the schedules added to Form 3-Q are schedules that are currently in the annual forms and require only that this data be reported on a quarterly basis in addition to the annual reports. Further, the Final Rule has modified some requirements that will ease considerably the reporting burden, that is, reinstating the \$250,000 cost threshold for page 357 of Form 2,

and instating the same \$250,000 threshold for new reporting on affiliate transactions on page 358. In addition, the Final Rule eliminates Form 11 which was previously filed in hard copy and incorporates that information into the annual and quarterly forms, thereby allowing the data to be submitted using Commission software. This, too, produces a substantial decrease in burden. We believe that the new, or revised, requirements strike a fair balance between the benefits these changes will facilitate and the imposition of any additional burden on the pipeline.

Internal Review: The Commission has conducted an internal review of the public reporting burden associated with this collection of information and has assured itself, by means of its internal review, that there is specific, objective support for this information burden estimate. Moreover, the Commission has reviewed the collection of information required by this rule and has determined that the collection of information is necessary and conforms to the Commission's plan, as described in this order, for the collection, efficient management, and use of the required information.⁹⁶

61. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the Chief Information Officer, phone: (202) 502-8415, fax: (202) 273-0873; e-mail: Michael.Miller@ferc.gov]. Comments concerning the collection of information and the associated burden estimates should be sent to the contact listed above and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone (202) 395-7318, fax: (202) 395-7285].

VIII. Document Availability

62. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Washington, DC 20426.

63. From the Commission's Home Page on the Internet, this document is

available at the Commission's document management system, e-Library. The full text of this document is available on e-Library in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in e-Library, type the docket number excluding the last three digits of this document in the docket number field.

63. User assistance is available for e-Library and the Commission's Web site during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@ferc.gov) or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.reference@ferc.gov).

IX. Effective Date and Congressional Notification

64. This final rule will take effect April 10, 2008, and the revisions to the forms are applicable on January 1, 2008, as proposed in the NOPR, with one exception. While the rule eliminates Form 11, it is important that the data collected in Form 11 continue to be filed with the Commission. Accordingly, pipelines will be required to continue to collect the data and file Form 11 for the remainder of 2008. Form 11 will be eliminated applicable as of February 28, 2009 when information for the fourth quarter of 2008 is filed. The January 1, 2008 applicability date will require Form 2 and 2-A filers to collect the revised data during 2008 and file a revised annual form in 2009 for the 2008 reporting year. Form 3-Q filers will submit a revised 3-Q beginning with the first quarter of 2009. The information now reported in Form 11 will be incorporated into Forms 2 and 3-Q beginning in 2009.

65. The Commission has determined with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB that this final rule is not a major rule within the meaning of section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.⁹⁷ The Commission will submit the final rule to both houses of Congress and the General Accounting Office.

List of Subjects

18 CFR Part 158

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements, Uniform System of Accounts.

⁹³ Dominion NOPR Comments at 4.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See 44 U.S.C. 804(2).

⁹⁷ 5 U.S.C. 801.

18 CFR Part 260

Natural gas, Reporting and recordkeeping requirements.

By the Commission.

Kimberly D. Bose,
Secretary.

In consideration of the foregoing, the Commission amends parts 158 and 260 of Title 18 of the *Code of Federal Regulations*, as set forth below:

PART 158—ACCOUNTS, RECORDS, MEMORANDA AND DISPOSITION OF CONTESTED AUDIT FINDINGS AND PROPOSED REMEDIES

■ 1. The authority citation for part 158 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7102–7352.

■ 2. Section 158.11 is revised to read as follows:

§ 158.11 Report of certification.

Each natural gas company not classified as Class C or Class D prior to January 1, 1984 must file with the Commission by May 18 of the following calendar year, a letter or report of the independent accountant certifying approval, covering the subjects and in the format prescribed in the General Instructions of the applicable Form No. 2 or Form No. 2–A. The letter or report must also identify which, if any, of the examined schedules do not conform to the Commission's requirements and

must describe the discrepancies that exist. The Commission will not be bound by the certification of compliance made by an independent accountant under this paragraph.

PART 260—STATEMENTS AND REPORTS (SCHEDULES)

■ 3. The authority citation for part 260 continues to read as follows:

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

■ 4. Section 260.3 is removed.

Note: The following appendices will not be published in the Code of Federal Regulations.

BILLING CODE 6717–01–P

**Appendix A- Summary Table of Proposed Changes to Schedules for FERC
Form Nos. 2, 2-A, and 3-Q.**

	Page Numbers	Schedule	Form 2	Form 2-A	Form 3- Q, major	Form 3-Q, non-major
1	122.1	Notes to Financial Statements	rev	rev	rev	rev
2	217	Rate Treatment	new	new		
3	218a	General Description of Construction Overhead Procedure (continued)	rev	rev	rev	rev
4	232	Other Regulatory Assets	rev	rev	rev	rev
5	234-235	Accumulated Deferred Income Taxes	rev	new		
6	262-263	Taxes Accrued, Prepaid and Charged During Year, Distribution of Taxes Charged	rev	new		
7	274-275	Accumulated Deferred Income Taxes-Other Property	rev	new		
8	276-277	Accumulated Deferred Income Taxes-Other	rev	new		
9	278	Other Regulatory Liabilities	rev	rev	rev	rev
10	299	Monthly Quantity & Revenue Data by Rate Schedule	new		new	
11	300-301	Gas Operating Revenues	rev	rev		
12	308	Other Gas Revenues	rev	new		
13	313	Discounted Services and Negotiated Services	new	new		
14	352	Employee Pensions and Benefits	new	new		
15	354-355	Distribution of Salaries and Wages	rev			
16	357	Charges for Outside Professional and Other Consultative Services	rev	new		
17	358	Transactions with Associated	new	new		
18	508-509	Compressor Station	rev			
19	520	Gas Account – Natural Gas	rev	rev	new	new
20	521	Shipper Supplied Gas for the Current Quarter	new	new	new	new
	Total Changes		20	17	7	6
	Total New		6	11	3	2
		KEY:				
		new = new				
		revised = rev				
		existing = ext				

Appendix B- List of Commenters

Company Name	Abbreviation
1 American Gas Association	AGA
2 American Public Gas Association	APGA
3 Apache Corporation	Apache
4 Boardwalk Pipeline Partners, Gulf Crossing Pipeline Company, Gulf South Pipeline Company, and Texas Gas Transmission	BGGT
5 Bureau of Economic Analysis	BEA
6 Calpine Corporation	Calpine
7 Dominion Resources	Dominion
8 Enbridge and Enbridge Energy Partners	Enbridge
9 Independent Petroleum Association of America and Texas Independent Producers & Royalty Owners Association	IPTA
10 Interstate Natural Gas Association of America	INGAA
11 Kansas Corporation Commission	KCC
12 Kinder Morgan Interstate Pipelines	Kinder Morgan
13 Michigan Public Service Commission	MIPSC
14 Natural Gas Supply Association	NGSA
15 Public Service Commission of the State of New York	NYPSC
16 Process Gas Consumers Group	PGC
17 Williston Basin Interstate Pipeline Company	Williston
18 Electric Power Supply Association	EPSA

Appendix C Revised Schedules for FERC Forms 2, 2-A, and 3-Q

Name of Respondent	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Notes to Financial Statements			

1. Provide important disclosures regarding the Balance Sheet, Statement of Income for the Year, Statement of Retained Earnings for the Year, and Statement of Cash Flow, or any account thereof. Classify the disclosures according to each financial statement, providing a subheading for each statement except where a disclosure is applicable to more than one statement. The disclosures must be on the same subject matters and in the same level of detail that would be required if the respondent issued general purpose financial statements to the public or shareholders.

2. Furnish details as to any significant contingent assets or liabilities existing at year end, and briefly explain any action initiated by the Internal Revenue Service involving possible assessment of additional income taxes of material amount, or a claim for refund of income taxes of a material amount initiated by the utility. Also, briefly explain any dividends in arrears on cumulative preferred stock.

3. Furnish details on the respondent's pension plans, post-retirement benefits other than pensions (PBOP) plans, and post-employment benefit plans as required by instruction no. 1 and, in addition, disclose for each individual plan the current year's cash contributions. Furnish details on the accounting for the plans and any changes in the method of accounting for them. Include details on the accounting for transition obligations or assets, gains or losses, the amounts deferred and the expected recovery periods. Also, disclose any current year's plan or trust curtailments, terminations, transfers, or reversions of assets. **Entities that participate in multiemployer postretirement benefit plans (e.g. parent company sponsored pension plans) disclose in addition to the required disclosures for the consolidated plan, (1) the amount of cost recognized in the respondent's financial statements for each plan for the period presented, and (2) the basis for determining the respondent's share of the total plan costs.**

4. **Furnish details on the respondent's asset retirement obligations (ARO) as required by instruction no. 1 and, in addition, disclose the amounts recovered through rates to settle such obligations. Identify any mechanism or account in which recovered funds are being placed (i.e. trust funds, insurance policies, surety bonds). Furnish details on the accounting for the asset retirement obligations and any changes in the measurement or method of accounting for the obligations. Include details on the accounting for settlement of the obligations and any gains or losses expected or incurred on the settlement.** 5. Provide a list of all environmental credits received during the reporting period.

6. Provide a summary of revenues and expenses for each tracked cost and special surcharge.

7. Where Account 189, Unamortized Loss on Reacquired Debt, and 257, Unamortized Gain on Reacquired Debt, are not used, give an explanation, providing the rate treatment given these items. See General Instruction 17 of the Uniform System of Accounts.

8. Explain concisely any retained earnings restrictions and state the amount of retained earnings affected by such restrictions.

9. Disclose details on any significant financial changes during the reporting year to the respondent or the respondent's consolidated group that directly affect the respondent's gas pipeline operations, including: sales, transfers or mergers of affiliates, investments in new partnerships, sales of gas pipeline facilities or the sale of ownership interests in the gas pipeline to limited partnerships, investments in related industries (i.e., production, gathering), major pipeline investments, acquisitions by the parent corporation(s), and distributions of capital.

10. Explain concisely unsettled rate proceedings where a contingency exists such that the company may need to refund a material amount to the utility's customers or that the utility may receive a material refund with respect to power or gas purchases. State for each year affected the gross revenues or costs to which the contingency relates and the tax effects and explain the major factors that affect the rights of the utility to retain such revenues or to recover amounts paid with respect to power and gas purchases.

11. Explain concisely significant amounts of any refunds made or received during the year resulting from settlement of any rate proceeding affecting revenues received or costs incurred for power or gas purchases, and summarize the adjustments made to balance sheet, income, and expense accounts.

12. Explain concisely only those significant changes in accounting methods made during the year which had an effect on net income, including the basis of allocations and apportionments from those used in the preceding year. Also give the approximate dollar effect of such changes.

13. For the 3Q disclosures, respondent must provide in the notes sufficient disclosures so as to make the interim information not misleading. Disclosures which would substantially duplicate the disclosures contained in the most recent FERC Annual Report may be omitted.

14. For the 3Q disclosures, the disclosures shall be provided where events subsequent to the end of the most recent year have occurred which have a material effect on the respondent. Respondent must include in the notes significant changes since the most recently completed year in such items as: accounting principles and practices; estimates inherent in the preparation of the financial statements; status of long-term contracts; capitalization including significant new borrowings or modifications of existing financing agreements; and changes resulting from business combinations or dispositions. However were material contingencies exist, the disclosure of such matters shall be provided even though a significant change since year end may not have occurred.

15. Finally, if the notes to the financial statements relating to the respondent appearing in the annual report to the stockholders are applicable and furnish the data required by the above instructions, such notes may be included herein.

Name of Respondent	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr

Non-Traditional Rate Treatment Afforded New Projects

1. The Commission's Certificate Policy Statement provides a threshold requirement for existing pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. See Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC P61,227 (1999); order clarifying policy, 90 FERC P61,128 (2000); order clarifying policy, 92 FERC P61,094 (2000) (Policy Statement). In column a, list the name of the facility granted non-traditional rate treatment.
2. In column b, list the CP Docket Number where the Commission authorized the facility.
3. In column c, indicate the type of rate treatment approved by the Commission (e.g. incremental, at risk).
4. In column d, list the amount in Account 101, Gas Plant in Service, associated with the facility.
5. In column e, list the amount in Account 108, Accumulated Provision for Depreciation of Gas Utility Plant, associated with the facility.
6. In column f, list the amount in Account 190, Accumulated Deferred Income Tax; Account 281, Accumulated Deferred Income Taxes – Accelerated Amortization Property; Account 282, Accumulated Deferred Income Taxes – Other Property; Account 283, Accumulated Deferred Income Taxes – Other, associated with the facility.
7. In column g, report the total amount included in the gas operations expense accounts during the year related to the facility (Account 401, Operation Expense).
8. In column h, report the total amount included in the gas maintenance expense accounts during the year related to the facility.
9. In column i, report the amount of depreciation expense accrued on the facility during the year.
10. In column j, list any other expenses (including taxes) allocated to the facility.
11. In column k, report the incremental revenues associated with the facility.
12. Identify the volumes received and used for any incremental project that has a separate fuel rate for that project.
13. Provide the total amounts for each column.

Line No.	Name of Facility	CP Docket No.	Type of Rate Treatment	Gas Plant In Service	Accumulated Depreciation	Accumulat-ed Deferred Income Taxes	Operating Expense	Maintenan-ce Expense	Depreciation Expense	Other Expenses (including taxes)	Incremental Revenues
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)
1											
2											
3											
4											
5											
6											
7											
8											
9											
10											
11											
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29											
30											
31											
32											
33											
34											
35											
36											
Total											

Name of Respondent	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
General Description of Construction Overhead Procedure (continued)			
Computation of Allowance for Funds Used During Construction Rates 1. For line (5), column (d) below, enter the rate granted in the last rate proceeding. If not available, use the average rate earned during the preceding 3 years. 2. Identify, in a footnote, the specific entity used as the source for the capital structure figures. 3. Indicate, in a footnote, if the reported rate of return is one that has been approved in a rate case, black-box settlement rate, or an actual three-year average rate.			
1. Components of Formula (Derived from actual book balances and actual cost rates):			
Line No.	Title (a)	Amount (b)	Capitalization Ration (percent) (c)
1		S	
2			s
3		D	
4		P	p
5		C	c
6			
7		W	
2. Gross Rate for Borrowed Funds $s(S/W) + d[(D/(D+P+C))(1-(S/W))]$			
3. Rate for Other Funds $[1-(S/W)][p(P/(D+P+C)) + c(C/(D+P+C))]$			
4. Weighted Average Rate Actually Used for the Year: a. Rate for Borrowed Funds - b. Rate for Other Funds-			

Name of Respondent	This Report Is: (1) An Original (2) A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr

Other Regulatory Assets (Account 182.3)

1. Report below the details called for concerning other regulatory assets which are created through the ratemaking actions of regulatory agencies (and not includable in other accounts).
2. For regulatory assets being amortized, show the period of amortization in column (a).
3. Minor items (5% of the Balance at the End of the Year for Account 182.3 or amounts less than \$250,000, whichever is less) may be grouped by classes.
4. Report separately any "Deferred Regulatory Commission Expenses" that are also reported on pages 350-351, Regulatory Commission Expenses.
5. Provide in a footnote, for each line item, the regulatory citation where authorization for the regulatory asset has been granted (e.g. Commission Order, state commission order, court decision).

Line No.	Description and Purpose of Other Regulatory Assets	Balance at Beginning Current Quarter/Year	Debits	Written off During Quarter/Year Account Charged	Written off During the Period		Balance at End of Current Quarter/Year
					Amount Recovered (e)	Amount deemed Unrecoverable (f)	
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Total							

Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission		Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Accumulated Deferred Income Taxes (Account 190)					
1. Report the information called for below concerning the respondent's accounting for deferred income taxes. 2. At Other (Specify), include deferrals relating to other income and deductions.					
Line No.	Account Subdivisions (a)	Balance at Beginning of Year (b)	Changes During Year Amounts Debited to Account 410.1 (c)	Changes During Year Amounts Credited to Account 411.1 (d)	
1	Account 190				
2	Electric				
3	Gas				
4					
5					
6	Other (Specify) (Footnote Details)				
7	TOTAL Account 190 (Enter TOTAL of Lines 1 thru 6)				
8	Classification of TOTAL				
9	Federal Income Taxes				
10	State Income Taxes				
11	Local Income Taxes				
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Name of Respondent			This Report is: (1) ☐ An Original (2) ☐ A Resubmission		Date of Report (Mo, Da, Yr) / /		Year/Period of Report End of Year/Qtr	
Accumulated Deferred Income Taxes (Account 190) (continued)								
3. Provide in a footnote a summary of the type and amount of deferred income taxes reported in the beginning-of-year and end-of-year balances for deferred income taxes that the respondent estimates could be included in the development of jurisdictional recourse rates.								
Line No.	Changes During Year Amounts Debited to Account 410.2 (e)	Changes During Year Amounts Credited to Account 411.2 (f)	Adjustments Debits Account No. (g)	Adjustments Debits Amount (h)	Adjustments Credits Account No. (i)	Adjustments Credits Amount (j)	Balance at End of Year (k)	
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Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Taxes Accrued, Prepaid and Charged During Year, Distribution of Taxes Charged (Show utility department where applicable and account charged)				
1. Give details of the combined prepaid and accrued tax accounts and show the total taxes charged to operations and other accounts during the year. Do not include gasoline other sales taxes which have been charged to the accounts to which taxed materials was charged. If the actual or estimated amounts of such taxes are known, show the amounts in a footnote and designate whether estimated or actual amounts. 2. Include on this page, taxes paid during the year and charged direct to final accounts, (not charged to prepaid or accrued taxes). Enter the amounts in both columns (d) and (e). The balancing of this page is not affected by the inclusion of these taxes. 3. Include in column (d) taxes charged during the year, taxes charged to operations and other accounts other than accrued and prepaid tax accounts. 4. List the aggregate of each kind of tax in such a manner that the total tax for each State and subdivision can be readily ascertained.				
Line No.	Kind of Tax (a)	Balance at Beginning of Year Taxes Accrued (b)	Balance at Beginning of Year Prepaid Taxes (c)	
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42	TOTAL			

Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission		Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Taxes Accrued, Prepaid and Charged During Year, Distribution of Taxes Charged (Show utility department where applicable and account charged) (Continued)					
5. If any tax (exclude Federal and State income taxes) covers more than one year, show the required information separately for each tax year, identifying the year in column (a). 6. Enter all adjustments of the accrued and prepaid tax accounts in column (f) and explain each adjustment in a footnote. Designate debit adjustments by parentheses. 7. Do not include on this page entries with respect to deferred income taxes or taxes collected through payroll deductions or otherwise pending transmittal of such taxes to the taxing authority. 8. Show in columns (i) thru (p) how tax accounts were distributed. Show both the utility department and the number of account charged. For taxes charged to utility plant, show the number of the appropriate balance sheet plant account or sub account. 9. For any tax apportioned to more than one utility department or account, state in a footnote the basis (necessity) of apportioning such tax. 10. Items under \$250,000 may be grouped. 11. Report in column (q) the applicable effective state income tax rate.					
Line No.	Taxes Charged During Year (d)	Taxes Paid During Year (e)	Adjustments (f)	Balance at End of Year Taxes Accrued (Account 236) (g)	Balance at End of Year Prepaid Taxes (Included in Account 165) (h)
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43	TOTAL				

Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission		Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Taxes Accrued, Prepaid and Charged During Year, Distribution of Taxes Charged (Show utility department where applicable and account charged) (Continued)					
1. Give details of the combined prepaid and accrued tax accounts and show the total taxes charged to operations and other accounts during the year. Do not include gasoline other sales taxes which have been charged to the accounts to which taxed materials was charged. If the actual or estimated amounts of such taxes are known, show the amounts in a footnote and designate whether estimated or actual amounts. 2. Include on this page, taxes paid during the year and charged direct to final accounts, (not charged to prepaid or accrued taxes). Enter the amounts in both columns (d) and (e). The balancing of this page is not affected by the inclusion of these taxes. 3. Include in column (d) taxes charged during the year, taxes charged to operations and other accounts other than accrued and prepaid tax accounts. 4. List the aggregate of each kind of tax in such a manner that the total tax for each State and subdivision can be readily be ascertained.					
DISTRIBUTION OF TAXES CHARGED (Show utility department where applicable and account charged)					
Line No.	Electric (Account 408.1, 409.1) (i)	Gas (Account 408.1, 409.1) (j)	Other Utility Department (Account 408.1, 409.1) (k)	Other Income and Deductions (Account 408.2, 409.2) (l)	
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Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission		Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Taxes Accrued, Prepaid and Charged During Year, Distribution of Taxes Charged (Show utility department where applicable and account charged) (Continued)					
5. If any tax (exclude Federal and State income taxes) covers more than one year, show the required information separately for each tax year, identifying the year in column (a). 6. Enter all adjustments of the accrued and prepaid tax accounts in column (f) and explain each adjustment in a footnote. Designate debit adjustments by parentheses. 7. Do not include on this page entries with respect to deferred income taxes or taxes collected through payroll deductions or otherwise pending transmittal of such taxes to the taxing authority. 8. Show in columns (i) thru (p) how tax accounts were distributed. Show both the utility department and the number of account charged. For taxes charged to utility plant, show the number of the appropriate balance sheet plant account or sub account. 9. For any tax apportioned to more than one utility department or account, state in a footnote the basis (necessity) of apportioning such tax. 10. Items under \$250,000 may be grouped. 11. Report in column (q) the applicable effective state income tax rate.					
DISTRIBUTION OF TAXES CHARGED (Show utility department where applicable and account charged)					
Line No.	Extraordinary Items (Account 409.3) (m)	Other Utility Operating Income (Account 408.1 and Account 409.1) (n)	Adjustments to Retained Earnings (Account 439) (o)	Other (p)	State/Local Income Tax Rate (q)
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Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Accumulated Deferred Income Taxes-Other Property (Account 282)				
1. Report the information called for below concerning the respondent's accounting for deferred income taxes relating to property not subject to accelerated amortization.				
2. At Other (Specify), include deferrals relating to other income and deductions.				
Line No.	Account Subdivisions (a)	Balance at Beginning of Year (b)	Changes During Year Amounts Debited to Account 410.1 (c)	Changes During Year Amounts Credited to Account 411.1 (d)
1	Account 282			
2	Electric			
3	Gas			
4				
5				
6	Other (Specify) (Footnote Details)			
7	TOTAL Account 282 (Enter TOTAL of Lines 1 thru 6)			
8	Classification of TOTAL			
9	Federal Income Taxes			
10	State Income Taxes			
11	Local Income Taxes			
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Name of Respondent			This Report is: (1) ☐ An Original (2) ☐ A Resubmission		Date of Report (Mo, Da, Yr) / /		Year/Period of Report End of Year/Qtr	
Accumulated Deferred Income Taxes-Other Property (Account 282) (continued)								
3. Provide in a footnote a summary of the type and amount of deferred income taxes reported in the beginning-of-year and end-of-year balances for deferred income taxes that the respondent estimates could be included in the development of jurisdictional recourse rates.								
Line No.	Changes During Year Amounts Debited to Account 410.2 (e)	Changes During Year Amounts Credited to Account 411.2 (f)	Adjustments Debits Account No. (g)	Adjustments Debits Amount (h)	Adjustments Credits Account No. (i)	Adjustments Credits Amount (j)	Balance at End of Year (k)	
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Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Accumulated Deferred Income Taxes-Other (Account 283)				
1. Report the information called for below concerning the respondent's accounting for deferred income taxes relating to amounts recorded in Account 283.				
2. At Other (Specify), include deferrals relating to other income and deductions.				
Line No.	Account Subdivisions (a)	Balance at Beginning of Year (b)	Changes During Year Amounts Debited to Account 410.1 (c)	Changes During Year Amounts Credited to Account 411.1 (d)
1	Account 283			
2	Electric			
3	Gas			
4				
5				
6	Other (Specify) (Footnote Details)			
7	TOTAL Account 283 (Enter TOTAL of Lines 1 thru 6)			
8	Classification of TOTAL			
9	Federal Income Taxes			
10	State Income Taxes			
11	Local Income Taxes			
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Name of Respondent			This Report is: (1) ☐ An Original (2) ☐ A Resubmission		Date of Report (Mo, Da, Yr) / /		Year/Period of Report End of Year/Qtr	
Accumulated Deferred Income Taxes-Other (Account 283) (continued)								
3. Provide in a footnote a summary of the type and amount of deferred income taxes reported in the beginning-of-year and end-of-year balances for deferred income taxes that the respondent estimates could be included in the development of jurisdictional recourse rates.								
Line No.	Changes During Year Amounts Debited to Account 410.2 (e)	Changes During Year Amounts Credited to Account 411.2 (f)	Adjustments Debits Account No. (g)	Adjustments Debits Amount (h)	Adjustments Credits Account No. (i)	Adjustments Credits Amount (j)	Balance at End of Year (k)	
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Name of Respondent	This Report Is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr

Other Regulatory Liabilities (Account 254)

1. Report below the details called for concerning other regulatory liabilities which are created through the ratemaking actions of regulatory agencies (and not includable in other accounts).
2. For regulatory assets being amortized, show the period of amortization in column (a).
3. Minor items (5% of the Balance at the End of the Year for Account 182.3 or amounts less than \$250,000, whichever is less) may be grouped by classes.
4. Provide in a footnote, for each line item, the regulatory citation where the respondent was directed to refund the regulatory liability (e.g. Commission Order, state commission order, court decision).

Line No.	Description and Purpose of Other Regulatory Assets (a)	Balance at Beginning Current Quarter/Year (b)	Debits (c)	Written off During Quarter/Year Account Charged (d)	Written off During the Period Amount		Balance at End of Current Quarter/Year (g)
					Amount Refunded (e)	Amount deemed non-refundable (f)	
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Total							

Name of Respondent	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr

Monthly Quantity & Revenue Data by Rate Schedule

Select the appropriate Month from the dropdown menu below.

1. Each natural gas company whose gas transported or stored for a fee exceeded 50 million Dth in each of the three previous calendar years is required to prepare this schedule.

2. Refer to the form and/or Uniform System of Accounts (USofA) for Natural Gas Companies (18 CFR Part 201). Reference to account numbers in the USofA is provided in parentheses beside applicable data. Quantities must not be adjusted for discounts.

3. Total Quantities (1000s of Dth) and Revenues (1000s of \$).

4. Report revenues and quantities of gas by rate schedule. Add rows if necessary to report 2.001, 2.002 data for all rate schedules. The rate schedule must be identified in the same manner as 4.001, 4.002 identified in other reports to the Commission. Where transportation services are bundled with storage services, reflect only transportation Dth. When reporting storage, report Dth of gas withdrawn from storage and revenues by rate schedule. Add rows as necessary to report all rate schedules. When rows are added, the additional row numbers should follow in sequence, 2.001, 2.002, 2.003, etc. or 4.001, 4.002, 4.003, etc.

5. Revenues in Column (d) include transition costs from upstream pipelines. Revenue (Other) in Column (f) includes reservation charges received by the pipeline plus usage charges, less revenues reflected in Columns (d) and (e). Include in Column (f), revenue for Accounts 490-495.

6. Enter footnotes as appropriate.

7. Select the appropriate month from the dropdown menu above.

Line No.	Item	Quantity	Revenue (Transition Costs and Take-or-Pay)	Revenue (GRI & ACA)	Revenue (Other)	Revenue (Total)
(a)	(b)	(c)	(d)	(e)	(f)	(g)
1	Total Sales					
2	Transportation of Gas for Others					
2.001	[Rate Schedule Number]					
2.002	[Rate Schedule Number]					
3	Total Transportation					
4	Storage					
4.001	[Rate Schedule Number]					
4.002	[Rate Schedule Number]					
5	Total Storage					
6	Gathering					
7	Gathering-Firm					
8	Gathering-Interruptible					
9	Additional Revenues					
10	Products Sale and Extraction (490-492)					
11	Rents (493-494)					
12	Other Gas Revenues (495)					
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Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission		Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Gas Operating Revenues					
1. Report below natural gas operating revenues for each prescribed account total. The amounts must be consistent with the detailed data on succeeding pages. 2. Revenues in columns (b) and (c) include transition costs from upstream pipelines. 3. Other Revenues in columns (f) and (g) include reservation charges received by the pipeline plus usage charges, less revenues reflected in columns (b) through (e). Include in columns (f) and (g) revenues for Accounts 480-495.					
Line No.	Title of Account (a)	Revenues for Transition Costs and Take-or-Pay Amount for Current Year (b)	Revenues for Transition Costs and Take-or-Pay Amount for Previous Year (c)	Revenues for GRI and ACA Amount for Current Year (d)	Revenues for GRI and ACA Amount for Previous Year (e)
1	480 Residential Sales				
2	481 Commercial and Industrial Sales				
3	482 Other Sales to Public Authorities				
4	483 Sales for Resale				
5	484 Interdepartmental Sales				
6	485 Intracompany Transfers				
7	487 Forfeited Discounts				
8	488 Miscellaneous Service Revenues				
9	489.1 Revenues from Transportation of Gas of Others Through Gathering Facilities				
10	489.2 Revenues from Transportation of Gas of Others Through Transmission Facilities				
11	489.3 Revenues from Transportation of Gas of Others Through Distribution Facilities				
12	489.4 Revenues from Storing Gas of Others				
13	490 Sales of Prod. Ext. from Natural Gas				
14	491 Revenues from Natural Gas Proc. by Others				
15	492 Incidental Gasoline and Oil Sales				
16	493 Rent from Gas Property				
17	494 Interdepartmental Rents				
18	495 Other Gas Revenues				
19	Subtotal:				
20	496 (Less) Provision for Rate Refunds				
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44	TOTAL:				

Name of Respondent			This Report is: (1) An Original (2) A Resubmission		Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Gas Operating Revenues (Continued)						
4. If increases or decreases from previous year are not derived from previously reported figures, explain any inconsistencies in a footnote.						
5. On Page 108, include information on major changes during the year, new service, and important rate increases or decreases.						
6. Report the revenue from transportation services that are bundled with storage services as transportation service revenue.						
Line No.	Other Revenues Amount for Current Year (f)	Other Revenues Amount for Previous Year (g)	Total Operating Revenues Amount for Current Year (h)	Total Operating Revenues Amount for Previous Year (i)	Dekatherm of Natural Gas Amount for Current Year (j)	Dekatherm of Natural Gas Amount for Previous Year (k)
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Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Other Gas Revenues (Account 495)				
Report below transactions included in Account 495, Other Gas Revenues:				
Line No.	Description of Transaction (a)	Amount(b)		
1	Commissions on Sale or Distribution of Gas of Others			
2	Compensation for Minor or Incidental Services Provided for Others			
3	Profit or Loss on Sale of Material and Supplies not Ordinarily Purchased for Resale			
4	Sales of Stream, Water, or Electricity, including Sales or Transfers to Other Departments			
5	Miscellaneous Royalties			
6	Revenues from Dehydration and Other Processing of Gas of Others except as provided for in the Instructions to Account 495:			
7	Revenues for Right and/or Benefits Received from Others which are Realized Through Research, Development, and Demonstration Ventures			
8	Gains on Settlements of Imbalance Receivables and Payables			
9	Revenues from Penalties earned Pursuant to Tariff Provisions, including Penalties Associated with Cash-out Settlements			
10	Revenues from Shipper Supplied Gas			
11	Other revenues (Specify)			
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Name of Respondent	This Report Is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr

Discounted Rate Services and Negotiated Rate Services

1. In column b, report the revenues from discounted rate services.
2. In column c, report the volumes of discounted rate services.
3. In column d, report the revenues from negotiated rate services.
4. In column e, report the volumes of negotiated rate services.

Line No.	Account (a)	Discounted Rate Services		Negotiated Rate Services	
		Revenue (b)	Volumes (c)	Revenue (d)	Volumes (e)
1	Account 489.1, Revenues from transportation of gas of others through gathering facilities.				
2	Account 489.2, Revenues from transportation of gas of others through transmission facilities.				
3	Account 489.4, Revenues from storing gas of others.				
4	Account 495, Other gas revenues.				
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Name of Respondent	This Report Is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of <u>Year/Qtr</u>

Employee Pensions and Benefits (Account 926)

1. Report below the items contained in Account 926, Employee Pensions and Benefits.

Line No.	Expense	Amount
1	Pensions – defined benefit plans	
2	Pensions – other	
3	Post-retirement benefits other than pensions (PBOP)	
4	Post- employment benefit plans	
5	Other (Specify)	
6		
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Total		

Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr	
Distribution of Salaries and Wages					
Report below the distribution of total salaries and wages for the year. Segregate amounts originally charged to clearing accounts to Utility Departments, Construction, Plant Removals and Other Accounts, and enter such amounts in the appropriate lines and columns provided. Salaries and wages billed to the Respondent by an affiliated company must be assigned to the particular operating function(s) relating to the expenses.					
In determining this segregation of salaries and wages originally charged to clearing accounts, a method of approximation giving substantially correct results may be used. When reporting detail of other accounts, enter as many rows as necessary numbered sequentially starting with 75.01, 75.02, etc.					
Line No.	Classification (a)	Direct Payroll Distribution (b)	Payroll Billed by Affiliated Companies (c)	Allocation of Payroll Charged for Clearing Accounts (d)	Total (e)
1	Electric				
2	Operation				
3	Production				
4	Transmission				
5	Distribution				
6	Customer Accounts				
7	Customer Service and Informational				
8	Sales				
9	Administrative and General				
10	TOTAL Operation (Total of lines 3 thru 9)				
11	Maintenance				
12	Production				
13	Transmission				
14	Distribution				
15	Administrative and General				
16	TOTAL Maintenance (Total of lines 12 thru 15)				
17	Total Operation and Maintenance				
18	Production (Total of lines 3 and 12)				
19	Transmission (Total of lines 4 and 13)				
20	Distribution (Total of lines 5 and 14)				
21	Customer Accounts (line 6)				
22	Customer Service and Informational (line 7)				
23	Sales (line 8)				
24	Administrative and General (Total of lines 9 and 15)				
25	TOTAL Operation and Maintenance (Total of lines 18 thru 24)				
26	Gas				
27	Operation				
28	Production – Manufactured Gas				
29	Production – Natural Gas(Including Exploration and Development)				
30	Other Gas Supply				
31	Storage, LNG Terminaling and Processing				
32	Transmission				
33	Distribution				
34	Customer Accounts				
35	Customer Service and Informational				
36	Sales				
37	Administration and General				
38	TOTAL Operation (Total of lines 28 thru 37)				
39	Maintenance				
40	Production – Manufactured Gas				
41	Production – Natural Gas(Including Exploration and Development)				
42	Other Gas Supply				
43	Storage, LNG Terminaling and Processing				
44	Transmission				
45	Distribution				

Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission		Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Distribution of Salaries and Wages (continued)					
Line No.	Classification (a)	Direct Payroll Distribution (b)	Payroll Billed by Affiliated Companies (c)	Allocation of Payroll Charged for Clearing Accounts (d)	Total (e)
46	Administrative and General				
47	TOTAL Maintenance (Total of lines 40 thru 46)				
48	Gas (Continued)				
49	Total Operation and Maintenance				
50	Production – Manufactured Gas (Total of lines 28 and 40)				
51	Production – Natural Gas (Including Expl. And Dev.)(Il. 29 and 41)				
52	Other Gas Supply (Total of lines 30 and 42)				
53	Storage, LNG Terminaling and Processing (Total of Il. 31 and 43)				
54	Transmission (Total of lines 32 and 44)				
55	Distribution (Total of lines 33 and 45)				
56	Customer Accounts (Total of line 34)				
57	Customer Service and Informational (Total of line 35)				
58	Sales (Total of line 36)				
59	Administrative and General (Total of lines 37 and 46)				
60	Total Operation and Maintenance (Total of lines 50 thru 59)				
61	Other Utility Departments				
62	Operation and Maintenance				
63	TOTAL ALL Utility Dept. (Total of lines 25, 60, and 62)				
64	Utility Plant				
65	Construction (By Utility Departments)				
66	Electric Plant				
67	Gas Plant				
68	Other				
69	TOTAL Construction (Total of lines 66 thru 68)				
70	Plant Removal (By Utility Departments)				
71	Electric Plant				
72	Gas Plant				
73	Other				
74	TOTAL Plant Removal (Total of lines 71 thru 73)				
75	Other Accounts (Specify) (footnote details)				
76	TOTAL Other Accounts				
77	TOTAL SALARIES AND WAGES				

Name of Respondent	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr

Charges for Outside Professional and Other Consultative Services

1. Report the information specified below for all charges made during the year included in any account (including plant accounts) for outside consultative and other professional services. These services include rate, management, construction, engineering, research, financial, valuation, legal, accounting, purchasing, advertising, labor relations, and public relations, rendered for the respondent under written or oral arrangement, for which aggregate payments were made during the year to any corporation partnership, organization of any kind, or individual (other than for services as an employee or for payments made for medical and related services) amounting to more than \$250,000, including payments for legislative services, except those which should be reported in Account 426.4 Expenditures for Certain Civic, Political and Related Activities.

(a) Name of person or organization rendering services.

(b) Total charges for the year.

2. Sum under a description "Other", all of the aforementioned services amounting to \$250,000 or less.

3. Total under a description "Total", the total of all of the aforementioned services.

4. Charges for outside professional and other consultative services provided by associated (affiliated) companies should be excluded from this schedule and be reported on Page 358, according to the instructions for that schedule.

Line No.	Description (a)	Amount (in dollars) (b)
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Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr
Transactions with Associated (Affiliated) Companies				
1. Report below the information called for concerning all goods or services received from or provided to associated (affiliated) companies amounting to more than \$250,000.				
2. Sum under a description "Other", all of the aforementioned goods and services amounting to \$250,000 or less.				
3. Total under a description "Total", the total of all of the aforementioned goods and services.				
4. Where amounts billed to or received from the associated (affiliated) company are based on an allocation process, explain in a footnote the basis of the allocation.				
Line No.	Description of the Good or Service (a)	Name of Associated/Affiliated Company (b)	Account(s) Charged or Credited (c)	Amount Charged or Credited (d)
1	Goods or Services Provided by Affiliated Company			
2				
3				
4				
5				
6				
7				
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14				
15				
16				
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19				
20	Goods or Services Provided for Affiliated Company			
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Name of Respondent	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr

Compressor Stations

1. Report below details concerning compressor stations. Use the following subheadings: field compressor stations, products extraction compressor stations, underground storage compressor stations, transmission compressor stations, distribution compressor stations, and other compressor stations.

2. For column (a), indicate the production areas where such stations are used. Group relatively small field compressor stations by production areas. Show the number of stations grouped. Identify any station held under a title other than full ownership. State in a footnote the name of owner or co-owner, the nature of respondent's title, and percent of ownership if jointly owned.

Line No.	Name of Station and Location (a)	Number of Units at Station (b)	Certificated Horsepower for Each Station (c)	Plant Cost (d)	Expenses(except depreciation and taxes) Fuel (e)
1					
2					
3					
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37					
Total					

Name of Respondent	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of <u>Year/Qtr</u>

Compressor Stations

Designate any station that was not operated during the past year. State in a footnote whether the book cost of such station has been retired in the books of account, or what disposition of the station and its book cost are contemplated. Designate any compressor units in transmission compressor stations installed and put into operation during the year and show in a footnote each unit's size and the date the unit was placed in operation.

3. For column (e), include the type of fuel or power, if other than natural gas. If two types of fuel or power are used, show separate entries for natural gas and the other fuel or power.

Line No.	Expenses(except depreciation and taxes) Power (f)	Expenses(except depreciation and taxes) Other (g)	Gas for Compressor Fuel in Dth (h)	Electricity for Compressor Station in kWh (i)	Operational Data Total Compressor Hours of Operation During Year (j)	Operational Data Number of Compressors Operated at Time of Station Peak (k)	Date of Station Peak (l)
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37							
Total							

Name of Respondent		This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of <u>Year/Qtr</u>
Gas Account – Natural Gas				
1. The purpose of this schedule is to account for the quantity of natural gas received and delivered by the respondent. 2. Natural gas means either natural gas unmixed or any mixture of natural and manufactured gas. 3. Enter in column (c) the year to date Dth as reported in the schedules indicated for the items of receipts and deliveries. 4. Enter in column (d) the respective quarter's Dth as reported in the schedules indicated for the items of receipts and deliveries. 5. Indicate in a footnote the quantities of bundled sales and transportation gas and specify the line on which such quantities are listed. 6. If the respondent operates two or more systems which are not interconnected, submit separate pages for this purpose. 7. Indicate by footnote the quantities of gas not subject to Commission regulation which did not incur FERC regulatory costs by showing (1) the local distribution volumes another jurisdictional pipeline delivered to the local distribution company portion of the reporting pipeline (2) the quantities that the reporting pipeline transported or sold through its local distribution facilities or intrastate facilities and which the reporting pipeline received through gathering facilities or intrastate facilities, but not through any of the interstate portion of the reporting pipeline, and (3) the gathering line quantities that were not destined for interstate market or that were not transported through any interstate portion of the reporting pipeline. 8. Indicate in a footnote the specific gas purchase expense account(s) and related to which the aggregate volumes reported on line No. 3 relate. 9. Indicate in a footnote (1) the system supply quantities of gas that are stored by the reporting pipeline, during the reporting year and also reported as sales, transportation and compression volumes by the reporting pipeline during the same reporting year, (2) the system supply quantities of gas that are stored by the reporting pipeline during the reporting year which the reporting pipeline intends to sell or transport in a future reporting year, and (3) contract storage quantities. 10. Also indicate the volumes of pipeline production field sales that are included in both the company's total sales figure and the company's total transportation figure. Add additional information as necessary to the footnotes. 11. Report on pages 520 A and B (1) shipper supplied gas for the current quarter and gas consumed in pipeline operations, (2) the disposition of any excess, the accounting recognition given to such disposition and the specific account(s) charged or credited, and (3) the source of gas used to meet any deficiency, the accounting recognition given to the gas used to meet the deficiency, including the accounting basis of the gas and the specific account(s) charged or credited. Also, indicate in a footnote the basis for valuing the gas.				
Line No.	Item (a)	Ref. Page No. of (FERC Form Nos. 2/2-A) (b)	Total Amount of Dth Year to Date (c)	Current Three Months Ended Amount of Dth Quarterly Only (d)
1	Name of System:			
2	GAS RECEIVED			
3	Gas Purchases (Accounts 800-805)			
4	Gas of Others Received for Gathering (Account 489.1)	303		
5	Gas of Others Received for Transmission (Account 489.2)	305		
6	Gas of Others Received for Distribution (Account 489.3)	301		
7	Gas of Others Received for Contract Storage (Account 489.4)	307		
8	Exchange Gas Received from Others (Account 806)	328		
9	Gas Received as Imbalances (Account 806)	328		
10	Receipts of Respondent's Gas Transported by Others (Account 858)	332		
11	Other Gas Withdrawn from Storage (Explain)			
12	Gas Received from Shippers as Compressor Station Fuel			
13	Gas Received from Shippers as Lost and Unaccounted for			
14	Other Receipts (Specify) (footnote details)			
15	Total Receipts (Total of lines 3 thru 14)			
16	GAS DELIVERED			
17	Gas Sales (Accounts 480-484)			
18	Deliveries of Gas Gathered for Others (Account 489.1)	303		
19	Deliveries of Gas Transported for Others (Account 489.2)	305		
20	Deliveries of Gas Distributed for Others (Account 489.3)	301		
21	Deliveries of Contract Storage Gas (Account 489.4)	307		
22	Exchange Gas Delivered to Others (Account 806)	328		
23	Gas Delivered as Imbalances (Account 806)	328		
24	Deliveries of Gas to Others for Transportation (Account 858)	332		
25	Other Gas Delivered to Storage (Explain)			
26	Gas Used for Compressor Station Fuel	509		
27	Other Deliveries (Specify) (footnote details)			
28	Total Deliveries (Total of lines 17 thru 27)			
29	GAS UNACCOUNTED FOR			
30	Production System Losses			
31	Gathering System Losses			
32	Transmission System Losses			
33	Distribution System Losses			
34	Storage System Losses			
35	Other Losses (Specify) (footnote details)			
36	Total Unaccounted For (Total of lines 30 thru 35)			
37	Total Deliveries & Unaccounted For (Total of lines 28 and 36)			

FERC FORM NO. 2 (REVISED)

Page 520

FERC FORM NO. 2-A (REVISED)

FERC FORM NO. 3-Q MAJOR (NEW)

FERC FORM NO. 3-Q NON-MAJOR (NEW)

Name of Respondent	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of Year/Qtr

Shipper Supplied Gas For The Current Quarter

1. On lines 1 through 4 report only the dekatherms of gas provided by shippers under tariff terms and conditions for transportation service and the use of that gas for compressor fuel, other operational purposes and lost and unaccounted for.
2. On line 6 report the dekatherms and dollar value of the excess or deficiency in shipper supplied gas.
3. On lines 10 through 17 report the dekatherms, the dollar amount and the account(s) credited for the dispositions of gas listed in column (a).
4. On lines 19 through 27 report the dekatherms, the dollar amount and the account(s) debited for the sources of gas reported in column (a).

Line No.	(a)	First Month of Current Quarter			
		Dths (b)	Amount (c)	Account(s) Debited (d)	Account(s) Credited (e)
1	Shipper Supplied Gas (Lines 12 and 13 page 520)				
2	Less gas used in compressors				
3	Less gas used for other operational purposes (footnote)				
4	Less gas lost and unaccounted for				
5					
6	Net excess or (deficiency)				
7					
8					
9	Disposition of excess gas:				
10	Gas sold to others				
11	Gas used to meet imbalances				
12	Gas added to system gas				
13	Gas returned to shippers				
14	Other (list)				
15					
16					
17	Total disposition of excess gas				
18					
19	Gas acquired to meet deficiency:				
20	System gas				
21	Purchased gas				
22	Other (list)				
23					
24					
25					
26					
27	Total acquired to meet deficiency				

Name of Respondent	This Report is: (1) ☐ An Original (2) ☐ A Resubmission	Date of Report (Mo, Da, Yr) / /	Year/Period of Report End of <u>Year/Qtr</u>

Shipper Supplied Gas For The Current Quarter

1. On lines 1 through 4 report only the dekatherms of gas provided by shippers under tariff terms and conditions for transportation service and the use of that gas for compressor fuel, other operational purposes and lost and unaccounted for.
2. On line 6 report the dekatherms and dollar value of the excess or deficiency in shipper supplied gas.
3. On lines 10 through 17 report the dekatherms, the dollar amount and the account(s) credited for the dispositions of gas listed in column (a).
4. On lines 19 through 27 report the dekatherms, the dollar amount and the account(s) debited for the sources of gas reported in column (a).

Line No.	Second Month of Current Quarter				Third Month of Current Quarter			
	Dths (b)	Amount (c)	Account(s) Debited (d)	Account Credited (e)	Dths (b)	Amount (c)	Account(s) Debited (d)	Account Credited (e)
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FERC FORM NO. 2 (NEW)
FERC FORM NO. 2-A (NEW)
FERC FORM NO. 3-Q MAJOR (NEW)
FERC FORM NO. 3-Q NON-MAJOR (NEW)

Page 521b

**DEPARTMENT OF HEALTH AND
HUMAN SERVICES**
Food and Drug Administration
21 CFR Part 558
**New Animal Drugs For Use in Animal
Feed; Zilpaterol**

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Intervet Inc. The NADA provides for use of approved, single-ingredient Type A medicated articles containing zilpaterol hydrochloride, monensin USP, and melengestrol acetate in three-way combination Type B and Type C medicated feeds for heifers fed in confinement for slaughter.

DATES: This rule is effective April 10, 2008.

FOR FURTHER INFORMATION CONTACT: Gerald L. Rushin, Center for Veterinary Medicine (HFV-126), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240-276-8103, e-mail: gerald.rushin@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Intervet Inc., P.O. Box 318, 29160 Intervet Lane, Millsboro, DE 19966, filed NADA 141-282 that provides for use of ZILMAX (zilpaterol hydrochloride), RUMENSIN (monensin USP), and MGA (melengestrol acetate) Type A medicated articles to make dry and liquid three-way combination Type B and Type C medicated feeds used for increased rate of weight gain, improved feed efficiency, and increased carcass leanness; for prevention and control of coccidiosis due to *Eimeria bovis* and *E. zuernii*; and for suppression of estrus (heat) in heifers fed in confinement for slaughter during the last 20 to 40 days on feed. The NADA is approved as of February 22, 2008, and the regulations in 21 CFR 558.665 are amended to reflect the approval.

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

The agency has determined under 21 CFR 25.33(a)(2) that this action is of a

type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor 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 558

Animal drugs, Animal feeds.

■ 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 558 is amended as follows:

**PART 558—NEW ANIMAL DRUGS FOR
USE IN ANIMAL FEEDS**

■ 1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

■ 2. In § 558.665, redesignate paragraphs (e)(4) and (e)(5) as paragraphs (e)(5) and (e)(6), and add new paragraph (e)(4) to read as follows:

§ 558.665 Zilpaterol.
(e) * * *

Zilpaterol grams/ton	Combination grams/ton	Indications for use	Limitations	Sponsor
*	*	*	*	*
(4) 6.8 to provide 60 to 90 mg/head/day	Melengestrol acetate to provide 0.25 to 0.5 mg/head/day	Heifers fed in confinement for slaughter: As in paragraph (e)(1) of this section; for prevention and control of coccidiosis due to <i>Eimeria bovis</i> and <i>E. zuernii</i> ; and for suppression of estrus (heat).	As in paragraph (e)(1) of this section; see §§ 558.342(d) and 558.355(d) of this chapter. Monensin as provided by No. 000986; melengestrol acetate as provided by No. 000009 in § 510.600(c) of this chapter.	057926
*	*	*	*	*

Dated: March 12, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8-7583 Filed 4-9-08; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF AGRICULTURE**Forest Service****36 CFR Part 242****DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 100**

[FWS-R7-SM-2008-0052; 70101-1335-0064L6]

Subsistence Management Regulations for Public Lands in Alaska; Federal Subsistence Regional Advisory Council Membership

AGENCIES: Forest Service, Agriculture; Fish and Wildlife Service, Interior.

ACTION: Reaffirmation of current regulations.

SUMMARY: This document describes the membership makeup of Federal subsistence regional advisory councils established under subsistence management regulations. This document is the final step in an administrative action with respect to those regulations, made necessary because of an order entered by the U.S. District Court for Alaska. The U.S. District Court order made it necessary to give further consideration to alternative methods for assuring balance in membership for regional advisory councils and to provide a complete and thorough administrative record.

FOR FURTHER INFORMATION CONTACT: Chair, Federal Subsistence Board, c/o U.S. Fish and Wildlife Service, Attention: Peter J. Probasco, Office of Subsistence Management; (907) 786-3888. For questions specific to National Forest System lands, contact Steve Kessler, Regional Subsistence Program Leader, USDA, Forest Service, Alaska Region, (907) 786-3592.

SUPPLEMENTARY INFORMATION:**Background**

Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111-3126) requires the Secretaries of the Interior and Agriculture to implement a program to grant a preference for subsistence uses of fish and wildlife resources on Federal public lands and waters, unless the State of Alaska enacts and implements laws of general applicability that are consistent with ANILCA and that provide for the subsistence definition, preference, and participation specified in Sections 803, 804, and 805 of ANILCA. The State implemented a program that the

Department of the Interior found to be consistent with ANILCA. However, in December 1989, the Alaska Supreme Court ruled in *McDowell v. State of Alaska* that the rural preference in the State subsistence statute violated the Alaska Constitution. The Court's ruling in *McDowell* required the State to delete the rural preference from the subsistence statute and, therefore, negated State compliance with ANILCA.

As a result of the *McDowell* decision, on July 1, 1990, the Department of the Interior and the Department of Agriculture (Departments) assumed responsibility for implementation of Title VIII of ANILCA on Federal public lands and waters pursuant to temporary subsistence management regulations that were published on June 29, 1990 (55 FR 27114). The Departments published final regulations in the **Federal Register** (57 FR 22940, May 29, 1992). On January 8, 1999 (64 FR 1276), the Departments published a final rule to extend jurisdiction to include certain waters in which there exists a Federal reserved water right in order to conform the Federal Subsistence Management Program to the Ninth Circuit Court's ruling in *Alaska v. Babbitt*, 72 F. 3d 698 (1995).

The subsistence management regulations, as revised January 8, 1999 (64 FR 1276), established a Federal Subsistence Board (Board) to administer the Federal Subsistence Management Program. The Board's composition consists of a Chair appointed by the Secretary of the Interior with concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; the Alaska Regional Director, U.S. National Park Service; the Alaska State Director, U.S. Bureau of Land Management; the Alaska Regional Director, U.S. Bureau of Indian Affairs; and the Alaska Regional Forester, U.S. Forest Service. Through the Board, these agencies participate in the development of the Federal subsistence management regulations. Because these regulations are jointly administered by the Departments, they are found in two titles (36 and 50) of the Code of Federal Regulations.

Federal Subsistence Regional Advisory Councils

The Federal subsistence management regulations divide Alaska into 10 subsistence resource regions, each of which is represented by a Federal subsistence regional advisory council (councils) (36 CFR 242.11 and 50 CFR 100.11). The councils provide a forum for the residents of the particular region with personal knowledge of local

conditions and resource requirements to have a meaningful role in the subsistence management of fish and wildlife on Alaska Federal public lands and waters as described in ANILCA Sections 801 and 805.

The Board reviews applications for membership on the councils and makes recommendations to the Secretaries on the appointments to the councils. The appointments themselves are then made by the Secretary of the Interior with the concurrence of the Secretary of Agriculture. The council members represent varied geographical areas, cultures, interests, and resource users within each region. A council member must be a resident of the region in which he or she is appointed, have knowledge of the fish and wildlife resources in that region, and have knowledge of the subsistence uses of that region.

Litigation

In 1998, Safari Club International and others filed suit in the U.S. District Court for the District of Alaska. This suit, among other things, contended that the membership on the councils was not balanced as required by the Federal Advisory Committee Act (FACA) of 1972, Public Law 92-463, 86 Stat. 770 (*Safari Club v. Demientieff*, No. A98-0414-CV). In the meantime, the Secretary of the Interior, as part of a national review of advisory committees and in response to inquiries related to the Federal subsistence regional advisory councils in Alaska, independently requested that the Board examine its process for selecting nominees, and "see that" groups such as "residents of non-rural areas, commercial users of fish and wildlife resources and sportsmen are represented on the councils." Based on Board recommendations following that in-depth examination, the Secretary of the Interior, with concurrence of the Secretary of Agriculture, in November 2003 increased the size of nine of the councils; established the goal of making appointments to the councils so as to achieve, where possible, a representation goal of 70 percent subsistence users and 30 percent sport and commercial users; revised the application/evaluation/selection process and forms; and approved a 3-year implementation period.

The Native Village of Venetie Tribal Government and others were permitted to intervene in the Safari Club case and to challenge the 70/30 ratio representational goals established by the Secretaries. In January 2004, the U.S. District Court for Alaska entered an order recognizing that, with respect to

the councils, “a council comprised of only subsistence users is not fairly balanced. Subsistence users are not the only persons directly affected by regional advisory council recommendations and subsistence users are not the only persons who might be interested in the management of fish and wildlife on federal lands. * * * Non-subsistence users of fish and wildlife are directly affected by management of fish and wildlife for subsistence uses and have a legitimate interest in the proper scientific management of same. * * * While all points of view and all persons directly affected are not entitled to representation on a FACA committee, in this instance, a cross-section of those affected by fish and wildlife management on federal public lands must be, in a reasonable and fair manner, afforded representation on regional advisory councils.”

In ruling on the cross-claim of the Native Village of Venetie Tribal Government and others, the Court also invalidated the Secretaries’ policy of a goal of a 70/30 (subsistence users/sport and commercial users) membership representation. The Court held that the Secretaries had failed to comply with the notice and comment provisions of the Administrative Procedure Act (5 U.S.C. 553) and ruled that the policy should have been put before the public for comment in a rulemaking process. The District Court ordered the Secretaries to conduct a rulemaking to promulgate an appropriate regional advisory council regulation consistent with FACA after compliance with 5 U.S.C. 553. The Secretaries initiated action with a proposed rule published on April 15, 2004 (69 FR 19964), and received testimony on the proposed rule at a May 2004 public hearing.

On October 14, 2004, the Secretaries published a final rule in the **Federal Register** (69 FR 60957). The Secretaries’ underlying purpose in revising § __.11(b), while complying with the District Court’s order, was to ensure continued compliance with both the fairly balanced representational requirements of FACA and the requirements and purposes of Title VIII of ANILCA in the appointments to the councils. In the change, the Secretaries recognized that some persons with interests other than subsistence uses are entitled under FACA to be represented on the councils. The Secretaries also recognized that Congress intended in Title VIII for Alaska residents “who have personal knowledge of local conditions and requirements * * * to have a meaningful role in the management of fish and wildlife and of

subsistence uses on public lands in Alaska,” and that Congress also intended that “large urban population centers” not be allowed to dominate the regional advisory council system. This rule established the 70/30 representational goal in the change to § __.11(b).

The Native Village of Venetie Tribal Government and others then challenged the final rule, and on August 8, 2006, the Court declared the 70/30 membership structure to be arbitrary and capricious because the Secretaries and the Board had failed to adequately explain the analysis of the relevant factors and to articulate their rationale in adopting the final rule. That order stated that “the court has not concluded that the 70/30 rule for regional advisory council membership is contrary to law. The court’s holding is that defendants have not submitted to the court an administrative record that provides a rationale for that rule.”

Purpose of This Notice

The purpose of this notice is to fulfill the requirements of the District Court’s August 8, 2006, order: To lay out a full administrative record, display a complete assessment of alternatives considered, and provide a more complete explanation for the option selected for providing a balanced membership on the councils. In order to meet the requirements of the District Court, the Secretaries and Board chose to involve the public and the regional advisory councils in a further gathering of ideas and alternative methods to meet all the requirements for Council makeup. The first step of this process was to solicit written comments and suggestions from the public in a formal request dated October 12, 2006 (71 FR 60095). Those comments and suggestions were summarized and presented to the regional advisory councils during their February and March 2007 meetings. At those meetings, the councils were then provided the opportunity to make recommendations to the Federal Subsistence Board for its consideration. The Board was presented a packet of materials with the public comment, Council recommendations, and staff summaries. At a meeting on May 10, 2007, the Board considered two main options based on the packet of materials and additional testimony, including verbal recommendations of the council chairs or their designee. The Board selected one of those options, after deliberation, to recommend to the Secretaries. The Secretaries agree with that recommendation, as documented in this notice.

Selection Process Explanation

The councils must have a balanced membership in accordance with FACA and the court’s rulings. This necessitates that qualified representatives from groups such as commercial users of fish and wildlife resources and sportsmen should sit as members of the councils. In order to implement that balanced membership, the Secretaries must have some method of identifying which interest or interests a prospective council member would represent. The Secretaries believe that self-identification by an applicant is the best way to obtain that information. Many individuals using the fish and wildlife resources of Alaska do so within different user groups. Subsistence fishermen frequently hold commercial fishing licenses, and commercial fishermen may also be sport fishermen or hunters. Sport hunters may have personal use fishing permits, and hunting guides may also hold sport fishing licenses. In almost all cases, however, an individual usually holds certain convictions and beliefs that would cause him or her to represent one of his or her interests more strongly than another interest when making recommendations on potential regulations or policies that would impact his or her use of the resource. For that reason, the Secretaries request that each applicant for a council identify a primary interest. In this way, the Secretaries can appoint applicants who would provide a balanced membership for each council.

Even though FACA requires a membership balanced in viewpoints, the purpose of the councils is to provide Alaska residents “who have personal knowledge of local conditions and requirements * * * to have a meaningful role in the management of fish and wildlife and of subsistence uses on public lands in Alaska” (ANILCA, Title VIII). The Secretaries believe that, in order to fulfill this mandate, subsistence interests must constitute a clear majority of members on each council. Likewise, since sport and commercial users are also entitled to be represented (where such qualified individuals may be present), a council composed of only subsistence users is not a council that meets the requirements of FACA when other qualified representation is available. The Secretaries and the Board, in promulgating the October 2004 rule, considered subsistence and sport and commercial membership ratios of 60/40, 70/30, 80/20, and 90/10 percent, respectively.

The Secretaries did not adopt the 90/10 ratio, because a single individual on a 10-member council could not adequately represent both sport and commercial interests and could easily be intimidated by the remaining 90 percent of the council. Council meetings are routinely held in remote villages and some council members have difficulty attending meetings, particularly if they are engaged in harvesting fish or wildlife resources at the time or are unable to travel due to inclement weather. If such a situation happens to the single person representing sport and commercial users, then there would be no representation of those viewpoints. The Secretaries also rejected the 60/40 ratio. A council with a 60/40 ratio could easily be dominated by sport and commercial interests when one or two members representing subsistence interests are missing from the meeting. An obverse situation could exist with an 80/20 membership ratio if one of the sport or commercial representatives were absent. A 70/30 membership ratio provides a majority representation for subsistence users without domination by sport or commercial interests and still allows meaningful representation by sport and commercial interests. All council members are expected to examine each proposal, policy, or plan and contribute to the development of council recommendations based on recognized principles of fish and wildlife conservation, satisfaction of subsistence needs, and substantial evidence, consistent with Title VIII of ANILCA, and are not expected to act as single interest only representatives.

The councils were first constituted with a 70/30 membership representation goal before their winter 2004 meetings. Since then, the 10 councils have held at least 70 regularly scheduled meetings. In every instance, these meetings have occurred without rancor or hostility among represented interests. Many members have expressed gratitude for the opportunity to associate and learn from members representing other interests. The balanced councils are successful in part because persons representing the different interests depend on the same fish and wildlife resources, with conservation being the main concern.

Summary of Comments From Federal Subsistence Regional Advisory Councils, Other Organizations, and the Public

As previously described, the Federal Subsistence Board sought public comment on October 12, 2006 (71 FR 60095). The Board received written comments from the Alaska Department

of Fish and Game (ADF&G) and the public, including two tribal agencies, one Native organization, one sport fishing and hunting organization, and seven private citizens. Assisted by summaries of that comment, the Federal Subsistence regional advisory councils considered council composition at their February and March 2007 meetings. At the Board's May 10, 2007 meeting, eight councils made formal recommendations and two councils chose not to make a recommendation but submitted comments to the Board. In total there were approximately 43 different recommendations centered around three basic themes. These were considered by the Board during its May 10, 2007 meeting. The recommendations and a response to those recommendations follow. The responses reflect the Secretaries' selected methodology for assuring balance in membership of the regional advisory councils.

Comments Regarding Council Structure

Recommendations Regarding a Percentage Quota

By a ratio of 2 to 1, the commenters and councils opposed setting a ratio of any kind. Their comments noted that: (1) The councils were created for subsistence users who otherwise have little say in the management of their resources; (2) since the purpose of the councils is for recommendations on subsistence management, councils should be composed of subsistence persons familiar with local uses and needs; (3) single-interest representation is not a realistic mirror of Alaskan resource users who are not neatly divided into groups.

Those who support designating a percentage of seats on each council for different user groups noted that: (1) The percentage should reflect each region's demographics, and (2) no less than 30 percent of council members should be commercial and sport use representatives and no more than 70 percent should be subsistence use representatives.

Response: The Secretaries conclude that using a ratio to fill council seats provides a process which clearly demonstrates their desire for diverse representation of users on the councils. The 70/30 ratio allows commercial and sport use representatives a meaningful participation on the councils while maintaining (and protecting) a majority voice for subsistence users. This ratio system of representation worked well during the years it was used. The ratio is a goal rather than an absolute requirement. The council member selection process is dependent on the

applications received, and some regions do not have a sufficient number of resident commercial and sport use applicants to fill 30 percent of the seats. The Secretaries recognize that a majority of applicants do participate in commercial or sport and subsistence activities, and the Departments generally approve for appointment those applicants with the most comprehensive knowledge of resource uses. The Secretaries intend that at no time will selections be made with less than a 70/30 ratio, favoring subsistence representatives.

Other Comments Regarding Council Structure

Some commenters recommended amending ANILCA to exempt the councils from FACA and to conduct a formal rulemaking for the balanced membership plan, which would include public hearings and consultation with tribal governments that have an interest in this regulation.

Response: Amendments to ANILCA are beyond the scope of this notice. The Federal Subsistence Management Program has conducted a formal rulemaking concerning council membership, of which this notice is a part. The rule balances the requirements of FACA and ANILCA.

Other recommendations were to (1) Include designated seats for tribal members; (2) designate seats to be nominated by the governor, Federal Subsistence Board, and State fish and game advisory committees; (3) add State subsistence and personal use, and animal protectionists, to the categories represented; (4) create separate councils for hunting and fishing in each region to allow more commercial and sport representation.

Response: ANILCA Title VIII priorities are established for all rural residents of Alaska and do not provide preference based on ethnicity. Under current regulations, anyone may nominate members for the Secretaries' consideration. However, the Secretaries have always reserved for themselves the authority to make final appointments.

FACA requires diverse viewpoints to be represented on the councils, but also requires that the membership be balanced with the purpose of the councils, which is to provide a forum for interested persons to advise the Board regarding any matter pertaining to subsistence uses and needs. FACA also states that not all interested user groups or individuals can expect membership on a Federal advisory committee.

Recommendations Regarding the Member Appointment Process

The commenters made recommendations related to the appointment process that are summarized as follows: (1) Expand outreach to diverse applicants; (2) revise applicant evaluation criteria to encourage diversity; (3) balance should also consider age, gender, ethnicity, income, education, geographic residence, and other factors; (4) require applicants to designate the interest group they feel most qualified to represent; and (5) maintain a contact list of various organizations, and contact each one regarding each applicant and verify with the community that the applicant would represent community resources use activities.

Response: Since inception of the councils, the Secretaries have considered age, gender, education, and geographic residence when making appointments. Beginning with the 2003 nomination cycle, the Board expanded outreach to commercial and sport use organizations, the application forms were modified to allow for self designation of user group representation, and the applicant evaluation criteria were modified to accommodate commercial and sport use representatives. The nominations process does include a thorough interview of the applicants, their references, and key regional contacts to determine whether applicants are qualified and able to represent their communities and regions.

Recommendations Regarding Individual Member Criteria

The commenters made recommendations related to membership evaluation criteria. Recommendations included: (1) Eliminate the requirement for all members to be knowledgeable about the subsistence uses of public lands in the region; (2) clearly identify the financial interests of members; (3) require all members to uphold ANILCA and protect subsistence uses; and (4) require all appointees to have a comprehensive understanding of Federal and State subsistence management systems, ANILCA, the user group issues, regional subsistence uses and areas, and *Robert's Rules of Order*.

Response: The requirement for all members to know subsistence uses is imbedded in ANILCA and can only be removed by Congress. ANILCA Title VIII and the implementing regulations require all council members to be residents of the region they serve, to have knowledge of that region, and to

have knowledge of the subsistence uses of that region. This knowledge is necessary for the councils to fulfill their purpose. The Department of the Interior's ethics policy for its many advisory committee members neither requires nor encourages financial disclosure, but it does require disclosure of lawsuits, land use permits, and certain other interactions with Department agencies in which the member is a named party. All members are expected to work within the framework of Title VIII and to uphold the law. The applicant evaluation process seeks those with the most comprehensive knowledge of the region's resources and resource uses and leadership qualities and experience. New council members are provided orientation training and an operations manual, and all councils have staff provided to facilitate a free flow of information and assistance to all council members.

Federal Subsistence Board Recommendation

During the Federal Subsistence Board's public meeting on May 10, 2007, after reviewing staff reports, recommendations, and comments by the regional advisory councils, public comments, and public testimony presented during the meeting, the Board developed and considered two distinct options: (1) The first option would lead to councils composed of individuals who each hold a variety of viewpoints, and (2) the other option would provide a variety of viewpoints by a membership composed of distinct single-use representatives.

Option 1. Councils composed of individuals, each of whom holds a variety of viewpoints. This option would seat members who have a comprehensive knowledge of the subsistence, commercial, and sport uses within their respective regions.

In combination, the majority of commenters and councils preferred this option. Most past and current council members participate in multiple resource uses. These members were able to represent the multiple viewpoints of the resource uses within their regions and offer a comprehensive perspective.

Option 2. Provide a variety of viewpoints by a membership composed of distinct single-use representatives. This option would maintain the goal of seating a specific percentage of commercial and sport use representatives on the subsistence regional advisory councils.

Among councils and commenters that favor this option, the ratio most mentioned is a ratio of 70/30

subsistence to commercial and sport users. This option would clearly show that commercial and sport uses are represented on the councils. Councils and public commenters wanted the Board to consider that some regions have little or no commercial or sport use; therefore, the percentage ratio should remain a goal rather than establish designated seats. If no qualified commercial or sport use representatives apply in any given year, seats could then be filled by subsistence use representatives, and the percentage ratio goal would be sought with the next year's appointments.

After deliberation, the Board voted 6–0 on Option 2, to recommend to the Secretaries the final rule as published on October 14, 2004 (69 FR 60957).

Secretarial Conclusion

The Secretaries concur with the recommendation of the Federal Subsistence Board. In deciding on the option which uses percentages for council membership, the Secretaries jointly conclude that percentages would serve as a guide and not a requirement. It is understood that filling seats representing other user groups may be difficult, if not impossible, at all times in certain regions of the State. The Secretaries agree that defining specific seats by user groups could be a divisive factor if applied in a rigid context. However, recent experience has shown that communities can be unified by having additional viewpoints brought into the discussion and by providing a forum for competing interests to work together to find common ground. In addition, the designation of specific seats adds clarity to the overall management of the program and assists the Secretaries in their selection process.

The Secretaries concur that this notice expresses their view in choosing the 70/30 ratio over others such as 60/40 or 80/20; that the current council composition accomplishes their goal to include diverse viewpoints on the councils and balance the councils' knowledge with the councils' functions; that the 70/30 ratio, as previously implemented, was working well and that in many cases this ratio supported stronger, more defensible recommendations and helped to unify people on the issues at hand; and that the differing viewpoints of the diverse membership lead to better discussions. The Secretaries consider the 70/30 ratio as a guideline and understand that in some regions it may be difficult to achieve that ratio due to regional demographics.

Drafting Information

Theo Matuskowitz drafted this notice under the guidance of Peter J. Probasco of the Office of Subsistence Management, Alaska Regional Office, U.S. Fish and Wildlife Service, Anchorage, Alaska. Charles Ardizzone, Alaska State Office, Bureau of Land Management; Sandy Rabinowitch and Nancy Swanton, Alaska Regional Office, National Park Service; Drs. Warren Eastland and Glenn Chen, Alaska Regional Office, Bureau of Indian Affairs; Jerry Berg and Carl Jack, Alaska Regional Office, U.S. Fish and Wildlife Service; and Steve Kessler, Alaska Regional Office, U.S. Forest Service, provided additional assistance.

Authority: 16 U.S.C. 3, 472, 551, 668dd, 3101–3126; 18 U.S.C. 3551–3586; 43 U.S.C. 1733.

Dated: April 3, 2008.

P. Lynn Scarlett,

Deputy Secretary of the Interior, Department of the Interior.

Dated: March 27, 2008.

Mark Rey,

Under Secretary for Natural Resources and Environment, Department of Agriculture, Forest Service.

[FR Doc. E8–7580 Filed 4–9–08; 8:45 am]

BILLING CODE 3410–11–P, 4310–55–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 02–60, FCC 08–47]

Rural Health Care Support Mechanism

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration.

SUMMARY: In this document, the Commission grants American Telemedicine Association's (ATA) Petition for Reconsideration in part and extends for three years the Commission's prior determination to grandfather those health care providers who were eligible under the Commission's definition of "rural" prior to the *Second Report and Order*.

DATES: Effective May 12, 2008.

FOR FURTHER INFORMATION CONTACT: Thomas Buckley, Senior Deputy Chief or Erica Myers, Attorney, Wireline Competition Bureau, Telecommunications Access Policy Division at (202) 418–7400 (voice), (202) 418–0484 (TTY).

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Order on*

Reconsideration, in WC Docket No. 02–60, released February 14, 2008. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554.

I. Introduction

1. In this Order on Reconsideration, the Commission grants in part a Petition for Reconsideration by the American Telemedicine Association (ATA), seeking limited reconsideration of the Commission's Rural Health Care Support Mechanism *Second Report and Order*, 70 FR 6365, February 7, 2005. Specifically, the Commission grants ATA's Petition for Reconsideration in part and extends for three years the Commission's prior determination to grandfather those health care providers who were eligible under the Commission's definition of "rural" prior to the *Second Report and Order*.

II. Discussion

2. The Commission finds that it is in the public interest to grant ATA's Petition for Reconsideration in part and extends for three years the Commission's prior determination to grandfather those health care providers who were eligible to participate in the Commission's rural health care mechanism under the Commission's definition of "rural" prior to the *Second Report and Order*. Given the Commission's broad discretion to define the term "rural," the Commission also finds that it is within its authority to continue providing funding to those health care entities that were previously eligible under the Commission's definition of that term. In particular, the Commission finds it is premature to discontinue support at this time to those health care providers who were eligible under the definition of "rural" prior to the *Second Report and Order*. ATA and commenters proffered specific, uncontested evidence that the application of the new definition of rural in the *Second Report and Order* would result in specific harms to entities that previously were eligible for universal service rural health care support. For example, in its petition, ATA identifies multiple health care facilities that participate in telehealth communications networks in Nebraska and Montana that would be adversely affected by the loss in universal service rural health care funding if the new definition of rural were applied to their rural health care funding applications. This, in turn, would serve only to endanger the continued availability of telemedicine and telehealth services

that these health care facilities provide. Indeed, the Coordinator for Telehealth Services at Avera St. Luke's Hospital in Aberdeen, South Dakota specifically commented that "if we lose USAC support of our telecommunication infrastructure[,] the impact on our facility, our community [of several hundred people], our region and our patients would be devastating. Telehealth Services, including extensive telemedicine, would face significant cuts if not termination." Additionally, the discussion of the term rural in this order relates only to the existing rural health care mechanism.

3. The Commission believes, as commenters suggest, that additional time is necessary for the Commission to evaluate the effect of the new definition on health care providers before they lose support as a result of the modified definition of rural adopted in the *Second Report and Order* became effective in March 2005. Only two funding years have concluded since the new definition went into effect. It would be premature for the Commission to remove previously eligible entities from the mechanism after this limited amount of time, particularly when (as described below) there remains sufficient available funding. Further, in November 2007, the Commission released the *Universal Service Rural Health Care Pilot Program Selection Order*, 22 FR 20360, November 19, 2007, which selected 69 organizations to participate in the Rural Health Care Pilot Program (Pilot Program), initiated by the Commission in September 2006, to facilitate the creation of a nationwide broadband network dedicated to health care, connecting public and private non-profit health care providers in rural and urban locations. A goal of the Pilot Program is to provide the Commission with a more complete and practical understanding of how to ensure the best use of the available RHC support mechanism funds to support a broadband, nationwide health care network (expressly including rural areas). Upon completion of the Pilot Program, among other things, the Commission intends to use the information it learns to fundamentally reexamine the entire universal service rural health care mechanism. In particular, the Commission intends to issue a report detailing the results of the Pilot Program and the status of the RHC support mechanism generally, and to recommend any changes necessary to improve the existing RHC program. In addition, the Commission intends to incorporate the information it gathers as part of the Pilot Program into the record

for any subsequent proceeding. The Commission expects that this post-Pilot Program review would include an examination of the definition of rural. Further, because only \$40.5 million was disbursed for the rural health care mechanism in 2006 and available Pilot Program support will be approximately \$139 million per funding year, well below the \$400 million annual cap for the rural health care mechanism, health care providers eligible under the rural definition adopted in the *Second Report and Order* would not be disadvantaged by the Commission permitting this limited universe of additional entities to remain eligible to receive rural health care support.

4. The Commission does not, however, as requested by ATA, grandfather indefinitely those health care providers who were eligible to participate in the Commission's rural health care mechanism under the Commission's definition of "rural" prior to the *Second Report and Order*. Instead, the Commission finds a three-year extension provides the appropriate timeframe to evaluate the effect of the changes in the definition of "rural" on health care providers and for the Commission to engage in the anticipated reexamination of the rural health care mechanism upon completion of the Pilot Program. Accordingly, health care providers that are no longer eligible to participate in the rural health care program due to the expiration of the three year transition period adopted in the *Second Report and Order* will remain eligible for support under the Rural Health Care Program for an additional three year period through the funding year ending on June 30, 2011.

III. Paperwork Reduction Act of 1995 Analysis

5. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

6. The Commission will send a copy of this Order on Reconsideration in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

IV. Final Regulatory Flexibility Certification

7. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

8. An initial regulatory flexibility analysis (IRFA) was incorporated in the *Second Report and Order*. The Commission sought written public comment on the proposals in the *Second Report and Order*, including comment on the IRFA. No comments were received to the *Second Report and Order* or IRFA that specifically raised the issue of the impact of the proposed rules on small entities.

9. In this Order, the Commission now extends, for three years, the Commission's prior determination to grandfather those health care providers who were eligible under the Commission's definition of "rural" prior to the *Second Report and Order*. This has no effect on any parties that do not currently participate in the rural health care support program. It does not create any additional burden on small entities. The Commission believes that this action imposes a minimal burden on the vast majority of entities, small and large, that are affected by this action.

10. Therefore, the Commission certifies that the requirements of the order will not have a significant economic impact on a substantial number of small entities.

11. In addition, the order and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the **Federal Register**.

V. Ordering Clauses

12. Pursuant to the authority contained in sections 1, 4(i), 4(j), 201-205, 214, 254, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j),

201-205, 214, 254, and 403, this *Order on Reconsideration* is adopted.

13. It is further ordered that, pursuant to the authority contained in sections [1, 4(i), 4(j), 10, 201-205, 214, 254, and 403] of the Communications Act of 1934, as amended, [47 U.S.C. 151, 154(i), 154(j), 201-205, 214, 254, and 403.] the Petition for Reconsideration filed by the American Telemedicine Association on March 7, 2005 is granted to the extent described herein.

14. It is further ordered that Part 54 of the Commission's rules, 47 CFR Part 54, is amended as set forth in Final Rules attached hereto, effective May 12, 2008 of this *Order on Reconsideration*.

15. It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Order on Reconsideration*, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 54

Communications commons carriers, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 54 as follows:

PART 54—UNIVERSAL SERVICE

■ 1. The authority citation for part 54 continues to read as follows:

Authority: 47 U.S.C. 1, 4(i), 201, 205, 214, and 254 unless otherwise noted.

■ 2. Amend § 54.601 by revising paragraph (a)(3)(i) to read as follows:

§ 54.601 Eligibility.

(a) * * *

(3) * * *

(i) Any health care provider that was located in a rural area under the definition used by the Commission prior to July 1, 2005, and that had received a funding commitment from USAC since 1998, remain eligible for support under this subpart though the funding year ending on June 30, 2011.

* * * * *

[FR Doc. E8-7635 Filed 4-9-08; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 648****[Docket No. 071017601–8510–02]****RIN 0648–AW17****Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; 2008 Georges Bank Cod Fixed Gear Sector Operations Plan and Agreement, and Allocation of Georges Bank Cod Total Allowable Catch**

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

ACTION: Final rule.

SUMMARY: This final rule implements the Georges Bank (GB) Cod Fixed Gear Sector (Fixed Gear Sector) Fishing Year (FY) 2008 Operations Plan and Agreement, approved by the Administrator, Northeast (NE) Region, NMFS (Regional Administrator), and allocates a hard total allowable catch (TAC) of GB cod to the Fixed Gear Sector. Framework 42 (FW 42) to the NE Multispecies Fishery Management Plan (FMP) authorized allocation of up to 20 percent of the annual GB cod TAC to the Fixed Gear Sector. Pursuant to that authorization, the Fixed Gear Sector submitted an Operations Plan and Sector Contract entitled, “Georges Bank Cod Fixed Gear Sector Fishing Year 2008–2009 Operations Plan and Agreement” (together referred to as the Sector Agreement) and an Environmental Assessment (EA), and requested an allocation of GB cod, consistent with the FMP. This action results in authorization of the Sector Operations Plan for FY 2008 and allocation of 1,430 mt of GB cod to the Sector.

DATES: Effective May 1, 2008, through April 30, 2009.

ADDRESSES: Copies of the Sector Agreement, EA, and the Final Regulatory Flexibility Analysis (FRFA) are available from the Northeast Regional Office: Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930. These documents are also accessible via the Federal eRulemaking Portal: <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Mark Grant, Sector Policy Analyst, phone (978) 281–9145, fax (978) 281–9135, e-mail Mark.Grant@NOAA.gov.

SUPPLEMENTARY INFORMATION: A proposed rule soliciting public comment on the Sector Agreement for the Fixed Gear Sector was published in the **Federal Register** on March 11, 2008 (73 FR 12942), with public comment accepted through March 26, 2008. The Regional Administrator approved the FY 2008 Sector Operations Plan, based on public comment, and based on a determination that the Operations Plan and Agreement are consistent with the goals of the FMP and applicable law and is in compliance with the regulations governing the development and operation of a sector as specified under § 648.87. Details pertaining to the principal regulations applying to the Fixed Gear Sector, the process of review and approval of sectors, and facts regarding the Fixed Gear Sector’s submission of the FY 2008 Sector Agreement are contained in the proposed rule. An EA entitled “Approval of the Georges Bank Cod Fixed Gear Sector Operations Plan Fishing Year 2008,” which analyzes the impacts of the proposed Fixed Gear Sector operations, was also prepared.

The Fixed Gear Sector was authorized to fish in FY 2006 and FY 2007, and, based upon the GB cod landings history of its members, was allocated <1.0 and 10.7 percent, respectively, of the annual GB cod TAC.

The 2008 Fixed Gear Sector Agreement contains the same elements and exemptions as the 2007 Fixed Gear Sector Agreement and Operations Plan. The Fixed Gear Sector Agreement will be overseen by a Board of Directors and a Sector Manager. The Fixed Gear Sector’s GB cod TAC is based upon the number of Fixed Gear Sector members and their qualifying historic landings of GB cod. The GB cod TAC is a “hard” TAC, meaning that, once the TAC is caught, Fixed Gear Sector vessels may not fish under a NE multispecies Day-at-Sea (DAS), possess or land GB cod or other regulated species managed under the FMP (regulated species), or use gear capable of catching groundfish (unless fishing under charter/party or recreational regulations). In addition, the Operations Plan allows Fixed Gear Sector members to fish in the “common pool,” subject to all of the restrictions of the FMP, prior to approval of the Operations Plan. If Fixed Gear Sector members fish during FY 2008 under “common pool” rules, prior to fishing in the approved Sector, all cod caught will count towards the Fixed Gear Sector’s GB cod TAC. Should the hard TAC be exceeded, the Sector’s allocation in the following year will be reduced by an amount equivalent to the overharvest.

The FY 2008 Sector Agreement contains exemptions from the following restrictions of the FMP: The GB and Gulf of Maine (GOM) cod trip limit; the GOM, GB, and Southern New England (SNE) limit on the number of hooks fished; and the GB Seasonal Closure Area when using hook gear. Justification for the proposed exemptions and analysis of the potential impacts of the Operations Plan are contained in the EA.

A total of 29 Fixed Gear Sector members signed the FY 2008 Fixed Gear Sector Contract. The GB cod TAC calculation is based upon the historic cod landings of the participating Fixed Gear Sector vessels, regardless of gear used. The allocation percentage is calculated by dividing the sum of total landings of GB cod landed by Fixed Gear Sector members in FY 1996 through 2001, by the sum of the total accumulated landings of GB cod landed by all NE multispecies vessels for the same time period. Based upon the qualifying landings histories of the Fixed Gear Sector members, the Fixed Gear Sector’s share of the overall U.S. portion of the GB cod TAC is 13.99 percent, or 3,152,802 lb (1,430 mt) (13.99 percent times the fishery-wide U.S. portion of the GB cod target TAC of 22,535,656 lb (10,222 mt)).

The Sector Contract contains procedures for the enforcement of the Operations Plan, a schedule of penalties, and provides the authority to the Fixed Gear Sector Manager to issue stop fishing orders to members of the Fixed Gear Sector. Participating vessels are required to land fish only in designated landing ports and are required to provide the Fixed Gear Sector Manager with a copy of the Vessel Trip Report (VTR) within 48 hr of offloading. Dealers purchasing fish from participating vessels are required to provide the Fixed Gear Sector Manager with a copy of the dealer report on a weekly basis. On a monthly basis, the Fixed Gear Sector Manager must transmit to NMFS aggregate catch data from dealer slips and aggregate discard data from the VTRs. After 90 percent of the Fixed Gear Sector’s allocation has been harvested, the Fixed Gear Sector Manager is required to provide NMFS with aggregate reports on a weekly basis. A total of 1/12 of the Fixed Gear Sector’s GB cod TAC, minus a reserve, is allocated to each month of the fishing year. GB cod quota that is not landed during a given month will be rolled over into the following month. Once the aggregate monthly quota of GB cod is reached, for the remainder of the month participating vessels may not fish under a NE multispecies DAS, possess or land

GB cod or other regulated species, or use gear capable of catching regulated NE multispecies. The harvest rules do not preclude a vessel from fishing under the charter/party or recreational regulations, provided the vessel fishes under the applicable charter/party and recreational rules on separate trips. For each fishing trip, participating vessels are required to fish under the NE multispecies DAS program regulations to account for any incidental groundfish species that they may catch while fishing for GB cod. In addition, participating vessels are required to call the Sector Manager prior to leaving port. All legal-sized cod caught must be retained, landed and counted against the Fixed Gear Sector's aggregate allocation. Participating vessels may not fish with or have on board gear other than jigs, non-automated demersal longline, handgear, or sink gillnets. Participating Fixed Gear Sector vessels fishing with hook gear may use an unlimited number of hooks in the Sector Area and are exempt from the GB Seasonal Closure Area during May.

Comments and Responses

Three comments were received on this action. One from the Cape Cod Hook Commercial Fishermen's Association (CCCHFA), one from representatives of both the Fixed Gear Sector and the GB Cod Hook Gear Sector, and the third from a member of the general public.

Comment 1: The comment is not directly relevant to this action because the commenter suggested that all allocations of fish be reduced 50 percent this year and 10 percent each subsequent year, asserting that the Sector Area is overfished.

Response: This comment is not relevant to this action.

Comments 2 and 3: The comments from CCCHFA and representatives of the two sectors both supported the approval of the Fixed Gear Sector's FY 2008 Operations Plan and Agreement. Both comments noted that the operations of the Fixed Gear Sector have reduced discards of GB cod, provided flexibility to members to make market-based decisions, and increased profitability for members.

Response: NMFS agrees and has approved the FY 2008 Operations Plan and Agreement.

A Letter of Authorization will be issued to each member of the Fixed Gear Sector exempting them, conditional upon their compliance with the Sector Contract, from the GOM and GB cod possession restrictions, the 3,600-hook limit in the GB RMA, the 2,000-hook limit in the GOM and SNE RMAs and

the GB Seasonal Closure Area when using hook gear, as specified in §§ 648.86(b)(1) and (2), 648.80(a)(4)(v), 648.80(a)(3)(v), 648.80(b)(2)(v) and 648.81(g), respectively.

Classification

NMFS has determined that this final rule is consistent with the FMP, the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable laws.

Pursuant to 5 U.S.C. 553(d)(1), the Assistant Administrator for Fisheries, NOAA, (Assistant Administrator) has determined that this rule is not subject to the 30-day delayed effectiveness provision of the Administrative Procedure Act because it provides the basis for NMFS to grant, effective with the start of the fishing year on May 1, 2008, Fixed Gear Sector members exemptions from the following regulations implementing the FMP:

1. GOM and GB cod trip limits;
2. GB Seasonal Closure Area when using hook gear; and
3. GOM, GB, and SNE limit on number of hooks fished.

These regulations will remain applicable to "common pool" vessels. Because the Fixed Gear Sector will be fishing under a hard TAC for GB cod, effort controls (i.e., exemptions 1–3 above) are not necessary to constrain the impact of the Fixed Gear Sector on the GB cod stock. Should the Fixed Gear Sector's allocated GB cod TAC be harvested, participating vessels would no longer be allowed to fish under a NE multispecies DAS, possess or land GB cod or other regulated species managed under the FMP, or use gear capable of catching groundfish (unless fishing under recreational or charter/party regulations). Fixed Gear Sector members will be required to fish under their current NE multispecies DAS allocation to account for any other regulated NE multispecies that they may catch while fishing for GB cod and are restricted to using hook gear or sink gillnets only.

In order for GB cod to be allocated to the Fixed Gear Sector and the Fixed Gear Sector authorized to fish in FY 2008, the Fixed Gear Sector must submit an Operations Plan and Sector Contract to the Regional Administrator for approval. The regulations at § 648.87(c) authorize the Regional Administrator to approve or disapprove sector operations after the receipt of the required documents, including a complete roster of all parties, vessels, and vessel owners who will participate in the sector. The Fixed Gear Sector did not submit its final FY 2008 roster until January 28, 2008, which delayed publication of the proposed rule until March 11, 2008,

with a comment period that ended on March 26, 2008. Because the final FY 2008 roster included vessels that did not meet the GB cod landings requirement previously codified at § 648.87(d)(2)(i), NMFS could not approve their participation until after the rule removing that eligibility requirement from the sector regulations published on April 3, 2008. Establishing an effective date 30 days after the publication of this final rule would prevent the Fixed Gear Sector from commencing sector operations with the start of the fishing year on May 1, 2008.

Implementation of the Sector Operations Plan is meant to mitigate adverse economic impacts that resulted from Amendment 13 and FW 42 to the FMP. Delaying the implementation beyond May 1, 2008, would result in an unnecessary economic loss to the members of the Fixed Gear Sector because vessels would be prevented from fishing in a month when 15 percent of the annual GB cod landings historically occur, and when the price for GB cod is highest. During the month of May landings of cod by hook gear are at their highest, and the Fixed Gear Sector is exempt from both hook limits and a seasonal closure of a large portion of its historic fishing area while using hook gear. Further, vessels participating in the Fixed Gear Sector in FY 2007 are currently operating under the exemptions above. Delaying implementation beyond May 1, 2008, would create a gap in the annual exemptions for this sector, forcing these vessels to remove gear currently in the water at a high expense.

This final rule has been determined to be not significant for the purposes of Executive Order (E.O.) 12866. This final rule does not contain policies with federalism or "takings" implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively. There are no Federal rules that duplicate, overlap, or conflict with this final rule.

An EA has been prepared for this final rule in compliance with the National Environmental Policy Act. A copy of this EA may be obtained (see **ADDRESSES**).

NMFS, pursuant to section 604 of the Regulatory Flexibility Act (RFA), prepared this FRFA in support of the 2008 GB Cod Fixed Gear Sector Operations Plan and allocation of GB cod TAC. The FRFA incorporates the economic impacts identified in the Initial RFA (IRFA), which was summarized in the preamble of the proposed rule and the corresponding analysis in the EA prepared for this action. A description of why this action was considered, along with the

objectives of, and the legal basis for, this rule are contained in the preamble to the proposed rule and are not repeated here.

Summary of the Issues Raised by Public Comments in Response to the IRFA. A Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made From the Proposed Rule as a Result of Such Comments

No public comments pertaining to the IRFA or the economic effects of this action were received.

Description of and Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

The Small Business Administration (SBA) size standard for small commercial fishing entities is \$4 million in annual gross sales. All permitted and participating vessels in the groundfish fishery, including Fixed Gear Sector members, are considered to be small entities because gross sales by any one entity (vessel) do not exceed this threshold, and, therefore there is no disproportionate impact between large and small entities. The number of participants in the Fixed Gear Sector is 29, substantially less than the total number of active vessels in the groundfish fishery. These 29 vessels will be subject to the regulatory exemptions and operational restrictions approved for the Fixed Gear Sector for FY 2008.

Description of Steps the Agency Has Taken to Minimize the Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

Approval of the FY 2008 Sector Agreement results in an allocation of 1,430 mt of GB cod to the Fixed Gear Sector and exemptions from several restrictions of the FMP and minimization of economic impacts on the Fixed Gear Sector. Once the GB cod TAC is harvested, participating vessels would not be allowed to fish under a NE multispecies DAS, possess or land GB cod, or other regulated species managed under the FMP, or use gear capable of catching groundfish (unless fishing under recreational or party/charter regulations). Fixed Gear Sector vessels may only fish with jigs, non-automated demersal longline, handgear, or sink gillnets.

This action will positively impact the 29 vessels that have voluntarily joined the Fixed Gear Sector, who are relatively more dependant upon groundfish revenue compared to other participants in the groundfish fishery.

The approval of the Fixed Gear Sector and allocation of GB cod TAC will indirectly benefit the communities of Chatham and Harwichport, MA, and to a lesser extent other Cape Cod communities involved in the groundfish fishery. Preliminary FY 2007 data show that the Sector has made 564 trips and landed 735,355 lb (333,551 kg) of GB cod; however, had the Fixed Gear Sector members been subject to the daily trip limit (1,000 lb/day; 454 kg/day) in place for the common pool vessels (non-sector vessels), they would have been prevented from landing 171,355 lb (77,725 kg) of that total. Based on the limited FY 2007 data, assuming a dock-side price of \$1.50 per lb (\$3.30 per kg) for cod, members of the Fixed Gear Sector would already have lost \$257,032.50 (171,355 lb (77,725 kg) X \$1.50 per lb (\$3.30 per kg)) in revenue if they were not exempt from the cod possession limit. Fixed Gear Sector members also landed various other species, which added to their total revenue. In general, the operation of the Fixed Gear Sector would continue to mitigate the negative economic impacts that result from the current suite of regulations that apply to the groundfish fishery (most recently FW 42; October 23, 2006; 71 FR 62156). The Fixed Gear Sector, by fishing under rules that are designed to meet their needs (as well as the conservation requirements of the FMP), is afforded a larger degree of flexibility and efficiency, which result in economic gains. For example, Fixed Gear Sector members are able to plan their fishing activity and income in advance with more certainty due to the fact that there is a cod TAC, which is apportioned to each month of the year. They are able to maximize their efficiency (revenue per trip) due to the exemption from cod possession limits and hook numbers. For some vessel owners in the Fixed Gear Sector, participation in the Fixed Gear Sector enables their businesses to remain economically viable. For the above reasons, approval of the FY 2008 Sector Agreement minimizes the impact on small entities.

In contrast, under the No Action alternative, all Fixed Gear Sector members would have remained in the common pool of vessels and fished under all the rules implemented by Amendment 13 and subsequent Framework Adjustments. Under the regulatory scenario of the No Action alternative, relative to the alternative implemented by this rule, Fixed Gear Sector members would likely have faced increased economic uncertainty, loss of efficiency, and loss of revenue, as noted

above. Because cod usually represents a high proportion of total fishing income for fixed gear vessels, revenues for Fixed Gear Sector members are sensitive to regulations that impact how and when they can fish for cod, such as possession limits and restrictions on the number of hooks that can be fished.

No other alternatives beyond the No Action were considered during the development of this action. The RFA requires each IRFA to include a description of significant alternatives that accomplish the objectives of applicable statutes (in this case, sector provisions) and minimize any significant economic impact to small entities. The objectives of sector management, as originally developed and implemented under Amendment 13, are to provide opportunities for like-minded vessel operators to govern themselves so that they can operate in a more effective and efficient manner. The Fixed Gear Sector developed the Sector Agreement after consultation with prospective members. Prospective members then signed a binding sector contract to abide by the measures specified in the Sector Agreement. As described above, the approved Sector Agreement minimizes economic impacts to participating vessels by allowing them to operate more efficiently. Accordingly, the approved Sector Agreement reflects the management measures preferred by vessels participating in the GB Cod Fixed Gear Sector during FY 2008 and represents all of the significant alternatives that accomplish the objectives of sector provisions and minimize economic impacts to small entities, as required by the RFA. Therefore, in conjunction with the NEPA requirement to consider a reasonable range of alternatives, no other alternatives were considered prior to approval of this action.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Action

This rule contains no collection-of-information requirement subject to the Paperwork Reduction Act.

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

Dated: April 4, 2008.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. E8-7639 Filed 4-9-08; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 679****[Docket No. 071106671–8010–02]****RIN 0648–XH00****Fisheries of the Exclusive Economic Zone Off Alaska; Northern Rockfish, Pacific Ocean Perch, and Pelagic Shelf Rockfish in the Western Regulatory Area and West Yakutat District 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 northern rockfish, Pacific ocean perch, and pelagic shelf rockfish for catcher vessels subject to sideboard limits established under the Central GOA Rockfish Program in the Western Regulatory Area and West Yakutat District of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the sideboard limits of northern rockfish, Pacific ocean perch, and pelagic shelf rockfish established for catcher vessels in the Western Regulatory Area and West Yakutat District of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), July 1, 2008, through 2400 hrs, A.l.t., July 31, 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.

The 2008 sideboard limits established for catcher vessels subject to sideboard limits in the Central GOA Rockfish Program in the West Yakutat District are 32 mt for Pacific ocean perch and 4 mt for pelagic shelf rockfish. The 2008 sideboard limit established for catcher vessels subject to sideboard limits in the Central GOA Rockfish Program in the Western Regulatory Area are zero mt. The sideboard limits are established by the 2008 and 2009 harvest specifications for groundfish of the GOA (73 FR 10562, February 27, 2008).

In accordance with § 679.82(d)(7)(ii), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the directed fishing sideboard limits have been reached for northern rockfish, Pacific ocean perch, and pelagic shelf rockfish established for catcher vessels subject to sideboard limits in the Central GOA Rockfish Program in the Western Regulatory Area and West Yakutat District of the GOA. Consequently, NMFS is prohibiting directed fishing for northern rockfish,

Pacific ocean perch, and pelagic shelf rockfish for catcher vessels subject to sideboard limits in the Central GOA Rockfish Program in the Western Regulatory Area and West Yakutat District of the GOA, effective 1200 hrs, A.l.t., July 1, 2008, through 2400 hrs, A.l.t., July 31, 2008.

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. Pursuant to 5 U.S.C. 553 (b)(B), the Assistant Administrator for Fisheries, NOAA (AA) finds good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment is unnecessary. Notice and comment is unnecessary because the closure is non-discretionary; pursuant to § 679.82(d)(7)(ii), the Regional Administrator has no choice but to prohibit directed fishing once it is determined that the directed fishing sideboard limit has been attained.

This action is required by § 679.82 and is exempt from review under Executive Order 12866.

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

Dated: April 3, 2008.

Alan D. Risenhoover

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

[FR Doc. E8–7650 Filed 4–9–08; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register

Vol. 73, No. 70

Thursday, April 10, 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 AGRICULTURE

Rural Housing Service

7 CFR Part 1980

RIN 0575-AC73

Income Limit Modification

AGENCY: Rural Housing Service, USDA.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Rural Housing Service is proposing to revise the existing income limit structure for Single Family Housing Guaranteed Loan Program (SFHGLP) eligibility. Instead of eligible adjusted income based on households ranging from 1–8 persons according to 7 CFR 1980.345 (a), a two tier income structure consisting of a 1–4 member household and a 5–8 member household is proposed. The new adjusted income limit for the 1–4 member household, for example, would be current adjusted income limit for the 4 member household. The present add-on income limits for larger households will remain unchanged. The present multiple income limits (1–8 persons) are cumbersome, and the proposed consolidation is expected to simplify program delivery as well as allow the agency to serve additional qualified homebuyers. The SFHGLP is in partnership with many State Housing Agencies throughout the United States. The majority of these agencies already maintain a two tier income structure, and this proposed change would allow a seamless integration of the respective programs. This proposal would not apply to other housing programs.

DATES: Comments on this advance notice of proposed rulemaking must be received on or before May 12, 2008 to be assured of consideration.

ADDRESSES: You may submit comments to this rule by any one of the following methods:

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

- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250-0742.

- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

All written comments will be available for public inspection during regular work hours at 300 7th Street, SW., 7th Floor address listed above.

FOR FURTHER INFORMATION CONTACT: David Chaput, Senior Loan Specialist, USDA Rural Development, Single Family Housing Guaranteed Loan Division, STOP 0784 (Room 2250) 1400 Independence Ave., SW., Washington, DC 20250-0784. Telephone: 202-720-1456.

SUPPLEMENTARY INFORMATION:

Classification

This advance notice has been reviewed under Executive Order (EO) 12866 and has been determined to be not significant for the purposes of this EO.

Dated: March 18, 2008.

Russell T. Davis,

Administrator, Rural Housing Service.

[FR Doc. E8-7205 Filed 4-9-08; 8:45 am]

BILLING CODE 3410-XV-P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

[NRC-2008-0019]

RIN 3150-AG63

Power Reactor Security Requirements; Supplemental Proposed Rule

AGENCY: Nuclear Regulatory Commission.

ACTION: Supplemental proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to add new provisions regarding licensee procedures for responding to notifications of potential aircraft threat

and for the mitigation of the loss of large areas of their facilities due to large fires or explosions. These provisions were previously noticed for public comment in the October 26, 2006 (71 FR 62664) proposed power reactor security rulemaking. The NRC is publishing this supplemental proposed rule notice to obtain additional stakeholder feedback on the additional regulatory text that has been added to these provisions since the original proposed rule was published for comment.

DATES: Submit comments on this proposed rule by May 12, 2008. Submit comments on the information collection aspects on this proposed rule by May 12, 2008.

ADDRESSES: You may submit comments by any one of the following methods. Please include the following number RIN 3150-AG63 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. Personal information, such as your name, address, telephone number, e-mail address, etc., will not be removed from your submission.

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 <http://www.regulations.gov>.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, 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.

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

Publicly available documents related to this rulemaking may be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction

contractor will copy documents for a fee.

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 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 PDR Reference staff at 1-800-397-4209, 301-415-4737 or by e-mail to PDR.Resource@NRC.gov.

FOR FURTHER INFORMATION CONTACT: Ms. Bonnie Schnetzler, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone 301-415-7883; e-mail: Bonnie.Schnetzler@nrc.gov, or Mr. Timothy Reed, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone 301-415-1462; e-mail: Timothy.Reed@nrc.gov.

SUPPLEMENTARY INFORMATION:

- I. Introduction
- II. Comments on the Proposed Rule
- III. Section-by-Section Analysis for 10 CFR 50.54(hh)
- IV. Relationship of Proposed § 50.54(hh)(2) to Aircraft Impact Assessment Proposed Rule
- V. Guidance Supporting § 50.54(hh)
- VI. Specific Request for Comments
- VII. Availability of Documents
- VIII. Plain Language
- IX. Voluntary Consensus Standards
- X. Finding of No Significant Environmental Impact: Availability
- XI. Paperwork Reduction Act Statement
- XII. Regulatory Analysis
- XIII. Regulatory Flexibility Act Certification
- XIV. Backfit Analysis

I. Introduction

The NRC published the proposed rulemaking on power reactor security for public comment in the **Federal Register** on October 26, 2006 (71 FR 62664). The proposed rule contained a large number of proposed requirements, including proposed requirements regarding licensee procedures for responding to notifications of potential aircraft threats and for the mitigation of the loss of large areas of their facilities due to large fires or explosions. Those provisions described proposed requirements that were similar to those previously imposed under section B.5 of "Interim Compensatory Measures (ICM) Order," dated February 25, 2002 (EA-02-026, March 4, 2002; 67 FR 9792) (Safeguards Information); specifically, the "B.5.a provision" and the "B.5.b

provision." Proposed section II(k)(1) of Appendix C to Part 73 (the B.5.a or "potential aircraft threats" provision) stated that "Licensees shall implement a 'Threat Warning System' which identifies specific graduated protective measures and actions to be taken to increase licensee preparedness against a heightened or imminent threat of attack." Proposed section II(j) of Appendix C to Part 73 (the B.5.b or "mitigative measures" provision) stated that the licensee "Integrated Response Plan" must "Include specific procedures, guidance, and strategies to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities using existing or readily available resources (equipment and personnel) that can be effectively implemented under the circumstances associated with loss of large areas of the plant due to explosions or fires."

During development of the power reactor security final rule, the NRC determined that several significant changes to the proposed rule language would be needed to adequately address stakeholder comments and associated implementation concerns. External stakeholders commented that locating these provisions in Appendix C to Part 73 was not appropriate, given that the actions taken to address these order requirements were not specific to a licensee's security organization but instead encompassed a much broader range of actions across the facility. Although these comments were focused specifically on the mitigative measures provision that was in proposed section II(j) of Appendix C to Part 73, the NRC recognized that the same issues applied equally to the potential aircraft threats provision contained in proposed section II(k)(1) of Appendix C to Part 73. The NRC agrees with the stakeholders comments and is proposing to re-locate the provisions from Part 73 to 10 CFR Part 50. Specifically these provisions would be located in a new paragraph (hh) that would be added to § 50.54 as a condition of the license. This approach was chosen to ensure consistency with the method by which the B.5.b requirements have been implemented for currently operating reactors. (See "Orders Modifying Licenses," 71 FR 36554, June 27, 2006.)

In the process of evaluating these comments, the NRC also considered whether it was appropriate to add additional details and make editorial changes to the rule language. The NRC wants to ensure that the potential aircraft threats and mitigative measures provisions are consistent with the work that was done with licensees over the last six years during implementation of

the ICM requirements. In addition, the NRC was concerned that the lack of specific language would lead to confusion about the NRC's expectations. Therefore, the NRC determined that more detailed rule language would better meet the Commission's regulatory objectives.

While the NRC has clarified the language in these provisions, these clarifications merely reflect the current ICM order requirements as intended by the Commission. In fact, it is the NRC's view that current Part 50 licensees would already be in compliance with these proposed requirements if they were to be codified in a final rule. As such, the language provided in this supplemental proposed rule does not describe "new requirements" using the existing post-9-11 security orders as the baseline of "current requirements." Rather, the NRC views these language changes as improving the specificity of the original proposed requirements. However, because this is a significant change to the proposed rule language on which external stakeholders did not have an opportunity to comment, the NRC concludes that obtaining stakeholder feedback on these re-located provisions through the use of a supplemental proposed rule is appropriate.

II. Comments on the Proposed Rule

As previously discussed, the NRC received several comments on the proposed 10 CFR Part 73, Appendix C provisions (i.e., proposed section II(j) and proposed section II(k)(1)) that were contained in the larger proposed power reactor security rulemaking, and that would now be re-located to proposed § 50.54(hh). These comments are discussed in detail in the following paragraphs.

II.1. Comments on Proposed Section II(j) of Appendix C to Part 73

Comment: Stakeholders commented that, for existing licensees, the NRC is already employing a different and more appropriate regulatory scheme for addressing ICM B.5.b conditions. Commenters noted that the B.5.b requirement is being controlled with a performance-based license condition that is satisfied by voluntary licensee commitments to B.5.b Phase 2 and Phase 3 mitigating strategies. Other commenters noted that these strategies are generally operations procedures that work in conjunction with Emergency Operating Procedures, Severe Accident Mitigation Guidelines, and Extreme Damage Mitigation Guidelines for beyond design base conditions. It was argued that this is an inappropriate

expansion of the security role or the roles of security programs in the hierarchy of plant procedures and processes and that putting specific detail regarding mitigating strategies into the security contingency response plan limits the effectiveness of licensee strategies for dealing with unpredictable plant events. It was commented that the NRC should retain the existing regulatory approach and language.

Response: The NRC agrees that the requirements were not appropriately located in Appendix C to Part 73. The proposed requirements described in that section pertain to a licensee's obligation to protect against design basis threat-related security events. The B.5.b. requirements have always been associated with beyond-design basis events. They do not specifically describe the actions that would have to be taken by security force personnel.

The NRC also agrees that the mitigating strategies requirements should be consistent with the actions that were taken by the NRC to close the B.5.b ICM order issue both in terms of the specific actions required and in regard to the general regulatory approach (i.e., through the use of license conditions). These efforts were reflected in the issuance of orders on June 20, 2006, requiring implementation of key radiological protection mitigation strategies. (See "Orders Modifying Licenses," 71 FR 36554; June 27, 2006). Thus, to address the necessary relocation of these requirements and to reflect consistency with the B.5.b. implementation experience, the NRC proposes that a more appropriate location for the mitigating strategies requirements would be in Part 50. It is the NRC's view that § 50.54 is the appropriate location for these proposed requirements because it describes "Conditions of Licensees."

Comment: Another commenter stated that proposed Part 73, Appendix C does not specify what types of fires or explosions the licensee must prepare for, nor does it specify what areas of the plant are considered particularly susceptible to damage or destruction by fire or explosion. The commenter stated that the provision also does not adequately describe whether, or to what degree, the licensee would rely on off-site first responders, such as local fire departments, to aid in either fighting the fire or maintaining cooling of the core or spent fuel pools in the event of containment loss or breach of a pool. The commenter stated that if this proposed revision is intended to address the potential effects of an aircraft attack on an operating nuclear plant, then the final rule must contain specific

provisions addressing the effects of jet fuel fires on vital areas of the plant, such as the containment dome, spent fuel pool building and control room building. In addition, the commenter said the NRC should require the licensee to demonstrate its ability to deal with significant aircraft debris, such as jet engines, impacting these same vital areas. The commenter stated that one simple solution would be to require licensees to harden the spent fuel pool buildings and control room building so that they are more resistant to an aircraft impact.

Response: As part of the issuance of the ICM order of 2002, the Commission made a determination as to the level of requirements needed to address beyond-design basis scenarios in section B.5.b. The Commission did not intend to limit beyond-design basis scenarios to aircraft attacks but, instead called for the development of mitigation measures to generally deal with the situation in which large areas of the plant were lost due to fires and explosions, whatever the beyond-design basis initiator. This supplemental proposed rule would codify generically applicable requirements similar to those that have previously been required by the ICM order. Accordingly, as with the original section B.5.b requirements, this proposed rule would apply only performance-based criteria so that individual licensees would have to determine the most appropriate site-specific measures that would meet the general performance criteria. Further, the NRC has provided licensees guidance describing parameters that could be used as aids in determining the scope of their site-specific mitigating strategies. Because the Commission has found this approach to be successful, and the proposed § 50.54(hh) requirements reflect consistency with the implementation of the 2002 ICM order requirements to address loss of large areas of the plant due to fire or explosions, the NRC does not believe it is necessary, or even practical, that the prescription suggested by the stakeholder be incorporated into supplemental proposed § 50.54(hh).

Comment: Another commenter noted the draft final Part 52 rule [Note that it is now a final rule: 72 FR 49352] includes requirements for design certification applicants to include a description and evaluation of the design features or strategies for the prevention and mitigation of a specific set of severe accidents. The commenter acknowledged that action should be taken to prevent or mitigate certain specific beyond design bases events including those resulting from large

fires and explosions. To improve regulatory coherency and consistency, the commenter stated that the NRC should address large fires and explosions in the same regulation and in the same manner as other similar beyond design bases events that are already being addressed in the regulations. The commenter noted that the evaluations of the features and strategies that could mitigate or prevent beyond design bases accidents that result from large fires and explosions are performed by engineering and operational groups and NRC reviews are performed by engineering and operations inspectors. Therefore, the commenter stated that it is more appropriate for these matters to be addressed in Part 52 as opposed to Part 73.

Response: The NRC does not agree that the issues that would be addressed by this proposed rule are design-related matters. As explained below, the proposed requirements of § 50.54(hh)(2) would require licensees to develop guidance and strategies to address beyond design basis events. They would not, however, require licensees or designers to make design changes. To the extent that some beyond design basis events such as aircraft impacts could be addressed through the design of the facility, the Commission intends that such requirements would be addressed in the proposed aircraft impact assessment rulemaking also discussed below. Therefore, the NRC believes that the best location for these proposed requirements is with other technical requirements in Part 50.

II.2. Comments on Proposed Appendix C, Section II(k)

Comment: One commenter stated that this is a significant expansion of the integrated response plan required by the Orders. The commenter also stated that this requirement is the subject of other existing regulatory requirements. Thus, the commenter recommended that the NRC delete this provision from the final rule.

Response: The NRC believes that most external stakeholders did not recognize that the potential aircraft threat requirements were co-located in proposed Appendix C to Part 73, section II(k) with the proposed threat warning requirements. The proposed section II(k) requirements (now the proposed 50.54(hh)(1) requirements) were inappropriately located in Appendix C, particularly within the proposed integrated response plan requirements. Further, the language of the proposed rule failed to capture the proposed requirements that the Commission

intended. As with the proposed section II(j) requirements, the NRC concludes that these proposed provisions need additional clarification and re-location to a more suitable regulation.

III. Section-by-Section Analysis for 10 CFR 50.54(hh)

Proposed § 50.54(hh)(1)

The proposed language for § 50.54(hh)(1) would establish the necessary regulatory framework and clarify current expectations to facilitate consistent application of Commission requirements for preparatory actions to be taken in the event of a potential aircraft threat to a nuclear power reactor facility. Because aircraft threats are significant, rapidly evolving events, and licensees may only receive threat notifications a short time before potential onsite impacts, the NRC has determined that it is not prudent for licensees to attempt to identify and accomplish ad hoc mitigative actions in the midst of such circumstances and that such an impromptu approach would unnecessarily limit the effectiveness of onsite and offsite responses. To cope effectively with potential aircraft threats, the proposed rule would require licensees to develop specific procedures, whether in a single procedure or among several procedures that describe the licensee's pre-identified actions to be taken with little or no hesitation when provided with pre-event notification. These pre-event preparations would provide the most effective responses possible to aircraft threats and demonstrate systematic onsite and offsite planning, coordination, communication, and testing.

The proposed rule would require licensees to develop, maintain, and implement procedures for verifying, to the extent possible, the authenticity of aircraft threat notifications to avoid taking actions in response to hoaxes that may adversely impact licensees or the health and safety of the public. Depending on the source of a threat notification, licensees may or may not be able to establish contact with appropriate entities to confirm the accuracy of the threat information received. Consequently, the NRC expects licensees, at a minimum, to contact the NRC Headquarters Operations Center for assistance with verifying callers' identities or the veracity of threat information.

The national protocol for dealing with aircraft threats is designed to be proactive with respect to threat identifications and notifications. However, threat information sources

may not be able to identify specific targets, and given the dynamic nature of potential aircraft threats, any associated notifications to licensees may necessarily be reactive in nature. Additionally, licensees must rely on sources which are external to their control rooms for potential aircraft threat notifications, and updates, when available. As a result, the proposed rule would require licensees to develop, maintain, and implement procedures for the maintenance of continuous communication with threat notification sources because it is imperative that licensees establish and maintain this capability throughout the duration of the pre-event notification period. With such a capability, licensees will be able to receive accurate and timely threat information upon which to base decisions concerning the most effective actions that need to be taken.

The proposed rule would also require that licensees develop, maintain, and implement procedures for notifying all onsite personnel and appropriate offsite response organizations (e.g., fire departments, ambulance services, emergency operations centers) in a timely manner following the receipt of potential aircraft threat notifications. These notifications would ensure that onsite personnel have as much time as possible to execute established procedures and provide offsite response organizations the opportunity to:

- Initiate mutual aid assistance agreements based on the perceived threat;
- Commence the near-site mustering of offsite fire-fighting and medical assistance for sites where these organizations are not proximately located; or
- Mobilize personnel for volunteer organizations or hospital staffs.

During the pre-event notification period, the proposed rule would require licensees to develop procedures to assess plant conditions continuously and take effective actions to mitigate the consequences of an aircraft impact. Examples include maximizing makeup water source inventories, isolating appropriate plant areas and systems, ceasing fuel handling operations and equipment testing, starting appropriate electrical generation equipment, and charging fire-service piping headers. By taking these actions, licensees can better position their sites to minimize the effect on public health and safety.

The proposed rule would also require licensees to develop and implement procedures for making site-specific determinations of the amount of lighting required to be extinguished, if any, to prevent or reduce visual discrimination

of sites relative to their immediate surroundings and distinction of individual buildings within protected areas. For example, it may make sense to turn off all the lights at an isolated site, but not for a site situated in an industrial area, where ambient lighting from surrounding industries is sufficient for target discrimination. Licensees would use centralized lighting controls or develop prioritized routes that allow personnel to turn off different sets of lights depending on available time, when appropriate.

The safety of licensee personnel and contractors is paramount to the successful response and implementation of mitigating measures after an onsite aircraft impact. To the maximum extent possible after a potential aircraft threat notification, the proposed rule would also require licensees to develop and implement procedures for pre-staging appropriate personnel and equipment at locations throughout their sites. Such actions would increase the chance that critical personnel and equipment will be available to address the consequences of an onsite aircraft impact and reduce the need to make improvised decisions during the pre-event notification period. The decision whether to shelter the remaining personnel in-place or evacuate them in response to a potential aircraft threat should be based on the physical layout of the site and the time available to conduct an effective evacuation. Licensees would need to:

- Determine how much time is necessary to evacuate their protected areas,
- Validate the accuracy of that determination using no-notice drills, and
- Incorporate the lessons learned from those drills into their site-specific procedures.

Licensees would also be required to develop procedures to facilitate the rapid re-entry of these personnel and offsite responders into their protected areas to deal with the consequences of an aircraft impact.

Because even the most well-considered plans and procedures do not guarantee that critical on-shift personnel will survive an aircraft impact, the proposed rule would require licensees to develop and implement procedures for an effective recall process for appropriate off-shift personnel. Those procedures would describe the licensee's process for initiating off-shift recalls during the pre-event notification period and for directing responding licensee personnel to pre-identified assembly area outside the site protected areas. When possible, the assembly area

locations should be coordinated with offsite response organizations to facilitate offsite response plans, as well as ensure off-shift licensee personnel will not be unnecessarily prevented from arriving onsite when needed.

Proposed § 50.54(hh)(2)

The proposed language for § 50.54(hh)(2) would require licensees to develop guidance and strategies for addressing the loss of large areas of the plant due to explosions or fires from a beyond-design basis event through the use of readily available resources and by identifying potential practicable areas for the use of beyond-readily-available resources. These strategies would address licensee response to events that are beyond the design basis of the facility. These proposed requirements originated in the ICM order of 2002. Ultimately, these mitigation strategies were further developed and refined through extensive interactions with licensees and industry. The NRC recognizes that these mitigation strategies will be beneficial for the mitigation of all beyond-design basis events that result in the loss of large areas of the plant due to explosions or fires. Current reactor licensees comply with these requirements through the use of the following 14 strategies that have been required through an operating license condition. These strategies fall into the three general areas identified by proposed § 50.54(hh)(2)(i), (ii), and (iii). These strategies are:

Fire fighting response strategy with the following elements:

1. Pre-defined coordinated fire response strategy and guidance.
 2. Assessment of mutual aid fire fighting assets.
 3. Designated staging areas for equipment and materials.
 4. Command and control.
 5. Training of response personnel.
- Operations to mitigate fuel damage considering the following:

1. Protection and use of personnel assets.
2. Communications.
3. Minimizing fire spread.
4. Procedures for implementing integrated fire response strategy.
5. Identification of readily-available, pre-staged equipment.
6. Training on integrated fire response strategy.
7. Spent fuel pool mitigation measures.

Actions to minimize release to include consideration of:

1. Water spray scrubbing.
2. Dose to onsite responders.

The NRC considered specifically including these 14 strategies in the text

of proposed § 50.54(hh)(2). However, the NRC decided that the more general performance-based language in proposed § 50.54(hh)(2) was a better approach to account for future reactor facility designs that may contain features that preclude the need for some of these strategies. New reactor licensees would also be required to employ similar strategies to address core cooling, spent fuel pool cooling, and fission product barrier integrity. The strategies would need to account for, as appropriate, the specific features of the plant design, or any design changes made as a result of an aircraft assessment performed per proposed § 52.500 (aircraft impact assessment proposed rule, 72 FR 56287; October 3, 2007).

The Commission issued guidance (Safeguards Information) to current reactor licensees on February 25, 2005, and additionally endorsed NEI 06-12, Revision 2, by letter dated December 22, 2006. These two sources of guidance provide an acceptable means for developing and implementing the above strategies. The Commission is currently developing a draft Regulatory Guide that consolidates this guidance and addresses new reactor designs.

IV. Relationship of Proposed § 50.54(hh)(2) to Aircraft Impact Assessment Proposed Rule

The proposed § 50.54(hh) would be applicable to both current reactor licensees and new applicants for and holders of reactor operating licenses under either part 50 or part 52. Current reactor licensees have already developed and implemented procedures that would comply with the proposed § 50.54(hh)(2) requirements, and would not require any additional action to comply with these proposed rule provisions. New applicants for and new holders of operating licenses under part 50 and combined licenses under part 52 would be required to develop and implement procedures that would employ mitigating strategies similar to those now employed by current licensees to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with loss of large areas of the plant due to explosions or fire. The requirements described in the proposed § 50.54(hh) relate to the development of procedures for addressing certain events that are the cause of large fires and explosions that affect a substantial portion of the nuclear power plant, and are not limited or directly linked to an aircraft impact. The rule contemplates that the initiating event for such large fires and explosions

could be any number of design basis threat or beyond design basis threat events. In addition, the NRC regards the proposed § 50.54(hh) as necessary for reasonable assurance of adequate protection to public health and safety and common defense and security; this is consistent with the NRC's designation of the orders on which § 50.54(hh) is based as being necessary for reasonable assurance of adequate protection.

In a separate rulemaking, the NRC has proposed to require designers of new nuclear power plants (e.g., applicants for standard design certification under part 52, and applicants for combined licenses under part 52) to conduct an assessment of the effects of the impact of a large commercial aircraft on the nuclear power plant. (72 FR 56287, October 3, 2007). Based upon the insights gained from this assessment, the applicant must include a description and evaluation of design features and functional capabilities to avoid or mitigate, to the extent practical and with reduced reliance upon operator actions, the effects of the aircraft impact. New reactor applicants would be subject to both the proposed requirements of the aircraft impact rule, and the proposed requirements § 50.54(hh). The overall objective of the NRC is to enhance a nuclear power plant's capabilities to withstand the effects of a large fire or explosion, whether caused by an aircraft impact or other event, from the standpoints of both design and operation. The impact of a large aircraft on the nuclear power plant would be regarded as a beyond design basis event. In light of the NRC's view that effective mitigation of the effects of events causing large fires and explosions (including the impact of a large commercial aircraft) should be provided through operational actions, the NRC believes that the mitigation of the effects of such impacts through design should be regarded as a safety enhancement which is not necessary for adequate protection. Therefore, the aircraft impact rule—unlike the proposed § 50.54(hh)—would be regarded as a safety enhancement which is not necessary for adequate protection.

The NRC regards the two rulemakings to be complementary in scope and objectives. The aircraft impact rule focuses on enhancing the design of future nuclear power plants to withstand large commercial aircraft impacts, with reduced reliance on human activities (including operator actions). Proposed § 50.54(hh) focuses on ensuring that the nuclear power plant's licensees will be able to implement effective mitigation measures for large fires and explosions

including (but not explicitly limited to) those caused by the impacts of large, commercial aircraft. Thus, these revisions to the NRC's regulatory framework for future nuclear power plants will provide more regulatory certainty, stability, and increased public confidence.

V. Guidance Supporting § 50.54(hh)

The NRC staff is preparing new regulatory guidance on the requirements in proposed § 50.54(hh). This guidance is intended to provide an acceptable method by which current Part 50 licensees, and future Part 50 and Part 52 applicants and licensees, would be able to implement and comply with the requirements of proposed § 50.54(hh). The regulatory guidance will be issued in draft form for comment following publication of this supplemental proposed rule.

Regarding the guidance supporting § 50.54(hh)(2), the NRC issued Phase 1 guidance (SGI) to current reactor licensees on February 25, 2005, and additionally endorsed NEI 06-12, Revision 2, by letter dated December 22, 2006, with regard to Phase 2 and 3 guidance. These two sources of guidance would provide an acceptable means for developing and implementing the mitigation strategies. The Commission is currently developing a draft Regulatory Guide that consolidates this guidance and is written with a focus on new reactor designs.

VI. Specific Request for Comments

In addition to the general invitation to submit comments on the proposed rule, the NRC also requests comments on the following questions:

1. The NRC recognizes that the actions that would be required by § 50.54(hh) would address beyond-design basis events that in some cases cannot be bounded (as is typically done for design basis events) in terms of the event conditions. As a result, the proposed § 50.54(hh) required actions, though beneficial in many cases, may not be effective for some situations. Given this, the NRC requests specific comments on whether there should be additional language added to the proposed § 50.54(hh) requirements that would limit the scope of the regulation (i.e., language that would constrain the requirements to a subset of beyond-design basis events such as beyond-design basis security events).

2. Under the proposed § 50.54(hh) requirements, the NRC would review applicants' procedures, guidance and strategies related to the proposed § 50.54(hh) as part of its licensing processes, inspection processes, or combination thereof, but these proposed requirements would not be included as part of a new application for a license under Part 50 or 52. The NRC is considering, however, whether it is also necessary or appropriate to also require inclusion of the § 50.54(hh)-related

activities within the NRC staff's review of a combined operating license application or operating license application. This would be accomplished by requiring such materials to be submitted as part of the applicant's application as required by § 50.34 or § 52.80, as applicable. The NRC requests specific comments on what would be the most effective and efficient process to review the applicants' and licensees' procedures, guidance and strategies developed and maintained in accordance with § 50.54(hh)(1) and § 50.54(hh)(2).

VII. Availability of Documents

The NRC is making the documents identified below available to interested persons through one or more of the following methods, as indicated.

Public Document Room (PDR). The NRC Public Document Room is located at 11555 Rockville Pike, Rockville, Maryland 20852.

Regulations.gov (Web). These documents may be viewed and downloaded electronically through the Federal eRulemaking Portal <http://www.Regulations.gov>, Dockets NRC-2006-0016 and NRC-2008-0019.

NRC's Electronic Reading Room (ERR). The NRC's public electronic reading room is located at <http://www.nrc.gov/reading-rm.html>.

Document	PDR	Web	ERR (ADAMS)
Proposed power reactor security rulemaking notice	X	X	ML062000122
Proposed power reactor security rulemaking regulatory analysis and supporting appendices	X	X	ML061920112 ML061380796 ML061440013
Proposed power reactor security rulemaking OMB information collection analysis	X	X	ML062830016
Proposed power reactor security rulemaking environmental assessment	X	X	ML061920093
EA-02-026, "Interim Compensatory Measures (ICM) Order" (67 FR 9792)	X	X	ML020520754
EA-06-0137, "Orders Modifying Licenses" (71 FR 36554)	X	X	ML061600023

VIII. Plain Language

The Presidential memorandum "Plain Language in Government Writing" published June 10, 1998 (63 FR 31883), directed that the Government's documents be in clear and accessible language. The NRC requests comments on the proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the NRC as explained in the ADDRESSES caption of this notice.

IX. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113, requires that Federal agencies use technical standards that are

developed or adopted by voluntary consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. The NRC is not aware of any voluntary consensus standard that could be used instead of the proposed Government-unique standards. The NRC will consider using a voluntary consensus standard if an appropriate standard is identified.

X. Finding of No Significant Environmental Impact: Availability

The NRC has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A

of 10 CFR part 51, that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required.

The determination of this environmental assessment is that there will be no significant offsite impact to the public from this action. This determination was made as part of the proposed power reactor security rulemaking (71 FR 62664; October 26, 2006), and it remains applicable to this supplemental proposed rulemaking.

XI. Paperwork Reduction Act Statement

The proposed rule published on October 26, 2006 (71 FR 62664) imposed new or amended information collection requirements contained in 10 CFR Parts 50, 72, and 73 that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). These new or amended information collection requirements were submitted to the Office of Management and Budget for review. The existing requirements were approved by the Office of Management and Budget, approval numbers 3150–0011, 3150–0132 and 3150–0002.

This supplemental proposed rule does not contain new or amended information collection requirements, but relocate information collections addressed in the proposed rule published October 26, 2006 (71 FR 62664) from 10 CFR part 73 (3150–0002) to 10 CFR part 50 (3150–0011). The burden estimated for the relocated information collections will be included in the revised OMB clearance package prepared for the final rule.

The U.S. Nuclear Regulatory Commission is seeking public comment on the potential impact of the information collections contained in this supplemental proposed rule and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility?
2. Is the estimate of burden accurate?
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques?

Send comments on any aspect of these proposed information collections, including suggestions for reducing the burden and on the above issues, by May 12, 2008 to the Records and FOIA/Privacy Services Branch (T–5 F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by Internet electronic mail to INFOCOLLECTS@NRC.GOV and to the Desk Officer, Nathan J. Frey, Office of Information and Regulatory Affairs, NEOB–10202, (3150–0011; 0132; 0002), Office of Management and Budget, Washington, DC 20503. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date. You may also e-mail comments to Nathan_J._Frey@omb.eop.gov or

comment by telephone at 202–395–7345.

Public Protection Notification

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

XII. Regulatory Analysis

The NRC has not prepared a separate regulatory analysis for this supplemental proposed rule. The regulatory analysis that was prepared to support the proposed power reactor security rulemaking (71 FR 62664; October 26, 2006) remains applicable to these provisions.

XIII. Regulatory Flexibility Act Certification

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule affects only the licensing and operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of “small entities” set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

XIV. Backfit Analysis

The NRC has determined that the proposed additions are not backfits as defined by 10 CFR 50.109(a)(1), and therefore a backfit analysis is unnecessary for this supplemental proposed rule. Section 50.109(a)(1) defines backfitting as “the modification or addition to systems, structures, components or design of a facility * * * or the procedures or organization required to design, construct or operate a facility; any of which may result from a new or amended provision in the Commission rules * * *.” The supplemental proposed rule contains proposed requirements regarding licensee procedures for responding to notifications of potential aircraft threats and for the mitigation of the loss of large areas of their facilities due to large fires or explosions. Though more specific detail is provided in these proposed rules, these provisions would impose requirements on current licensees requirements that are substantially similar to those previously imposed under section B.5 of “Interim Compensatory Measures (ICM) Order,” dated February 25, 2002 (EA–02–026,

March 4, 2002; 67 FR 9792) (Safeguards Information); specifically, the “B.5.a provision” and the “B.5.b provision.” Further, the proposed requirements are consistent with the implementing guidance that has been issued to licensees subsequent to the order. Therefore, these proposed requirements would not constitute backfits as defined by the rule, and no backfit analysis has been prepared.

List of Subjects for 10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

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 part 50.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 2902, 106 Stat. 3123 (42 U.S.C. 5841). Section 50.10 also issued under secs. 101, 185, 68 Stat. 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80–50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

2. In § 50.54, paragraph (hh) is added to read as follows:

§ 50.54 Conditions of licenses.

* * * * *

(hh)(1) Each licensee shall develop, maintain and implement procedures that describe how the licensee will address the following areas if the licensee is notified of a potential aircraft threat:

(i) Verification of the authenticity of threat notifications;

(ii) Maintenance of continuous communication with applicable entities;

(iii) Notifications to all onsite personnel and applicable offsite response organizations;

(iv) Onsite protective actions to enhance the capability of the facility to mitigate the consequences of an aircraft impact;

(v) Measures to reduce visual discrimination of the site relative to its surroundings or individual buildings within the protected area;

(vi) Pre-staging and dispersal of equipment and personnel, as well as rapid reentry of onsite personnel and offsite responders into site protected areas; and

(vii) Recall of site personnel.

(2) Each licensee shall develop and implement guidance and strategies intended to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities under the circumstances associated with loss of large areas of the plant due to explosions or fire, to include strategies in the following areas:

(i) Fire fighting;

(ii) Operations to mitigate fuel damage; and

(iii) Actions to minimize radiological release.

Dated at Rockville, Maryland, this 2nd day of April 2008.

For the Nuclear Regulatory Commission.

Martin J. Virgilio,

Acting Executive Director for Operations.

[FR Doc. E8-7582 Filed 4-9-08; 8:45 am]

BILLING CODE 7590-01-P

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Part 1**

[REG-168745-03]

RIN 1545-BE18

Guidance Regarding Deduction and Capitalization of Expenditures Related to Tangible Property; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to a notice of proposed rulemaking.

SUMMARY: This document contains corrections to a notice of proposed rulemaking (REG-168745-03) that was published in the **Federal Register** on Monday, March 10, 2008 (73 FR 12838) explaining how section 263(a) of the Internal Revenue Code applies to amounts paid to acquire, produce, or improve tangible property. The proposed regulations clarify and expand the standards in the current regulations under section 263(a), as well as provide some bright-line tests (for example, a de minimis rule for acquisitions). The proposed regulations will affect all taxpayers that acquire, produce, or improve tangible property.

FOR FURTHER INFORMATION CONTACT: Merrill D. Feldstein or Mon L. Lam, (202) 622-4950 (not a toll-free number).

SUPPLEMENTARY INFORMATION:**Background**

The correction notice that is the subject of this document is under sections 162 and 263(a) of the Internal Revenue Code.

Need for Correction

As published, a notice of proposed rulemaking (REG-168745-03) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of a notice of proposed rulemaking (REG-168745-03), which was the subject of FR Doc. E8-4466, is corrected as follows:

1. On page 12838, column 2, in the preamble, under the paragraph heading “*I. Overview*”, line 9 from the bottom of the column, the language “to the rules relating to unit of property,” is corrected to read “to the rules relating to unit of property and”.

2. On page 12839, column 1, in the preamble, under the paragraph heading “*III. Materials and Supplies under § 1.162-3*”, line 2 from the bottom of the column, the language “material and supplies regulations, the” is corrected to read “materials and supplies regulations, the”.

3. On page 12839, column 2, in the preamble, under the paragraph heading “*III. Materials and Supplies under § 1.162-3*”, first paragraph, line 7, the language “economic useful life of the asset for” is corrected to read “economic useful life of the asset for purposes of”.

4. On page 12840, column 3, in the preamble, under the paragraph heading “*B. Transaction Costs*”, first paragraph, line 7, the language “T.C. 106, 110 (1950), acq., 1951-1 CB 3.” is corrected to read “T.C. 106, 110 (1950), acq., (1951-1 CB 3).”.

5. On page 12841, column 2, in the preamble, under the paragraph heading “*C. De Minimis Rule*”, line 18 from the bottom of the column, the language “is provided in § 1.263A-1(b)(14) of the” is corrected to read “is provided in § 1.263A-1(b)(14) of”.

6. On page 12842, column 1, in the preamble, under the paragraph heading “*VIII. Improvements*”, sixth paragraph of the column, the language “(ii) Adapt a unit of property to a new or different use.” is corrected to read “(iii) Adapt a unit of property to a new or different use.”.

7. On page 12842, column 2, in the preamble, under the paragraph heading “*VIII. Improvements*”, first paragraph of the column, line 3, the language “263A(b), which states that section 263A” is corrected to read “263A(b)(1), which states that section 263A”.

8. On page 12842, column 3, in the preamble, under the paragraph heading “*A. Unit of Property*”, second paragraph of the column, lines 9 through 10, the language “used in certain regulated industries; network assets were excluded from the” is corrected to read “used in certain regulated industries. Network assets were excluded from the”.

§ 1.162-3 [Corrected]

9. On page 12848, column 2, § 1.162-3(c), line 9, the language “sections. For example, see section” is corrected to read “sections. For example, see”.

10. On page 12848, column 2, § 1.162-3(d)(1)(i), last line, the language “unit of property; or” is corrected to read “unit of property;”.

11. On page 12848, column 2, § 1.162-3(d)(1)(ii), last line, the language “taxpayer’s operations; or” is corrected to read “taxpayer’s operations;”.

§ 1.263(a)-0 [Corrected]

12. On page 12851, column 1, § 1.263(a)-3(g)(2)(i)(A), the language “(1) Like-new condition.” is corrected to read “(A) Like-new condition.”.

13. On page 12851, column 1, § 1.263(a)-3(g)(2)(i)(B), the language “(2) Economic useful life.” is corrected to read “(B) Economic useful life.”.

§ 1.263(a)-2 [Corrected]

14. On page 12855, column 2, § 1.263(a)-2(d)(4)(vi), line 8, the language “(including within paragraph (d)(4)(iv)(B))” is corrected to read “(including within paragraph (d)(4)(vi)(B))”.

15. On page 12855, column 3, § 1.263(a)-2(d)(4)(vii) *Example 3.*, line 12, the language “under § 1.162-3(a)(1) and § 1.163-3(d)(1)(iii),” is corrected to

read “under § 1.162–3(a)(1) and § 1.162–3(d)(1)(iii).”.

16. On page 12855, column 3, § 1.263(a)–2(d)(4)(vii) *Example 4.*, the language “an election under § 1.162–3(d) to capitalize” is corrected to read “an election under § 1.162–3(e) to capitalize”.

§ 1.263(a)–3 [Corrected]

17. On page 12856, column 3, § 1.263(a)–3(c)(1), line 4 from the bottom of the paragraph, the language “of the production or resale activities,” is corrected to read “of production or resale activities.”.

18. On page 12858, column 2, § 1.263(a)–3(d)(2)(iv) *Example 4.*, line 5, the language “business. Within the plant X utilizes an” is corrected to read “business. Within the plant, X utilizes an”.

19. On page 12860, column 1, § 1.263(a)–3(e)(5) *Example 1.* (i), line 10, the language “replacement part. After the ESVs the engines” is corrected to read “replacement part. After the ESVs, the engines”.

20. On page 12861, column 1, § 1.263(a)–3(e)(5) *Example 7.*, lines 22 through 25, the language “costs. Because the scheduled maintenance involves recurring activities that X expects to perform more than once during the 18 year class life of the towboat. This maintenance” is corrected to read “costs. The scheduled maintenance involves recurring activities that X expects to perform more than once during the 18 year class life of the towboat. Because this maintenance”.

21. On page 12861, column 2, § 1.263(a)–3(e)(5) *Example 9.*, line 9 from the bottom of the paragraph, the language “ordinary efficient operating condition if the” is corrected to read “ordinarily efficient operating condition if the”.

22. On page 12861, column 3, § 1.263(a)–3(f)(2)(i), line 13, the language “financial statement (as described in” is corrected to read “financial statement (as defined in”.

23. On page 12862, column 1, § 1.263(a)–3(f)(3) *Example 3.* (i), lines 4 and 5, the language “for use its manufacturing operations. Assume that the machine is a unit of property and it” is corrected to read “for use in its manufacturing operations. Assume that the machine is a unit of property and”.

24. On page 12862, column 3, § 1.263(a)–3(f)(3) *Example 6.* (i), line 1, the language “*Example 6. Not a betterment.* X owns a” is corrected to read “*Example 6. Not a betterment.* (i) X owns a”.

25. On page 12863, column 2, § 1.263(a)–3(f)(3) *Example 8.*, line 2, the language “quality of the plant or its output of compared” is corrected to read “quality of the plant or its output compared”.

26. On page 12864, column 1, § 1.263(a)–3(g)(2)(i)(A), line 1, the language “(1) *Like-new condition.* A unit of” is corrected to read “(A) *Like-new condition.* A unit of”.

27. On page 12864, column 1, § 1.263(a)–3(g)(2)(i)(B), line 1, the language “(2) *Economic useful life.* The” is corrected to read “(B) *Economic useful life.* The”.

28. On page 12864, column 2, § 1.263(a)–3(g)(3)(i)(A), line 1, the language “(1) A part or a combination of parts” is corrected to read “(A) A part or a combination of parts”.

29. On page 12864, column 2, § 1.263(a)–3(g)(3)(i)(B), line 1, the language “(2) A part or a combination of parts” is corrected to read “(B) A part or a combination of parts”.

30. On page 12864, column 3, § 1.263(a)–3(g)(4) *Example 2.*, line 4, the language “for which it had property taken into account” is corrected to read “for which it had properly taken into account”.

31. On page 12865, column 1, § 1.263(a)–3(g)(4) *Example 6.*, first paragraph of the column, line 4, the language “rebuild, the freight car has been restored to” is corrected to read “rebuild, the freight car has been restored to a”.

32. On page 12865, column 1, § 1.263(a)–3(g)(4) *Example 6.*, line 11, the language “paid restore the freight car to like-new” is corrected to read “paid restore the freight car to a like-new”.

33. On page 12865, column 1, § 1.263(a)–3(g)(4) *Example 7.*, line 9, the language “the freight car to like-new condition after the” is corrected to read “the freight car to a like-new condition after the”.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).
[FR Doc. E8–7515 Filed 4–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–151135–07]

RIN–1545–BH39

Multiemployer Plan Funding Guidance; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking.

SUMMARY: This document corrects a notice of proposed rulemaking (REG–151135–07) that was published in the **Federal Register** on Tuesday, March 18, 2008 (73 FR 14417), that provides additional rules for certain multiemployer defined benefit plans that are in effect on July 16, 2006.

FOR FURTHER INFORMATION CONTACT: Bruce Perlin, (202) 622–6090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking (REG–151135–07) that is the subject of this correction is under section 432 of the Internal Revenue Code.

Need for Correction

As published, REG–151135–07 contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the notice of proposed rulemaking (REG–151135–07) that was the subject of FR Doc. 08–1044, is corrected as follows:

On page 14420, column 3, in the preamble, under the paragraph title “§ 1.432(a)–1 General Rules Relating to Section 432”, first paragraph, line 1, the language “Section 1.432–1 provides general” is corrected to read “Section 1.432(a)–1 provides general”.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).
[FR Doc. E8–7558 Filed 4–9–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506-AA89

Financial Crimes Enforcement Network; Withdrawal of the Finding of Primary Money Laundering Concern and the Notice of Proposed Rulemaking Against First Merchant Bank**AGENCY:** Financial Crimes Enforcement Network, Department of the Treasury.**ACTION:** Withdrawal of the finding of primary money laundering concern and notice of proposed rulemaking.**SUMMARY:** This document withdraws our August 24, 2004 finding that First Merchant Bank is a financial institution of primary money laundering concern and our notice of proposed rulemaking recommending the imposition of the fifth special measure, pursuant to the authority contained in 31 U.S.C. 5318A of the Bank Secrecy Act.**DATES:** The notice of proposed rulemaking is withdrawn as of April 10, 2008.**FOR FURTHER INFORMATION CONTACT:** Regulatory Policy and Programs Division, Financial Crimes Enforcement Network, (800) 949-2732.**SUPPLEMENTARY INFORMATION:****I. Background***A. Statutory Provisions*

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Public Law 107-56 ("USA PATRIOT Act"). Title III of the USA PATRIOT Act amends the anti-money laundering provisions of the Bank Secrecy Act, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314 and 5316-5332, to promote the prevention, detection, and prosecution of money laundering and the financing of terrorism. Regulations implementing the Bank Secrecy Act appear at 31 CFR part 103. The authority of the Secretary of the Treasury ("the Secretary") to administer the Bank Secrecy Act and its implementing regulations has been delegated to the Director of the Financial Crimes Enforcement Network.¹

Section 311 of the USA PATRIOT Act added section 5318A to the Bank Secrecy Act, granting the Secretary the

authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, foreign financial institution, class of international transactions, or type of account is of "primary money laundering concern," to require domestic financial institutions and domestic financial agencies to take certain "special measures" against the primary money laundering concern.²

Taken as a whole, section 5318A provides the Secretary with a range of options that can be adapted to target specific money laundering and terrorist financing concerns most effectively. These options provide the authority to bring additional and useful pressure on those jurisdictions and institutions that pose money-laundering threats and the ability to take steps to protect the U.S. financial system. Through the imposition of various special measures, we can: Gain more information about the concerned jurisdictions, financial institutions, transactions, and accounts; monitor more effectively the respective jurisdictions, financial institutions, transactions, and accounts; and ultimately protect U.S. financial institutions from involvement with jurisdictions, financial institutions, transactions, or accounts that pose a money laundering concern.

B. First Merchant Bank

First Merchant Bank OSH Ltd. ("First Merchant Bank") was licensed in the "Turkish Republic of Northern Cyprus"³ in 1993 as an offshore bank. It had 21 employees and was a privately owned commercial bank specializing in the provision of commercial and investment banking services to individual and corporate offshore

² Available special measures include requiring: (1) *Recordkeeping* and reporting of certain financial transactions; (2) collection of information relating to beneficial ownership; (3) collection of information relating to certain payable-through accounts; (4) collection of information relating to certain correspondent accounts; and (5) prohibition or conditions on the opening or maintaining of correspondent or payable-through accounts. 31 U.S.C. 5318A(b)(1)-(5). For a complete discussion of the range of possible countermeasures, see 68 FR 18917 (April 17, 2003) (proposing to impose special measures against Nauru).

³ The "Turkish Republic of Northern Cyprus" was described at length in the August 24, 2004 notice of proposed rulemaking, 69 FR 51979, Aug. 24, 2004 (RIN 1506-AA65). Today's withdrawal of that proposed rulemaking does not provide updates on jurisdictional developments. Further discussion of jurisdictional developments can be found in FinCEN's advisory *Guidance to Financial Institutions on the Money Laundering Threat Involving the Turkish Cypriot Administered Area of Cyprus*, published on March 20, 2008 at <http://www.fincen.gov/fin-2008-a003.html>. The advisory, however, has no bearing on today's withdrawal, nor does this withdrawal have any bearing on the advisory.

customers. First Merchant Bank was owned by Standard Finance Ltd. (Ireland) and private shareholders (98% and 2%, respectively).⁴ Standard Finance Ltd., in turn, was owned by Provincial & Allied Funding Corp. (Bahamas) and Millvale Holdings Inc. (British Virgin Islands). First Merchant Bank's website stated that it had four wholly owned subsidiaries: FMB Finance Ltd. (British Virgin Islands), First Merchant International Inc. (Bahamas), First Merchant Finance Ltd. (Ireland), and First Merchant Trust Ltd. (Ireland).⁵ For the purposes of this document, unless the context dictates otherwise, references to First Merchant Bank include FMB Finance Ltd., First Merchant International Inc., First Merchant Finance Ltd., and First Merchant Trust Ltd., and any other branch, office, or subsidiary of First Merchant Bank operating in the "Turkish Republic of Northern Cyprus" or in any other jurisdiction.

II. The 2004 Finding, Proposed Rulemaking, and Subsequent Developments*A. The 2004 Finding and Proposed Rulemaking*

Based upon review and analysis of relevant information, consultations with relevant Federal agencies and departments, and after consideration of the factors enumerated in section 311, the Secretary, through his delegate, the Director of the Financial Crimes Enforcement Network, found that reasonable grounds existed for concluding that First Merchant Bank was a financial institution of primary money laundering concern. This finding was published on August 24, 2004,⁶ in a notice of proposed rulemaking which proposed prohibiting covered financial institutions from, directly or indirectly, opening or maintaining correspondent accounts in the United States for First Merchant Bank or any of its branches, offices, or subsidiaries, pursuant to the authority under 31 U.S.C. 5318A. The notice of proposed rulemaking outlined the various factors supporting the finding and proposed prohibition.

⁴ See The Bankers' Almanac, Reed Business Information Ltd (2005).

⁵ First Merchant Finance, Ltd. and First Merchant Trust, Ltd. both listed their address as Kildress House Pembroke Row, LWR Baggot St., Dublin, BUE 2, Ireland. First Merchant International Inc. and FMB Finance, Ltd. were listed on First Merchant Bank's Web site at http://www.firstmerchantbank.com/home_main.htm (no longer accessible).

⁶ See 69 FR 51979 (Aug. 24, 2004, RIN 1506-AA65).

¹ Therefore, references to the authority of the Secretary under section 311 of the USA PATRIOT Act apply equally to the Director of the Financial Crimes Enforcement Network.

During an extended comment period,⁷ we received two comment letters on the notice of proposed rulemaking: one comment letter from First Merchant Bank through its U.S. legal counsel and one comment letter from a securities industry trade association.

B. First Merchant Bank's Subsequent Developments

The United States government has recent information indicating that First Merchant Bank is no longer conducting transactions as a financial institution. The Ministry of Finance of the "Turkish Republic of Northern Cyprus" ceased First Merchant Bank's operations on December 4, 2006.⁸ After this date, no Cypriot banks have reported conducting any transactions with First Merchant Bank. On February 21, 2007, the Ministry of Finance cancelled First Merchant Bank's license, withdrawing First Merchant Bank's authority to

operate as a financial institution in the "Turkish Republic of Northern Cyprus." ⁹ On June 26, 2007, the Turkish Cypriot Money Laundering Board ordered First Merchant Bank's website be taken down and its offices closed. Furthermore, we confirmed the dissolution of First Merchant Bank's parent, Standard Finance Ltd. (Ireland), and two of First Merchant Bank's subsidiaries, First Merchant Finance Ltd. (Ireland) and First Merchant Trust Ltd. (Ireland). As for First Merchant Bank's two other subsidiaries, our research indicates FMB Finance Limited (British Virgin Islands) is no longer registered and First Merchant International Inc. (Bahamas) is not in existence and is not known to have operated there.

III. Withdrawal of the Finding of First Merchant Bank as a Financial Institution of Primary Laundering Concern

For the reasons set forth above, we hereby withdraw our finding that First

Merchant Bank is a financial institution of primary money laundering concern as of April 10, 2008. Our withdrawal of the finding of First Merchant Bank as a financial institution of primary money laundering concern does not acknowledge any remedial measure taken by First Merchant Bank, but is the result of First Merchant Bank no longer operating as a financial institution because it no longer exists.

IV. Withdrawal of Notice of Proposed Rulemaking

For the reasons set forth above, we hereby withdraw the notice of proposed rulemaking imposing the fifth special measure authorized by 31 U.S.C. 5318A(B)(5) against First Merchant Bank as published in the **Federal Register** on August 24, 2004 (69 FR 51979).

Dated: April 4, 2008.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. E8-7627 Filed 4-9-08; 8:45 am]

BILLING CODE 4810-02-P

⁷ See 69 FR 58374 (September 30, 2004) (extension of original comment period from September 23, 2004, to November 1, 2004.).

⁸ *Off-Shore Bank, Operations of which have been ceased by the Ministry of Finance of TRNC with an announcement published in the Official Gazette No: 201 on December 04, 2006 at <http://www.kktcmb.trnc.net/ENGLISH/banks/offshore-banks-eng.html>.*

⁹ *Off-Shore Banks, Licences of which have been cancelled by the Ministry of Finance of TRNC with an announcement published in the Official Gazette No: 32 on February 21, 2007 at <http://www.kktcmb.trnc.net/ENGLISH/banks/offshore-banks-eng.html>.*

Notices

Federal Register

Vol. 73, No. 70

Thursday, April 10, 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.

DEPARTMENT OF AGRICULTURE

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Announcement of Intent To Establish the 2010 Dietary Guidelines Advisory Committee and Solicitation of Nominations for Membership

AGENCIES: U.S. Department of Agriculture (USDA), Food, Nutrition, and Consumer Services (FNCS) and Research, Education and Economics (REE); and U.S. Department of Health and Human Services (HHS), Office of Public Health and Science (OPHS).

ACTION: Notice.

SUMMARY: The Department of Agriculture and the Department of Health and Human Services announce the intent to establish a Dietary Guidelines Advisory Committee and invite nominations for the Committee.

DATES: Nominations must be submitted by close of business on May 24, 2008.

ADDRESSES: Nominations may be submitted by electronic mail to DG2010Nominations@cnpp.usda.gov. This address can be obtained through our Web site at www.cnpp.usda.gov. Alternatively, nominations may be sent to the following address: Carole Davis, Nutrition Promotion Staff Director, Co-Executive Secretary of the Dietary Guidelines Advisory Committee, Center for Nutrition Policy and Promotion, U.S. Department of Agriculture, 3101 Park Center Drive, Room 1034, Alexandria, VA 22302, (703)-305-7600 (telephone), (703)-305-3300 (fax).

FOR FURTHER INFORMATION CONTACT: USDA Co-Executive Secretaries: Carole Davis (telephone 703-305-7600), Center for Nutrition Policy and Promotion, 3101 Park Center Drive, Room 1034, Alexandria, Virginia 22302; or, Shanthi Bowman, (telephone 301-504-0619), Agricultural Research Service, Beltsville Human Nutrition Research Center, 10300 Baltimore Avenue, Bldg. 005,

Room 125, BARC-WEST, Beltsville, Maryland 20705. HHS Co-Executive Secretaries: Kathryn McMurry (telephone 240-453-8280) or Holly McPeak (telephone 240-453-8280), Office of Disease Prevention and Health Promotion, Office of Public Health and Science, 1101 Wootton Parkway, Suite LL100, Rockville, Maryland 20852. Additional information is available on the Internet at <http://www.cnpp.usda.gov>.

SUPPLEMENTARY INFORMATION:

Authority and Purpose: The formation of this Committee is necessary and in the public interest. The Committee will be established in accordance with the Federal Advisory Committee Act, 5 U.S.C. Appendix 2. Section 301 of the National Nutrition Monitoring and Related Research Act of 1990, 7 U.S.C. 5341, requires the Secretaries of HHS and USDA to publish the *Dietary Guidelines for Americans* at least every five years. The *Dietary Guidelines for Americans* contain nutrition and dietary information for the general public over 2 years of age. Because of its focus on health promotion and risk reduction, the *Dietary Guidelines* form the basis for Federal food and nutrition policy and education activities. The information and key recommendations of the *Dietary Guidelines for Americans* are based on the preponderance of scientific and medical knowledge which is current at the time.

The *Dietary Guidelines* were first published by HHS and USDA in 1980, with revisions in 1985, 1990, 1995, 2000 and 2005. Beginning with the 1985 edition, HHS and USDA have appointed a Dietary Guidelines Advisory Committee of prominent experts in nutrition and health to make recommendations regarding the Dietary Guidelines.

Structure: The Committee will evaluate whether a revision of the 2005 edition of the *Dietary Guidelines for Americans* is warranted, based on a thorough evaluation of the most current scientific and applied literature and, if so, will proceed to develop recommendations for these revisions in an advisory report to the Secretaries of Agriculture and Health and Human Services. The Committee is expected to begin meeting during the Fall of 2008 and will hold two- or three-day meetings, on four or possibly five occasions over the course of its

appointment. Pursuant to the requirements of the Federal Advisory Committee Act, the meetings will be open to the public. After all meetings have concluded, the Committee will prepare a report of its recommendations.

For those interested in the 2005 edition of the advisory report, it is available electronically at <http://www.healthierus.gov/dietaryguidelines>. A limited number of hard copies are available upon request from the USDA or HHS Co-Executive Secretaries listed above.

Prospective members of the Dietary Guidelines Advisory Committee should be knowledgeable of current scientific research in human nutrition and be respected and published experts in their fields. They should be familiar with the purpose, communication, and application of the *Dietary Guidelines* and have demonstrated interest in the public's health and well-being through their research and/or educational endeavors. Expertise is sought in specific specialty areas, including but not limited to, the prevention of chronic diseases (e.g., cancer, cardiovascular disease, type 2 diabetes, obesity, and osteoporosis), energy balance (including physical activity), epidemiology, food safety and technology, general medicine, gerontology, nutrient bioavailability, nutrition biochemistry and physiology, nutrition education, pediatrics, public health, and evidence review methodology.

Nominations: The Departments will consider nominations for Committee membership of individuals qualified to carry out the above-mentioned tasks. A nomination should include, at a minimum, the following for each nominee: (1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (i.e., specific attributes which qualify the nominee for service in this capacity), and a statement that the nominee would be willing to serve as a member of the Committee, if selected; (2) the nominator's name, address and daytime telephone number, and the address, telephone number and electronic mail address of the individual being nominated; and (3) a copy of the nominee's curriculum vitae.

Equal opportunity practices regarding membership appointments to the Committee, will be aligned with USDA and HHS policies. To ensure that

recommendations of the Committee take into account the needs of the diverse groups served by USDA and HHS, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

Dated: March 26, 2008.

Nancy Montanez Johner,

Under Secretary, Food, Nutrition and Consumer Services, U.S. Department of Agriculture.

Dated: March 31, 2008.

Gale A. Buchanan,

Under Secretary, Research, Education, and Economics, U.S. Department of Agriculture.

Dated: April 3, 2008.

Joxel Garcia,

Assistant Secretary for Health, U.S. Department of Health and Human Services.
[FR Doc. E8-7614 Filed 4-9-08; 8:45 am]

BILLING CODE 3410-30-P

DEPARTMENT OF AGRICULTURE

Cooperative State Research, Education, and Extension Service

Notice of Intent To Extend a Currently Approved Information Collection

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

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Office of Management and Budget (OMB) regulations (5 CFR part 1320) that implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Cooperative State Research, Education, and Extension Service's (CSREES) intention to request approval for an extension of a currently approved information collection for Children, Youth, and Families at Risk (CYFAR).

DATES: Written comments on this notice must be received by June 9, 2008 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

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

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

E-mail: jhitchcock@csrees.usda.gov;

Mail: Jason Hitchcock, Information Systems and Technology Management, USDA/CSREES, STOP 2216, 1400 Independence Avenue, SW., Washington, DC 20250-2216;

Hand Delivery/Courier: Jason Hitchcock, Information Systems and

Technology Management, USDA/CSREES, 800 9th Street, SW., Room 4217, Waterfront Centre, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT:

Jason Hitchcock, (202) 720-4343.

SUPPLEMENTARY INFORMATION:

Title: Children, Youth, and Families at Risk (CYFAR) Year-End Report.

OMB Number: 0524-0043.

Expiration Date of Current Approval: January 31, 2009.

Type of Request: Intent to seek approval for the extension of a currently approved information collection for three years.

Abstract: Funding for the Children, Youth, and Families at Risk (CYFAR) community project grants is authorized under section 3(d) of the Smith-Lever Act (7 U.S.C. 341 *et seq.*), as amended, and other relevant authorizing legislation, which provides jurisdictional basis for the establishment and operation of Extension educational work for the benefit of youth and families in communities. The CYFAR funding program supports community-based programs serving children, youth, and families in at-risk environments. CYFAR funds are intended to support the development of high-quality, effective programs based on research and to document the impact of these programs on intended audiences.

The CYFAR Year-End Report collects demographic and impact data from each community site where federal assistance is provided. It allows CSREES staff to gauge the impact of the program on the target audience and to make programmatic improvements. This collection also allows program staff to demonstrate the capacity developed in locales where federal assistance is provided.

The evaluation processes of CYFAR are consistent with the requirements of legislation and OMB requirements. The Government Performance and Results Act of 1993 (GPRA) (31 U.S.C. 1101 *et seq.*), the Federal Activities Inventory Reform Act of 1998 (FAIR Act) (Pub. L. 105-270), and the Agricultural Research, Extension, and Education Reform Act of 1998 (AREERA) (7 U.S.C. 7601 *et seq.*; Pub. L. 105-185), together with OMB requirements, support the reporting requirements requested in this information collection. One of the five Presidential Management Agenda initiatives, Budget and Performance Integration, builds on GPRA and earlier efforts to identify program goals and performance measures, and link them to the budget process. The FAIR Act requires the development and implementation of a system to monitor

and evaluate agricultural research and extension activities in order to measure the impact and effectiveness of research, extension, and education programs. AREERA requires a performance evaluation to be conducted to determine whether federally funded agricultural research, extension, and education programs result in public goods that have national or multistate significance.

The immediate need for this information collection is to provide a means for satisfying accountability requirements. The long-term objective is to provide a means to enable the evaluation and assessment of the effectiveness of programs receiving federal funds and to fully satisfy requirements of performance and accountability legislation in GPRA, the FAIR Act, and AREERA.

Estimate of Burden: There are currently CYFAR projects in 48 states and 3 territories. Each state and territory is required to submit an annual year-end report which includes demographic and impact data on each of the community projects. CSREES estimates the burden of this collection to be 322 hours per response. There are currently 51 respondents, thus making the total annual burden of this collection an estimated 16,422 hours.

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 will have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Obtaining a Copy of the Information Collection: A copy of the information collection and related instructions may be obtained free of charge by contacting Jason Hitchcock by telephone, (202) 720-4343, or by e-mail, jhitchcock@csrees.usda.gov.

Done in Washington, DC, this 4th day of April, 2008.

Gale Buchanan,

Undersecretary, Research, Education, and Economics.

[FR Doc. E8-7619 Filed 4-9-08; 8:45 am]

BILLING CODE 3410-22-P

DEPARTMENT OF AGRICULTURE**Forest Service****Information Collection; Forest Landscape Value and Special Place Mapping for National Forest Planning****AGENCY:** Forest Service, USDA.**ACTION:** Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the new information collection, Forest Landscape Value and Special Place Mapping for National Forest Planning.

DATES: Comments must be received in writing on or before June 9, 2008, to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to Dr. Patrick Reed, USDA Forest Service, Regional Social Scientist, Chugach National Forest, 3301 C Street, Suite 300, Anchorage, AK 99503.

Comments may also be submitted via facsimile to (907) 743-9479 or by e-mail to preed01@fs.fed.us.

The public may inspect comments received at 3301 C Street, Suite 300, during normal business hours. Visitors are encouraged to call ahead to (907) 743-9571 to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: Dr. Patrick Reed, USDA Forest Service, (907) 743-9571. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1-800-877-8339 twenty-four hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Title: Forest Landscape Value and Special Place Mapping for National Forest Planning.

OMB Number: 0596-NEW.

Type of Request: New.

Abstract: The Forest Service is proposing to augment the public participation process for revision of national forest land management plans by collecting data about the nature and location of landscape values and special places recognized by the public on national forest lands. Over the next 3 years, up to 20 national forest units (4-6 units per year) will collect the aforementioned information as part of the national forest plan revision public participation process. The forest plan revision includes determining public

desire for use (along with suitability of areas for different uses), identification of special areas, collaboration with the public, and monitoring for adaptive management.

Primarily using an Internet-based geographic information system (GIS), national forests will invite the public to share values regarding specific forest landscapes and special places. A comparable paper-based option, suitable for use in mail back surveys and focus group meetings, may be provided to individuals who do not have access to the Internet or as an alternative primary means of collecting data.

The information will be used in the revision of specific national forest plans. Forest planners and managers will use the collected information to develop land management plans that are consistent with public values, while working within the regulatory framework. The data collected would provide Forest Service managers with a new, systematic science-based tool for collecting and analyzing public opinion about desired forest conditions and use of specific geographic forest locations. Survey results will be useful in gauging public support for proposed forest management options and in collaborative and participatory approaches to planning. While the collection is designed to assist with development of forest land management plans under NFMA, the information collected could be used in a variety of forest planning processes (i.e., travel management and recreation facilities planning) and projects.

The legal authorities supporting the collection of this information include the National Environmental Policy Act (NEPA) of 1969, the National Forest Management Act (NFMA) of 1976, and the proposed 2008 NFMA Planning Rule (36 CFR part 219).

Estimate of Annual Burden: 20 minutes.

Type of Respondents: Individuals; state, county, and tribal governments; as well as for-profit and non-profit entities.

Estimated Annual Number of Respondents: 3,500 (average of 3 years).

Estimated Annual Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 1,167 (average of 3 years).

Comment Is Invited

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (2) the accuracy of the agency's estimate of the burden of the

collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission request toward Office of Management and Budget approval.

Dated: April 4, 2008.

Charles L. Myers,

Associate Deputy Chief, NFS.

[FR Doc. E8-7565 Filed 4-9-08; 8:45 am]

BILLING CODE 3410-11-P

DEPARTMENT OF AGRICULTURE**Commodity Credit Corporation****Natural Resources Conservation Service****Conservation Security Program; Correction**

AGENCY: Natural Resources Conservation Service and Commodity Credit Corporation, USDA.

ACTION: Notice; Correction on March 27, 2008, (73 FR 16246).

SUMMARY: The Commodity Credit Corporation and Natural Resources Conservation Service published in the **Federal Register** on March 27, 2008, (73 FR 16246), a document stating "Notice of the Conservation Security Program, (CSP-08-01) sign-up. This notice corrects the end date from May 17, 2008 to May 16, 2008, in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections of the previously published document.

Additionally, page 16251 of the **Federal Register**, Vol. 73, No. 60, dated Thursday, March 27, 2008, contains a 2008 Conservation System Criteria—Cropland table that requires numerical corrections. The 2008 Conservation System Criteria—Cropland table needs to be revised by deleting:

- from the Group Level 2 row—"and ≤ 178".
- from the Group Level 3 row—"and ≤ 154".
- from the Group Level 4 row—"and ≤ 132".

The revised table with corrected language follows.

2008 CONSERVATION SYSTEM CRITERIA BY LAND USE TABLE

Group Level	REVISED - 2008 Conservation System Criteria - Cropland	
	Conservation Cropping and Tillage System Performance Level and Stewardship Practices and Activities installed and maintained for at least two years prior to the sign-up period from the attached list.	
1	SWET score of ≥ 179 , plus at least 2 unique practices or activities from each area of Soil Quality, Water Quality, and Wildlife Habitat.	
2	SWET score of ≥ 155 , plus at least 1 unique practice or activities from each area of Soil Quality, Water Quality, and Wildlife Habitat, and one additional practice from any of the areas.	
3	SWET score of ≥ 133 , plus at least 1 unique practice or activity from each area of Soil Quality, Water Quality and Wildlife Habitat.	
4	SWET score of ≥ 89 , plus at least 2 unique practices or activities from any of the areas.	
5	* Must meet minimum level of treatment as defined in this sign-up notice (CSP-08-01)	

Cropland
(Row crops, closely grown crops, forage crops in rotation with row or closely grown crops, orchards, vineyards, horticultural crops, cropped woodland and marshes, and permanent hayland)

FOR FURTHER INFORMATION CONTACT:

Dwayne Howard, Branch Chief—
Stewardship Programs, Financial
Assistance Programs Division, NRCS,
P.O. Box 2890, Washington, DC 20013–
2890, telephone: (202) 720–1845; fax:
(202) 720–4265. Submit e-mail to:
dwayne.howard@wdc.usda.gov,
Attention: Conservation Security
Program.

Signed in Washington, DC, on April 4,
2008.

Arlen Lancaster,

*Vice President, Commodity Credit
Corporation, Chief, Natural Resources
Conservation Service.*

[FR Doc. E8–7629 Filed 4–9–08; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF COMMERCE**International Trade Administration**

[Docket Number: 080403512–8513–01]

**North American Free Trade
Agreement: Amendments to Rules of
Procedure for Article 1904 Binational
Panel Reviews**

AGENCY: North American Free Trade
Agreement, NAFTA Secretariat, United
States Section, International Trade
Administration, Department of
Commerce.

ACTION: Amendments to Rules of
Procedure for NAFTA Article 1904
Binational Panel Reviews.

SUMMARY: Canada, Mexico and the
United States have amended the rules of
procedure for Article 1904 binational
panel reviews. These rules apply to
binational panel proceedings conducted
pursuant to Article 1904 of the North
American Free Trade Agreement
("NAFTA" or "the Agreement"). These
amendments are intended to improve
the panel review process under Chapter
Nineteen of NAFTA in order to increase
its efficiency and effectiveness.

DATES: *Effective Date:* These
amendments to the rules of procedure
shall apply to all binational panel
proceedings commenced by a Request
for Panel Review filed with the NAFTA
Secretariat, United States Section, on or
after April 10, 2008.

FOR FURTHER INFORMATION CONTACT:
Michele Lynch, Senior Counsel, or
William Isasi, Senior Attorney, U.S.
Department of Commerce, Office of the
General Counsel, Office of Chief
Counsel for Import Administration,
HCHB Room 3622, 1401 Constitution
Ave., NW., Washington, DC 20230, (202)
482–2879 or (202) 482–4339,
respectively.

SUPPLEMENTARY INFORMATION:**Background**

Chapter Nineteen of NAFTA
establishes a mechanism for replacing
judicial review of final antidumping and
countervailing duty determinations
involving imports from Canada, Mexico
or the United States with review by
independent binational panels. If
requested, these panels will review final
determinations to determine whether
they are consistent with the
antidumping or countervailing duty law
of the importing country. Title IV of the
North American Free Trade Agreement
Implementation Act of 1993, Public Law
No. 103–182, 107 Stat. 2057, amended
United States law to implement Chapter
Nineteen of the Agreement. *See, e.g.*, 19
U.S.C. 3431 *et. seq.*; *see also* 19 CFR
356.1, *et. seq.*

The *NAFTA Rules of Procedure for
Article 1904 Binational Panel Reviews*
are intended to give effect to the panel
review provisions of Chapter Nineteen
of the Agreement by setting forth the
procedures for commencing,
conducting, and completing panel
reviews. Originally published in 1994,
these rules were the result of
negotiations among Canada, Mexico,
and the United States in compliance
with the terms of the Agreement. *See
North American Free Trade Agreement:
Rules of Procedure for Article 1904
Binational Panel Reviews*, 59 Fed. Reg.
8685 (Feb. 23, 1994). In August 2007,
Canada, Mexico, and the United States,
through the NAFTA Free Trade
Commission, agreed to amend the
*NAFTA Rules of Procedure for Article
1904 Binational Panel Reviews*. These
amendments provide technical changes
to the rules based on changes in the
governments of Canada and Mexico.
These amendments also provide
technical changes based on the
experience of the NAFTA Secretariats
and participants in the binational
review process. In addition and
consistent with the agreement reached
through the NAFTA Free Trade
Commission, these amendments require
a participant other than an individual
(*e.g.*, corporate persons) to be
represented by a counsel of record.

The *NAFTA Rules of Procedure for
Article 1904 Binational Panel Reviews*
are amended as described below.
Following a description of the
amendments is a reproduction of the
rules incorporating these amendments.
These rules as well as other NAFTA
Chapter 19 dispute resolution
provisions are also available at: [http://
www.nafta-sec-alena.org](http://www.nafta-sec-alena.org).

**Amendments to NAFTA Rules of
Procedure for Article 1904 Binational
Panel Reviews**

Amendments to Rule 3

Rule 3 is amended in light of changes
to the governments of Canada and
Mexico. Rule 3 is amended as follows:

The definitions in rule 3 of
"privileged information", "Proprietary
Information Access Application" and
"Proprietary Information Access Order"
are amended by replacing the words
"Secretaría de Comercio y Fomento
Industrial" with "Secretaría de
Economía."

The definition in rule 3 of "Deputy
Minister" is repealed.

The following definition is added to
rule 3 following the definition of
"Agreement":

"'CBSA President' means the President of
the Canada Border Services Agency
appointed under subsection 7(1) of the
Canada Border Services Agency Act, or the
successor thereto, and includes any person
authorized to perform a power, duty or
function of the CBSA President under the
Special Import Measures Act, as amended;"
and

The words "Deputy Minister" are replaced
by the words "CBSA President" in the
definitions in rule 3 of "Proprietary
Information Access Application",
"Proprietary Information Access Order" and
"service list".

Amendments to Rule 11

Rule 11 is amended to clarify which
documents the responsible Secretary
shall forward to the other involved
Secretary, and to clarify that absent an
explicit written request, only non-
privileged and non-proprietary
documents will be forwarded. Rule 11 is
amended as follows:

11. (1) The responsible Secretary shall
forward to the other involved Secretary
all orders and decisions issued by the
panel. The responsible Secretary shall
also forward to the other involved
Secretary a copy of all documents filed
in the office of the responsible Secretary
that are not clearly marked as privileged
or proprietary pursuant to subrules
44(2) and 56(1)(a).

(2) If an involved Secretariat makes a
written request to the responsible
Secretary requesting any privileged or
proprietary documents, the responsible
Secretary shall forward such documents
to the involved Secretariat forthwith.

Amendments to Rule 13

Rule 13 is amended in light of
changes to the governments of Canada
and Mexico. Rule 13 is amended as
follows:

The words in subrule 13(1)
"Secretaría de Comercio y Fomento

Industrial” are replaced by “Secretaría de Economía”. The words in subrule 13(1) “Deputy Minister” are replaced by the words “CBSA President”.

Amendments to Rule 21

Rule 21 is amended to clarify that participants other than individuals (*e.g.*, corporate persons) must be represented by a counsel of record. Rule 21 is amended as follows:

21. * * *

(3) A participant other than an individual must be represented by a counsel of record.

Amendments to Rule 22

Rule 22 is amended to clarify that Information Access Orders are exempt from the general multiple copy filing requirements found in Rule 22(1). Rule 22 is amended as follows:

22. (1) Subject to subrule 46(1), rule 47 and subrules 50(1), 52(3) and 73(2)(a), no document is filed with the Secretariat until one original and eight copies of the document are received by the responsible Secretariat during its normal business hours within the time period fixed for filing.

Amendments to Rule 50

Rule 50 is amended to clarify that in filing an Information Access Order with the responsible Secretariat, parties should comply with the applicable regulations of the administering authority. Rule 50 is amended as follows:

50. (1) Where a proprietary Information Access Order is issued to a person in a panel review, the person shall file with the responsible Secretariat, pursuant to the applicable regulations of the investigating authority, a copy of the Proprietary Information Access Order.

Amendments to Rule 71

Rule 71 is amended to establish that if a timely complaint is not filed, the responsible Secretariat will issue a notice terminating panel review. Rule 71 is amended as follows:

71. * * *

(3) A panel review is deemed to be terminated on the day after the expiration of the limitation period established pursuant to subrule 39(1) if no Complaint has been filed in a timely manner. The responsible Secretariat shall issue a Notice of Completion of Panel Review.

Amendments to Rule 73

Rule 73 is amended to clarify the number of copies of a remand Index and non-privileged items on the Index that the investigating authority shall file

with the responsible Secretariat. In addition, Rule 73 is amended to clarify that the investigating authority must serve the remand Index on the counsel of record or, absent a counsel of record, on the participant(s), as well as file proof of that service with the responsible Secretariat. Rule 73 is amended as follows:

73. (2)(a) the investigating authority shall file with the responsible Secretariat two copies of an Index listing each item in the supplementary remand record, together with proof of service of the Index on the counsel of record of each of the participants, or where a participant is not represented by counsel, on the participant, and two copies of each non-privileged item listed in that Index, within five days after the date in which the investigating authority filed the Determination on Remand with the panel;

Amendments to Rule 78

Rule 78 is amended to harmonize the *NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews* with the *NAFTA Rules of Procedures for Article 1904 Extraordinary Challenge Committees*. This amendment clarifies the effective date of a Notice of Completion of Panel Review when no Request for an Extraordinary Challenge Committee is filed and a panel has not been terminated pursuant to subrule 71(2). Rule 78 is amended as follows:

78. * * *

(b) in any other case, on the day after the expiration of the limitation period established pursuant to subrules 37(1) and 37(2)(a) of the *NAFTA Extraordinary Challenge Committee Rules*.

North American Free Trade Agreement Rules of Procedure for Article 1904 Binational Panel Reviews

Contents

Preamble Rule

1. Short Title
2. Statement of General Intent
3. Definitions and Interpretation

Part I—General

6. Duration and Scope of Panel Review
8. Responsibilities of the Secretary
17. Internal Functioning of Panels
19. Computation of Time
21. Counsel of Record
22. Filing, Service and Communications
28. Pleadings and Simultaneous Translation of Panel Reviews in Canada
32. Costs

Part II—Commencement of Panel Review

33. Notice of Intent To Commence Judicial Review
34. Request for Panel Review
36. Joint Panel Reviews
39. Complaint
40. Notice of Appearance

41. Record for Review
- Part III—Panels**
42. Announcement of Panel
 43. Violation of Code of Conduct
- Part IV—Proprietary and Privileged Information**
44. Filing or Service Under Seal
 46. Proprietary Information Access Orders
 52. Privileged Information
 54. Violations of Proprietary Information Access Applications or Orders
- Part V—Written Proceedings**
55. Form and Content of Pleadings
 57. Filing of Briefs
 58. Failure to File Briefs
 59. Content of Briefs and Appendices
 60. Appendix to the Briefs
 61. Motions
- Part VI—Oral Proceedings**
65. Location
 66. Pre-Hearing Conference
 67. Oral Argument
 68. Subsequent Authorities
 69. Oral Proceedings in Camera
- Part VII—Decisions and Completions of Panel Reviews**
70. Orders, Decisions and Terminations
 73. Panel Review of Action on Remand
 75. Re-examination of Orders and Decisions
- Part VIII—Completion of Panel Review**
81. Stays and Suspensions
- Schedule—Procedural Forms**
- Preamble**

The Parties

Having regard to Chapter Nineteen of the North American Free Trade Agreement between Canada, the United Mexican States and the United States of America; Acting pursuant to Article 1904.14 of the Agreement;

Adopted Rules of Procedure governing all panel reviews conducted pursuant to Article 1904 of the Agreement; and now

Adopt the following amended Rules of Procedure, which will take effect in Canada from the date of their publication in the *Canada Gazette*, in Mexico from the date of their publication in the *Diario Oficial de la Federación*, and in the United States from the date of their publication in the **Federal Register**, for panels requested pursuant to Article 1904(2) of the North American Free Trade Agreement following such publication.

Short Title

1. These rules may be cited as the *NAFTA Article 1904 Panel Rules*.

Statement of General Intent

2. These rules are intended to give effect to the provisions of Chapter Nineteen of the Agreement with respect to panel reviews conducted pursuant to Article 1904 of the Agreement and are designed to result in decisions of panels within 315 days after the commencement of the panel review.

The purpose of these rules is to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904. Where a procedural question arises that is not covered by these rules, a panel may adopt the procedure to be followed in the particular case before it by analogy to these rules or may refer for guidance to rules of procedure of a court that would otherwise have had jurisdiction in the importing country. In the event of any inconsistency between the provisions of these rules and the Agreement, the Agreement shall prevail.

Definitions and Interpretation

3. In these rules,

“Agreement” means the North

American Free Trade Agreement;

“CBSA President” means the President of the Canada Border Services Agency appointed under subsection 7(1) of the Canada Border Services Agency Act, or the successor thereto, and includes any person authorized to perform a power, duty or function of the CBSA President under the Special Import Measures Act, as amended;

“Code of Conduct” means the code of conduct established by the Parties pursuant to Article 1909 of the Agreement;

“complainant” means a Party or interested person who files a Complaint pursuant to rule 39;

“counsel” means

(a) With respect to a panel review of a final determination made in Canada, a person entitled to appear as counsel before the Federal Court of Canada,

(b) With respect to a panel review of a final determination made in Mexico, a person entitled to appear as counsel before the Tribunal Fiscal de la Federacion, and

(c) With respect to a panel review of a final determination made in the United States, a person entitled to appear as counsel before a federal court in the United States;

“counsel of record” means a counsel referred to in subrule 21(1);

“final determination” means, in the case of Canada, a definitive decision within the meaning of subsection 77.01(1) of the *Special Import Measures Act*, as amended;

“first Request for Panel Review” means

(a) Where only one Request for Panel Review is filed for review of a final determination, that Request, and

(b) Where more than one Request for Panel Review is filed for review of the same final determination, the Request that is filed first;

“government information” means

(a) With respect to a panel review of a final determination made in Canada, information

(i) The disclosure of which would be injurious to international relations or national defence or security,

(ii) That constitutes a confidence of the Queen’s Privy Council for Canada, or

(iii) Contained in government-to-government correspondence that is transmitted in confidence,

(b) With respect to a panel review of a final determination made in Mexico, information the disclosure of which is prohibited under the laws and regulations of Mexico, including

(i) Data, statistics and documents referring to national security and strategic activities for scientific and technological development, and

(ii) Information contained in government-to-government correspondence that is transmitted in confidence, and

(c) With respect to a panel review of a final determination made in the United States, information classified in accordance with Executive Order No. 12065 or its successor;

“interested person” means a person who, pursuant to the laws of the country in which a final determination was made, would be entitled to appear and be represented in a judicial review of the final determination;

“investigating authority” means the competent investigating authority that issued the final determination subject to review and includes, in respect of the issuance, amendment, modification or revocation of a Proprietary Information Access Order, any person authorized by the investigating authority;

“involved Secretariat” means the section of the Secretariat located in the country of an involved Party;

“legal holiday” means

(a) With respect to the Canadian Section of the Secretariat, every Saturday and Sunday, New Year’s Day (January 1), Good Friday, Easter Monday, Victoria Day, Canada Day (July 1), Labour Day (first Monday in September), Thanksgiving Day (second Monday in October), Remembrance Day (November 11), Christmas Day (December 25), Boxing Day (December 26), any other day fixed as a statutory holiday by the Government of Canada or by the province in which the Section is located and any day on which the offices of the Canadian Section of the Secretariat are officially closed in whole or in part,

(b) With respect to the Mexican Section of the Secretariat, every Saturday and Sunday, New Year’s Day (January 1), Constitution Day (February

5), Benito Juarez’s Birthday (March 21), Labor Day (May 1), Battle of Puebla (May 5), Independence Day (September 16), Congressional Opening Day (November 1), Revolution Day (November 20), Transmission of the Federal Executive Branch (every six years on December 1), Christmas Day (December 25), any day designated as a statutory holiday by the Federal Laws or, in the case of Ordinary Elections, by the Local Electoral Laws and any day on which the offices of the Mexican Section of the Secretariat are officially closed in whole or in part, and

(c) With respect to the United States Section of the Secretariat, every Saturday and Sunday, New Year’s Day (January 1), Martin Luther King’s Birthday (third Monday in January), Presidents’ Day (third Monday in February), Memorial Day (last Monday in May), Independence Day (July 4), Labor Day (first Monday in September), Columbus Day (second Monday in October), Veterans’ Day (November 11), Thanksgiving Day (fourth Thursday in November), Christmas Day (December 25), any day designated as a holiday by the President or the Congress of the United States and any day on which the offices of the Government of the United States located in the District of Columbia or the offices of the United States Section of the Secretariat are officially closed in whole or in part;

“Mexico” means the United Mexican States;

“official publication” means

(a) In the case of the Government of Canada, the *Canada Gazette*;

(b) In the case of the Government of Mexico, the *Diario Oficial de la Federacion*, and

(c) In the case of the Government of United States, the **Federal Register**;

“panel” means a binational panel established pursuant to Annex 1901.2 to Chapter Nineteen of the Agreement for the purpose of reviewing a final determination;

“participant” means any of the following persons who files a Complaint pursuant to rule 39 or a Notice of Appearance pursuant to rule 40:

(a) A Party,

(b) An investigating authority, and

(c) An interested person;

“Party” means the Government of Canada, the Government of Mexico or the Government of the United States;

“person” means “

(a) An individual,

(b) A Party,

(c) An investigating authority,

(d) A government of a province, state or other political subdivision of the country of a Party,

(e) A department, agency or body of a Party or of a government referred to in paragraph (d), or

(f) A partnership, corporation or association;

“pleading” means a Request for Panel Review, a Complaint, a Notice of Appearance, a Change of Service Address, a Notice of Motion, a Notice of Change of Counsel of Record, a brief or any other written submission filed by a participant;

“privileged information” means

(a) With respect to a panel review of a final determination made in Canada, information of the investigating authority that is subject to solicitor-client privilege under the laws of Canada, or that constitutes part of the deliberative process with respect to the final determination, and with respect to which the privilege has not been waived,

(b) With respect to a panel review of a final determination made in Mexico,

(i) Information of the investigating authority that is subject to attorney-client privilege under the laws of Mexico, or

(ii) Internal communications between officials of the Secretaria de Economia in charge of antidumping and countervailing duty investigations or communications between those officials and other government officials, where those communications constitute part of the deliberative process with respect to the final determination, and

(c) With respect to a panel review of a final determination made in the United States, information of the investigating authority that is subject to the attorney-client, attorney work product or government deliberative process privilege under the laws of the United States with respect to which the privilege has not been waived;

“proof of service” means

(a) With respect to a panel review of a final determination made in Canada or Mexico,

(i) An affidavit of service stating by whom the document was served, the date on which it was served, where it was served and the manner of service, or

(ii) An acknowledgement of service by counsel for a participant stating by whom the document was served, the date on which it was served and the manner of service and, where the acknowledgment is signed by a person other than the counsel, the name of that person followed by a statement that the person is signing as agent for the counsel, and

(b) With respect to a panel review of a final determination made in the United States, a certificate of service in

the form of a statement of the date and manner of service and of the name of the person served, signed by the person who made service;

“proprietary information” means

(a) With respect to a panel review of a final determination made in Canada, information referred to in subsection 84(3) of the *Special Import Measures Act*, as amended, or subsection 45(3) of the *Canadian International Trade Tribunal Act*, as amended, with respect to which the person who designated or submitted the information has not withdrawn the person's claim as to the confidentiality of the information,

(b) With respect to a panel review of a final determination made in Mexico, *informacion confidencial*, as defined under article 80 of the *Ley de Comercio Exterior* and its regulations, and

(c) With respect to a panel review of a final determination made in the United States, business proprietary information under section 777(f) of the *Tariff Act of 1930*, as amended, and any regulations made under that Act;

“Proprietary Information Access Application” means

(a) With respect to a panel review of a final determination made in Canada, a disclosure undertaking in the prescribed form, which form

(i) In respect of a final determination by the CBSA President, is available from the CBSA President, and

(ii) In respect of a final determination by the Tribunal, is available from the Tribunal,

(b) With respect to a panel review of a final determination made in Mexico, a disclosure undertaking in the prescribed form, which form is available from the Secretaria de Economia, and

(c) With respect to a panel review of a final determination made in the United States, a Protective Order Application

(i) In respect of a final determination by the International Trade Administration of the United States Department of Commerce, in a form prescribed by, and available from, the International Trade Administration of the United States Department of Commerce, and

(ii) In respect of a final determination by the United States International Trade Commission, in a form prescribed by, and available from, the United States International Trade Commission;

“Proprietary Information Access Order” means

(a) In the case of Canada, a Disclosure Order issued by the CBSA President or the Tribunal pursuant to a Proprietary Information Access Application,

(b) in the case of Mexico, a Disclosure Order issued by the Secretaria de

Economia pursuant to a Proprietary Information Access Application, and

(c) In the case of the United States, a Protective Order issued by the International Trade Administration of the United States Department of Commerce or the United States International Trade Commission pursuant to a Proprietary Information Access Application;

“responsible Secretariat” means the section of the Secretariat located in the country in which the final determination under review was made;

“responsible Secretary” means the Secretary of the responsible Secretariat;

“Secretariat” means the Secretariat established pursuant to Article 2002 of the Agreement;

“Secretary” means the Secretary of the United States Section of the Secretariat, the Secretary of the Mexican Section of the Secretariat or the Secretary of the Canadian Section of the Secretariat and includes any person authorized to act on behalf of that Secretary;

“service address” means

(a) With respect to a Party, the address filed with the Secretariat as the service address of the Party, including any facsimile number submitted with that address,

(b) With respect to a participant other than a Party, the address of the counsel of record for the person, including any facsimile number submitted with that address or, where the person is not represented by counsel, the address set out by the participant in a Request for Panel Review, Complaint or Notice of Appearance as the address at which the participant may be served, including any facsimile number submitted with that address, or

(c) Where a Change of Service Address has been filed by a Party or participant, the address set out as the new service address in that form, including any facsimile number submitted with that address;

“service list” means, with respect to a panel review,

(a) Where the final determination was made in Canada, a list comprising the other involved Party and

(i) In the case of a final determination made by the CBSA President, persons named on the list maintained by the CBSA President who participated in the proceedings before the CBSA President and who were exporters or importers of goods of the country of the other involved Party or complainants referred to in section 34 of the *Special Import Measures Act*, as amended, and

(ii) In the case of a final determination made by the Tribunal, persons named on the list maintained by the Tribunal

of parties in the proceedings before the Tribunal who were exporters or importers of goods of the country of the other involved Party, complainants referred to in section 31 of the *Special Import Measures Act*, as amended, or other domestic parties whose interest in the findings of the Tribunal is with respect to goods of the country of the other involved Party, and

(b) Where the final determination was made in Mexico or the United States, the list, maintained by the investigating authority of persons who have been served in the proceedings leading to the final determination;

“Tribunal” means the Canadian International Trade Tribunal or its successor and includes any person authorized to act on its behalf;

“United States” means the United States of America.

4. The definitions set forth in Article 1911 of the Agreement and Annex 1911 to Chapter Nineteen of the Agreement are hereby incorporated into these rules.

5. Where these rules require that notice be given, it shall be given in writing.

Part I—General

Duration and Scope of Panel Review

6. A panel review commences on the day on which a first Request for Panel Review is filed with the Secretariat and terminates on the day on which a Notice of Completion of Panel Review is effective.

7. A panel review shall be limited to

(a) The allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review; and

(b) Procedural and substantive defenses raised in the panel review.

Responsibilities of the Secretary

8. The normal business hours of the Secretariat, during which the offices of the Secretariat shall be open to the public, shall be from 9 a.m. to 5 p.m. on each weekday other than

(a) In the case of the United States Section of the Secretariat, legal holidays of that Section;

(b) In the case of the Canadian Section of the Secretariat, legal holidays of that Section; and

(c) In the case of the Mexican Section of the Secretariat, legal holidays of that Section.

9. The responsible Secretary shall provide administrative support for each panel review and shall make the arrangements necessary for the oral proceedings and meetings of each panel,

including, if required, interpreters to provide simultaneous translation.

10. (1) Each Secretary shall maintain a file for each panel review. Subject to subrules (3) and (4), the file shall be comprised of either the original or a copy of all documents filed, whether or not filed in accordance with these rules, in the panel review.

(2) The file number assigned to a first Request for Panel Review shall be the Secretariat file number for all documents filed or issued in that panel review. All documents filed shall be stamped by the Secretariat to show the date and time of receipt.

(3) Where, after notification of the selection of a panel pursuant to rule 42, a document is filed that is not provided for in these rules or that is not in accordance with the rules, the responsible Secretary may refer the unauthorized filing to the chairperson of the Panel for instructions, provided such authority has been delegated by the Panel to its chairperson pursuant to rule 17.

(4) On a referral referred to in subrule (3), the chairperson may instruct the responsible Secretary to

(a) Retain the document in the file, without prejudice to a motion to strike such document; or

(b) Return the document to the person who filed the document, without prejudice to a motion for leave to file the document.

11. (1) The responsible Secretary shall forward to the other involved Secretary all orders and decisions issued by the panel. The responsible Secretary shall also forward to the other involved Secretary a copy of all documents filed in the office of the responsible Secretary that are not clearly marked as privileged or proprietary pursuant to subrules 44(2) and 56(1)(a).

(2) If an involved Secretariat makes a written request to the responsible Secretary requesting any privileged or proprietary documents, the responsible Secretary shall forward such documents to the involved Secretariat forthwith.

12. Where under these rules a responsible Secretary is required to publish a notice or other document in the official publications of the involved Parties, the responsible Secretary and the other involved Secretary shall cause the notice or other document to be published in the official publication of the country in which that section of the Secretariat is located.

13. (1) Each Secretary and every member of the staff of the Secretariat shall, before taking up duties, file a Proprietary Information Access Application with each of the CBSA President, the Tribunal, the Secretaria

de Economia, the International Trade Administration of the United States Department of Commerce and the United States International Trade Commission.

(2) Where a Secretary or a member of the staff of the Secretariat files a Proprietary Information Access Application in accordance with subrule (1), the appropriate investigating authority shall issue to the Secretary or to the member a Proprietary Information Access Order.

14. (1) The responsible Secretary shall file with the investigating authority one original, and any additional copies required by the investigating authority, of every Proprietary Information Access Application and any amendments or modifications thereto, filed by a panelist, assistant to a panelist, court reporter, interpreter or translator pursuant to rule 47.

(2) The responsible Secretary shall ensure that every panelist, assistant to a panelist, court reporter, interpreter and translator, before taking up duties in a panel review, files with the responsible Secretariat a copy of a Proprietary Information Access Order.

15. Where a document containing proprietary information or privileged information is filed with the responsible Secretariat, each involved Secretary shall ensure that

(a) The document is stored, maintained, handled and distributed in accordance with the terms of any applicable Proprietary Information Access Order;

(b) The inner wrapper of the document is clearly marked to indicate that it contains proprietary information or privileged information; and

(c) Access to the document is limited to officials of, and counsel for, the investigating authority whose final determination is under review and

(i) In the case of proprietary information, the person who submitted the proprietary information to the investigating authority or counsel for that person and any persons who have been granted access to the information under a Proprietary Information Access Order with respect to the document, and

(ii) In the case of privileged information filed in a panel review of a final determination made in the United States, persons with respect to whom the panel has ordered disclosure of the privileged information under rule 52, if the persons have filed with the responsible Secretariat a Proprietary Information Access Order with respect to the document.

16. (1) Each Secretary shall permit access by any person to the information in the file in a panel review that is not

proprietary information or privileged information and shall provide copies of that information on request and payment of an appropriate fee.

(2) Each Secretary shall, in accordance with subrule 15(c) and the terms of the applicable Proprietary Information Access Order or order of the panel,

(a) Permit access to proprietary information or privileged information in the file of a panel review; and

(b) On payment of an appropriate fee, provide a copy of the information referred to in subrule (a).

(3) No document filed in a panel review shall be removed from the offices of the Secretariat except in the ordinary course of the business of the Secretariat or pursuant to the direction of a panel.

Internal Functioning of Panels

17. (1) A panel may adopt its own internal procedures, not inconsistent with these rules, for routine administrative matters.

(2) A panel may delegate to its chairperson

(a) The authority to accept or reject filings in accordance with subrule 10(4); and

(b) The authority to grant motions consented to by all participants, other than a motion filed pursuant to rule 20 or 52, a motion for remand of a final determination or a motion that is inconsistent with an order or decision previously made by the panel.

(3) A decision of the chairperson referred to in subrule (2) shall be issued as an order of the panel.

(4) Subject to subrule 26(b), meetings of a panel may be conducted by means of a telephone conference call.

18. Only panelists may take part in the deliberations of a panel, which shall take place in private and remain secret. Staff of the involved Secretariats and assistants to panelists may be present by permission of the panel.

Computation of Time

19. (1) In computing any time period fixed in these rules or by an order or decision of a panel, the day from which the time period begins to run shall be excluded and, subject to subrule (2), the last day of the time period shall be included.

(2) Where the last day of a time period computed in accordance with subrule (1) falls on a legal holiday of the responsible Secretariat, that day and any other legal holidays of the responsible Secretariat immediately following that day shall be excluded from the computation.

20. (1) A panel may extend any time period fixed in these rules if

(a) Adherence to the time period would result in unfairness or prejudice to a participant or the breach of a general legal principle of the country in which the final determination was made;

(b) The time period is extended only to the extent necessary to avoid the unfairness, prejudice or breach;

(c) The decision to extend the time period is concurred in by four of the five panelists; and

(d) In fixing the extension, the panel takes into account the intent of the rules to secure just, speedy and inexpensive reviews of final determinations.

(2) A participant may request an extension of time by filing a Notice of Motion no later than the tenth day prior to the last day of the time period. Any response to the Notice of Motion shall be filed no later than seven days after the Notice of Motion is filed.

(3) A participant who fails to request an extension of time pursuant to subrule (2) may file a notice of motion for leave to file out of time, which shall include reasons why additional time is required and why the participant has failed to comply with the provisions of subrule (2).

(4) The panel will normally rule on such a motion before the last day of the time period which is the subject of the motion.

Counsel of Record

21. (1) A counsel who signs a document filed pursuant to these rules on behalf of a participant shall be the counsel of record for the participant from the date of filing until a change is effected in accordance with subrule (2).

(2) A participant may change its counsel of record by filing with the responsible Secretariat a Notice of Change of Counsel of Record signed by the new counsel, together with proof of service on the former counsel and other participants.

(3) A participant other than an individual must be represented by a counsel of record.

Filing, Service and Communications

22. (1) Subject to subrule 46(1), rule 47 and subrules 50(1), 52(3) and 73(2)(a), no document is filed with the Secretariat until one original and eight copies of the document are received by the responsible Secretariat during its normal business hours and within the time period fixed for filing.

(2) The responsible Secretariat shall accept, date and time stamp and place in the appropriate file every document submitted to the responsible Secretariat.

(3) Receipt, date and time stamping or placement in the file of a document by

the responsible Secretariat does not constitute a waiver of any time period fixed for filing or an acknowledgement that the document has been filed in accordance with these rules.

23. The responsible Secretary shall be responsible for the service of

(a) Notices of Intent to Commence Judicial Review and Complaints on Each Party;

(b) Requests for Panel Review on the Parties, the investigating authority and the persons listed on the service list; and

(c) Notices of Appearance, Proprietary Information Access Orders granted to panelists, assistants to panelists, court reporters, interpreter or translators and any amendments or modifications thereto or notices of revocation thereof, decisions and orders of a panel, Notices of Final Panel Action and Notices of Completion of Panel Review on the participants.

24. (1) Subject to subrules (4) and (5), all documents filed by a participant, other than the administrative record, any supplementary remand record and any document required by rule 23 to be served by the responsible Secretary, shall be served by the participant on the counsel of record of each of the other participants, or where a participant is not represented by counsel, on the participant.

(2) A proof of service shall appear on, or be affixed to, all documents referred to in subrule (1).

(3) Where a document is served by expedited delivery courier or expedited mail service, the date of service set out in the affidavit of service or certificate of service shall be the day on which the document is consigned to the expedited delivery courier or expedited mail service.

(4) A document containing proprietary information or privileged information shall be filed and served under seal in accordance with rule 44, and shall be served only on

(a) The investigating authority; and

(b) Participants who have been granted access to the proprietary information or privileged information under a Proprietary Information Access Order or an order of the panel.

(5) A complainant shall serve a Complaint on the investigating authority and on all persons listed on the service list.

25. Subject to subrule 26(a), a document may be served by

(a) Delivering a copy of the document to the service address of the participant;

(b) Sending a copy of the document to the service address of the participant by facsimile transmission or by expedited delivery courier or expedited mail

service, such as express mail in the United States or Priority Post in Canada; or

(c) Personal service on the participant.

26. Where proprietary information or privileged information is disclosed in a panel review to a person pursuant to a Proprietary Information Access Order, the person shall not

(a) File, serve or otherwise communicate the proprietary information or privileged information by facsimile transmission; or

(b) Communicate the proprietary information or privileged information by telephone.

27. Service on an investigating authority does not constitute service on a Party and service on a Party does not constitute service on an investigating authority.

Pleadings and Simultaneous Translation of Panel Reviews in Canada

28. Rules 29 to 31 apply with respect to a panel review of a final determination made in Canada.

29. Either English or French may be used by any person or panelist in any document or oral proceeding.

30. (1) Subject to subrule (2), any order or decision including the reasons therefor, issued by a panel shall be made available simultaneously in both English and French where

(a) In the opinion of the panel, the order or decision is in respect of a question of law of general public interest or importance; or

(b) The proceedings leading to the issuance of the order or decision were conducted in whole or in part in both English and French.

(2) Where

(a) An order or decision issued by a panel is not required by subrule (1) to be made available simultaneously in English and French, or

(b) An order or decision is required by subrule (1)(a) to be made available simultaneously in both English and French but the panel is of the opinion that to make the order or decision available simultaneously in both English and French would occasion a delay prejudicial to the public interest or result in injustice or hardship to any participant, the order or decision, including the reasons therefor, shall be issued in the first instance in either English or French and thereafter at the earliest possible time in the other language, each version to be effective from the time the first version is effective.

(3) Nothing in subrule (1) or (2) shall be construed as prohibiting the oral delivery in either English or French of

any order or decision or any reasons therefor.

(4) No order or decision is invalid by reason only that it was not made or issued in both English and French.

31. (1) Any oral proceeding conducted in both English and French shall be translated simultaneously.

(2) Where a participant requests simultaneous translation of oral proceedings in a panel review, the request shall be made as early as possible in the panel review and preferably at the time of filing a Complaint or Notice of Appearance.

(3) Where the chairperson of a panel is of the opinion that there is a public interest in the panel review, the chairperson may direct the responsible Secretary to arrange for simultaneous translation of any of the oral proceedings in the panel review.

Costs

32. Each participant shall bear the costs of, and those incidental to, its own participation in a panel review.

Part II—Commencement of Panel Review

Notice of Intent To Commence Judicial Review

33. (1) Where an interested person intends to commence judicial review of a final determination, the interested person shall

(a) Where the final determination was made in Canada, publish a notice to that effect in the *Canada Gazette* and serve a Notice of Intent to Commence Judicial Review on both involved Secretaries and on all persons listed on the service list; and

(b) Where the final determination was made in Mexico or the United States, within 20 days after the date referred to in subrule (3)(b) or (c), serve a Notice of Intent to Commence Judicial Review on

(i) Both involved Secretaries,
(ii) The investigating authority, and
(iii) All persons listed on the service list.

(2) Where the final determination referred to in subrule (1) was made in Canada, the Secretary of the Canadian Section of the Secretariat shall serve a copy of the Notice of Intent to Commence Judicial Review on the investigating authority.

(3) Every Notice of Intent to Commence Judicial Review referred to in subrule (1) shall include the following information (model form provided in the Schedule):

(a) The information set out in subrules 55(1)(c) to (f);

(b) The title of the final determination for which judicial review is sought, the

investigating authority that issued the final determination, the file number assigned by the investigating authority and, if the final determination was published in an official publication, the appropriate citation, including the date of publication; and

(c) The date on which the notice of the final determination was received by the other Party if the final determination was not published in an official publication.

Request for Panel Review

34. (1) A Request for Panel Review shall be made in accordance with the requirements of

(a) Section 77.011 or 96.21 of the *Special Import Measures Act*, as amended, and any regulations made thereunder;

(b) Section 516A of the *Tariff Act of 1930*, as amended, and any regulations made thereunder;

(c) Section 404 of the United States *North American Free Trade Agreement Implementation Act* and any regulations made thereunder; or

(d) Articles 97 and 98 of the *Ley de Comercio Exterior* and its regulations.

(2) A Request for Panel Review shall contain the following information (model form provided in the Schedule):

(a) The information set out in subrule 55(1);

(b) The title of the final determination for which panel review is requested, the investigating authority that issued the final determination, the file number assigned by the investigating authority and, if the final determination was published in an official publication, the appropriate citation;

(c) The date on which the notice of the final determination was received by the other Party if the final determination was not published in an official publication;

(d) Where a Notice of Intent to Commence Judicial Review has been served and the sole reason that the Request for Panel Review is made is to require review of the final determination by a panel, a statement to that effect; and

(e) The service list, as defined in rule 3.

35. (1) On receipt of a first Request for Panel Review, the responsible Secretary shall

(a) Forthwith forward a copy of the Request to the other involved Secretary;

(b) Forthwith inform the other involved Secretary of the Secretariat file number; and

(c) Serve a copy of the first Request for Panel Review on the persons listed on the service list together with a statement setting out the date on which the Request was filed and stating that

(i) A Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with rule 39 within 30 days after the filing of the first Request for Panel Review.

(ii) A Party, an investigating authority or other interested person who does not file a Complaint but who intends to participate in the panel review shall file a Notice of Appearance in accordance with rule 40 within 45 days after the filing of the first Request for Panel Review, and

(iii) The panel review will be limited to the allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review and to the procedural and substantive defenses raised in the panel review.

(2) On the filing of a first Request for Panel Review, the responsible Secretary shall forthwith publish a notice of that Request in the official publications of the involved Parties, stating that a Request for Panel Review has been received and specifying the date on which the Request was filed, the final determination for which panel review is requested and the information set out in subrule (1)(c).

Joint Panel Reviews

36. (1) Subject to rule 37, where

(a) A panel is established to review a final determination made under paragraph 41(1)(a) of the *Special Import Measures Act*, as amended, with respect to particular goods of the United States or Mexico and a Request for Panel Review of a final determination made under subsection 43(1) of that Act with respect to those goods is filed, or

(b) A panel is established to review a final determination made under section 705(a) or 735(a) of the *Tariff Act of 1930*, as amended, with respect to particular goods of Canada or Mexico and a Request for Panel Review of a final determination made under section 705(b) or 735(b) of that Act with respect to those goods is filed, within 10 days after that Request is filed, a participant in the former panel review, the investigating authority in the latter panel review or an interested person listed in the service list of the latter panel review may file a motion in the former panel review requesting that both final determinations be reviewed jointly by one panel.

(2) Any participant in the former panel review, the investigating authority in the latter panel review or an interested person listed in the service list of the latter panel review who certifies an intention to become a

participant in the latter panel review may, within 10 days after a motion is filed under subrule (1), file an objection to the motion, in which case the motion shall be deemed to be denied and separate panel reviews shall be held.

37. (1) Where a panel is established to review a final determination made under paragraph 41(1)(a) of the *Special Import Measures Act*, as amended, that applies with respect to particular goods of the United States or Mexico and a Request for Panel Review of a negative final determination made under subsection 43(1) of that Act with respect to those goods is filed, the final determinations shall be reviewed jointly by one panel.

(2) Where a panel is established to review a final determination made under section 705(a) or 735(a) of the *Tariff Act of 1930*, as amended, that applies with respect to particular goods of Canada or Mexico and a Request for Panel Review of a negative final determination made under section 705(b) or 735(b) of that Act with respect to those goods is filed, the final determinations shall be reviewed jointly by one panel.

38. (1) Subject to subrules (2) and (3), where final determinations are reviewed jointly pursuant to rule 36 or 37, the time periods fixed under these rules for the review of the final determination made under subsection 43(1) of the *Special Import Measures Act*, as amended, or section 705(b) or 735(b) of the *Tariff Act of 1930*, as amended, shall apply to the joint review, commencing with the date fixed for filing briefs pursuant to rule 57.

(2) Unless otherwise ordered by a panel as a result of a motion under subrule (3), where final determinations are reviewed jointly pursuant to rule 37, the panel shall issue its decision with respect to the final determination made under subsection 43(1) of the *Special Import Measures Act*, as amended, or section 705(b) or 735(b) of the *Tariff Act of 1930*, as amended, and where the panel remands the final determination to the investigating authority and the Determination on Remand is affirmative, the panel shall thereafter issue its decision with respect to the final determination made under paragraph 41(1)(a) of the *Special Import Measures Act*, as amended, or section 705(a) or 735(a) of the *Tariff Act of 1930*, as amended.

(3) Where the final determinations are reviewed jointly pursuant to rule 36 or 37, any participant may, unilaterally or with the consent of the other participants, request by motion that time periods, other than the time periods referred to in subrule (1), be

fixed for the filing of pleadings, oral proceedings, decisions and other matters.

(4) A Notice of Motion pursuant to subrule (3) shall be filed no later than 10 days after the date fixed for filing Notices of Appearance in the review of the final determination made under subsection 43(1) of the *Special Import Measures Act*, as amended, or section 705(b) or 735(b) of the *Tariff Act of 1930*, as amended.

(5) Unless otherwise ordered by a panel, where the panel has not issued a ruling on a motion filed pursuant to subrule (3) within 30 days after the filing of the Notice of Motion, the motion shall be deemed denied.

Complaint

39. (1) Subject to subrule (3), any interested person who intends to make allegations of errors of fact or law, including challenges to the jurisdiction of the investigating authority, with respect to a final determination, shall file with the responsible Secretariat, within 30 days after the filing of a first Request for Panel Review of the final determination, a Complaint, together with proof of service on the investigating authority and on all persons listed on the service list.

(2) Every Complaint referred to in subrule (1) shall contain the following information (model form provided in the Schedule):

(a) The information set out in subrule 55(1);

(b) The precise nature of the Complaint, including the applicable standard of review and the allegations of errors of fact or law, including challenges to the jurisdiction of the investigating authority;

(c) A statement describing the interested person's entitlement to file a Complaint under this rule; and

(d) Where the final determination was made in Canada, a statement as to whether the complainant

(i) Intends to use English or French in pleadings and oral proceedings before the panel, and

(ii) Requests simultaneous translation of any oral proceedings.

(3) Only an interested person who would otherwise be entitled to commence proceedings for judicial review of the final determination may file a Complaint.

(4) Subject to subrule (5), an amended Complaint shall be filed no later than 5 days before the expiration of the time period for filing a Notice of Appearance pursuant to rule 40.

(5) An amended Complaint may, with leave of the panel, be filed after the time limit set out in subrule (4) but no later

than 20 days before the expiration of the time period for filing briefs pursuant to subrule 57(1).

(6) Leave to file an amended Complaint may be requested of the panel by the filing of a Notice of Motion for leave to file an amended Complaint accompanied by the proposed amended Complaint.

(7) Where the panel does not grant a motion referred to in subrule (6) within the time period for filing briefs pursuant to subrule 57(1), the motion shall be deemed to be denied.

Notice of Appearance

40. (1) Within 45 days after the filing of a first Request for Panel Review of a final determination, the investigating authority and any other interested person who proposes to participate in the panel review and who has not filed a Complaint in the panel review shall file with the responsible Secretariat a Notice of Appearance containing the following information (model form provided in the Schedule):

(a) The information set out in subrule 55(1);

(b) A Statement as to the basis for the person's claim of entitlement to file a Notice of Appearance under this rule;

(c) In the case of a Notice of Appearance filed by the investigating authority, any admissions with respect to the allegations set out in the Complaints;

(d) A statement as to whether appearance is made

(i) In support of some or all of the allegations set out in a Complaint under subrule 39(2)(b), (ii) in opposition to some or all of the allegations set out in a Complaint under subrule 39(2)(b), or

(iii) In support of some of the allegations set out in a Complaint under subrule 39(2)(b) and in opposition to some of the allegations set out in a Complaint under subrule 39(2)(b); and

(e) Where the final determination was made in Canada, a statement as to whether the person filing the Notice of Appearance.

(i) Intends to use English or French in pleadings and oral proceedings before the panel, and

(ii) Requests simultaneous translation of any oral proceedings.

(2) Any complainant who intends to appear in opposition to allegations set out in a Complaint under subrule 39(2)(b) shall file a Notice of Appearance containing the statements referred to in subrules (1)(b) and (1)(d) (ii) or (iii).

Record for Review

41. (1) The investigating authority whose final determination is under

review shall, within 15 days after the expiration of the time period fixed for filing a Notice of Appearance, file with the responsible Secretariat.

(a) Nine copies of the final determination, including reasons for the final determination;

(b) Two copies of an Index comprised of a descriptive list of all items contained in the administrative record, together with proof of service of the Index on all participants; and

(c) Subject to subrules (3), (4) and (5), two copies of the administrative record.

(2) An Index referred to in subrule (1) shall, where applicable, identify those items that contain proprietary information, privileged information or government information by a statement to that effect.

(3) Where a document containing proprietary information is filed, it shall be filed under seal in accordance with rule 44.

(4) No privileged information shall be filed with the responsible Secretariat unless the investigating authority waives the privilege and voluntarily files the information or the information is filed pursuant to an order of a panel.

(5) No government information shall be filed with the responsible Secretariat unless the investigating authority, after having reviewed the government information and, where applicable, after having pursued appropriate review procedures, determines that the information may be disclosed.

Part III—Panels

Announcement of Panel

42. On the completion of the selection of a panel, the responsible Secretary shall notify the participants and the other involved Secretary of the names of the panelists.

Violation of Code of Conduct

43. Where a participant believes that a panelist or an assistant to a panelist is in violation of the Code of Conduct, the participant shall forthwith notify the responsible Secretary in writing of the alleged violation. The responsible Secretary shall promptly notify the other involved Secretary and the involved Parties of the allegations.

Part IV—Proprietary Information and Privileged Information

Filing or Service Under Seal

44. (1) Where, under these rules, a document containing proprietary information or privileged information is required to be filed under seal with the Secretariat or is required to be served under seal, the document shall be filed or served in accordance with this rule

and, where the document is a pleading, in accordance with rule 56.

(2) A document filed or served under seal shall be

(a) Bound separately from all other documents;

(b) Clearly marked.

(i) With respect to a panel review of a final determination made in Canada,

(A) In the case of a document containing proprietary information, "Proprietary", "Confidential", "De nature exclusive" or "Confidentiel", and

(B) In the case of a document containing privileged information, "Privileged" or "Protege",

(ii) With respect to a panel review of a final determination made in Mexico,

(A) In the case of a document containing proprietary information, "Confidential", and

(B) In the case of a document containing privileged information, "Privilegiada", and

(iii) With respect to a panel review of a final determination made in the United States,

(A) In the case of a document containing proprietary information, "Proprietary", and

(B) In the case of a document containing privileged information, "Privileged"; and

(c) Contained in an opaque inner wrapper and an opaque outer wrapper.

(3) An inner wrapper referred to in subrule (2)(c) shall indicate

(a) That proprietary information or privileged information is enclosed, as the case may be; and

(b) The Secretariat file number of the panel review.

45. Filing or service of proprietary information or privileged information with the Secretariat does not constitute a waiver of the designation of the information as proprietary information or privileged information.

Proprietary Information Access Orders

46. (1) A counsel of record, or a professional retained by, or under the control or direction of, a counsel of record, who wishes disclosure of proprietary information in a panel review shall file a Proprietary Information Access Application with respect to the proprietary information as follows:

(a) With the responsible Secretariat, four copies; and

(b) With the investigating authority, one original and any additional copies that the investigating authority requires.

(2) A Proprietary Information Access Application referred to in subrule (1) shall be served

(a) Where the Proprietary Information Access Application is filed before the

expiration of the time period fixed for filing a Notice of Appearance in the panel review, on the persons listed in the service list; and

(b) In any other case, on all participants other than the investigating authority, in accordance with subrule 24(1).

47. (1) Every panelist, assistant to a panelist, court reporter, interpreter and translator shall, before taking up duties in a panel review, provide to the responsible Secretary a Proprietary Information Access Application.

(2) A panelist, assistant to a panelist, court reporter, interpreter or translator who amends or modifies a Proprietary Information Access Application shall provide the responsible Secretariat with a copy of the amendment or modification.

(3) Where the investigating authority receives, pursuant to subrule 14(1), a Proprietary Information Access Application or an amendment or modification thereto, the investigating authority shall issue a Proprietary Information Access Order, amendment or modification accordingly.

48. The investigating authority shall, within 30 days after a Proprietary Information Access Application is filed in accordance with subrule 46(1), serve on the person who filed the Proprietary Information Access Application

(a) A Proprietary Information Access Order; or

(b) A notification in writing setting out the reasons why a Proprietary Information Access Order is not issued.

49. (1) Where

(a) An investigating authority refuses to issue a Proprietary Information Access Order to a counsel of record or to a professional retained by, or under the control or direction of, a counsel of record, or

(b) An investigating authority issues a Proprietary Information Access Order with terms unacceptable to the counsel of record, the counsel of record may file with the responsible Secretariat a Notice of Motion requesting that the panel review the decision of the investigating authority.

(2) Where, after consideration of any response made by the investigating authority referred to in subrule (1), the panel decides that a Proprietary Information Access Order should be issued or that the terms of a Proprietary Information Access Order should be modified or amended, the panel shall so notify counsel for the investigating authority.

(3) Where the final determination was made in the United States and the investigating authority fails to comply with the notification referred to in

subrule (2), the panel may issue such orders as are just in the circumstances, including an order refusing to permit the investigating authority to make certain arguments in support of its case or striking certain arguments from its pleadings.

50. (1) Where a Proprietary Information Access Order is issued to a person in a panel review, the person shall file with the responsible Secretariat, pursuant to the applicable regulations of the investigating authority, a copy of the Proprietary Information Access Order.

(2) Where a Proprietary Information Access Order is revoked, amended or modified by the investigating authority, the investigating authority shall provide to the responsible Secretariat and to all participants a copy of the Notice of Revocation, amendment or modification.

51. Where a Proprietary Information Access Order is issued to a person, the person is entitled

(a) To access to the document; and

(b) Where the person is a counsel of record, to a copy of the document containing the proprietary information, on payment of an appropriate fee, and to service of pleadings containing the proprietary information.

Privileged Information

52. (1) A Notice of Motion for disclosure of a document in the administrative record identified as containing privileged information shall set out

(a) The reasons why disclosure of the document is necessary to the case of the participant filing the Notice of Motion; and

(b) A statement of any point of law or legal authority relied on, together with a concise argument in support of disclosure.

(2) Within 10 days after a Notice of Motion referred to in subrule (1) is filed, the investigating authority shall, if it intends to respond, file the following in response:

(a) An affidavit of an official of the investigating authority stating that, since the filing of the Notice of Motion, the official has examined the document and has determined that disclosure of the document would constitute disclosure of privileged information; and

(b) A statement of any point of law or legal authority relied on, together with a concise argument in support of non-disclosure.

(3) After having reviewed the Notice of Motion referred to in subrule (1) and any response filed under subrule (2), the panel may order

(a) That the document shall not be disclosed; or

(b) That the investigating authority file two copies of the document under seal with the responsible Secretariat.

(4) Where the panel has issued an order pursuant to subrule (3)(b), the panel shall select two panelists, one of whom shall be a lawyer who is a citizen of the country of one involved Party and the other of whom shall be a lawyer who is a citizen of the country of the other involved Party.

(5) The two panelists selected under subrule (4) shall

(a) Examine the document *in camera*; and

(b) Communicate their decision, if any, to the panel.

(6) The decision referred to in subrule (5)(b) shall be issued as an order of the panel.

(7) Where the two panelists selected under subrule (4) fail to come to a decision, the panel shall

(a) Examine the document *in camera*; and

(b) Issue an order with respect to the disclosure of the document.

(8) Where an order referred to in subrule (6) or (7) is to the effect that the document shall not be disclosed, the responsible Secretary shall return all copies of the document to the investigating authority by service under seal.

53. In a panel review of a final determination made in the United States, where, pursuant to rule 52, disclosure of a document is granted,

(a) The panel shall limit disclosure to

(i) Persons who must have access in order to permit effective representation in the panel review,

(ii) Persons, such as the Secretariat staff, court reporters, interpreters and translators, who must have access for administrative purposes in order to permit effective functioning of the panel, and

(iii) Members of an Extraordinary Challenge Committee and their assistants who may need access pursuant to the *NAFTA Extraordinary Challenge Committee Rules*;

(b) The panel shall issue an order identifying by name and by title or position the persons who are entitled to access and shall allow for future access by new counsel of record and by members of an Extraordinary Challenge Committee and, as necessary, their assistants; and

(c) The investigating authority shall issue a Proprietary Information Access Order with respect to that document in accordance with the order of the panel.

Violations of Proprietary Information Access Applications or Orders

54. Where a person alleges that the terms of a Proprietary Information Access Application or of a Proprietary Information Access Order have been violated, the panel shall refer the allegations to the investigating authority for investigation and, where applicable, the imposition of sanctions in accordance with section 77.034 of the *Special Import Measures Act*, as amended, section 777(f) of the *Tariff Act of 1930*, as amended, or article 93 of the *Ley de Comercio Exterior*.

Part V—Written Proceedings

Form and Content of Pleadings

55. (1) Every pleading filed in a panel review shall contain the following information:

(a) The title of, and any Secretariat file number assigned for, the panel review;

(b) A brief descriptive title of the pleading;

(c) The name of the Party, investigating authority or interested person filing the document;

(d) The name of counsel of record for the Party, investigating authority or interested person;

(e) The service address, as defined in rule 3; and

(f) The telephone number of the counsel of record referred to in subrule (d) or, where an interested person is not represented by counsel, the telephone number of the interested person.

(2) Every pleading filed in a panel review shall be on paper 8 1/2 x 11 inches (216 millimetres by 279 millimeters) in size. The text of the pleading shall be printed, typewritten or reproduced legibly on one side only with a margin of approximately 1 1/2 inches (40 millimetres) on the left-hand side with double spacing between each line of text, except for quotations of more than 50 words, which shall be indented and single-spaced. Footnotes, titles, schedules, tables, graphs and columns of figures shall be presented in a readable form. Briefs and appendices shall be securely bound along the left-hand margin.

(3) Every pleading filed on behalf of a participant in a panel review shall be signed by counsel for the participant or, where the participant is not represented by counsel, by the participant.

56. (1) Where a participant files a pleading that contains proprietary information, the participant shall file two sets of the pleading in the following manner:

(a) One set containing the proprietary information shall be filed under seal and

(i) With respect to a panel review of a final determination made in Canada, shall be labelled “Proprietary”, “Confidential”, “Confidentiel” or “De nature exclusive”, with the top of each page that contains proprietary information marked with the word “Proprietary”, “Confidential”, “Confidentiel” or “De nature exclusive” and with the proprietary information enclosed in brackets,

(ii) With respect to a panel review of a final determination made in Mexico, shall be labelled “Confidencial”, with the top of each page that contains proprietary information marked with the word “Confidencial” and with the proprietary information enclosed in brackets, and

(iii) With respect to a panel review of a final determination made in the United States, shall be labelled “Proprietary”, with the top of each page that contains proprietary information marked with the word “Proprietary” and with the proprietary information enclosed in brackets; and

(b) No later than one day following the day on which the set of pleadings referred to in subrule (a) is filed, another set not containing proprietary information shall be filed and

(i) With respect to a panel review of a final determination made in Canada, shall be labelled “Non-Proprietary”, “Non-Confidential”, “Non confidentiel” or “De nature non exclusive”,

(ii) With respect to a panel review of a final determination made in Mexico, shall be labelled “No-confidencial”, and

(iii) With respect to a panel review of a final determination made in the United States, shall be labelled “Non-Proprietary”, with each page from which proprietary information has been deleted marked to indicate the location from which the proprietary information was deleted.

(2) Where a participant files a pleading that contains privileged information, the participant shall file two sets of the pleading in the following manner:

(a) One set containing the privileged information shall be filed under seal and

(i) With respect to a panel review of a final determination made in Canada, shall be labelled “Privileged” or “Protege”, with the top of each page that contains privileged information marked with the word “Privileged” or “Protege” and with the privileged information enclosed in brackets,

(ii) With respect to a panel review of a final determination made in Mexico, shall be labelled “Privilegiada”, with the top of each page that contains privileged information marked with the

word “Privilegiada”, and with the privileged information enclosed in brackets, and

(iii) With respect to a panel review of a final determination made in the United States, shall be labelled “Privileged”, with the top of each page that contains privileged information marked with the word “Privileged” and with the privileged information enclosed in brackets; and

(b) No later than one day following the day on which the set of pleadings referred to in subrule (a) is filed, another set not containing privileged information shall be filed and

(i) With respect to a panel review of a final determination made in Canada, shall be labelled “Non-Privileged” or “Non protege”,

(ii) With respect to a panel review of a final determination made in Mexico, shall be labelled “No-privilegiada”, and

(iii) With respect to a panel review of a final determination made in the United States, shall be labelled “Non-Privileged”, with each page from which privileged information has been deleted marked to indicate the location from which the privileged information was deleted.

Filing of Briefs

57. (1) Subject to subrule 38(1), every participant who has filed a Complaint under rule 39 or a Notice of Appearance with a statement under subrule 40(1)(d)(i) or (iii) shall file a brief, setting forth grounds and arguments supporting allegations of the Complaint no later than 60 days after the expiration of the time period fixed, under subrule 41(1), for filing the administrative record.

(2) Every participant who has filed a Notice of Appearance with a statement under subrule 40(1)(d)(ii) or (iii) shall file a brief setting forth grounds and arguments opposing allegations of a Complaint no later than 60 days after the expiration of the time period for filing of briefs referred to in subrule (1).

(3) Every participant who has filed a brief pursuant to subrule (1) may file a brief replying to the grounds and arguments set forth in the briefs filed pursuant to subrule (2) no later than 15 days after the expiration of the time period for filing of briefs referred to in subrule (2). Reply briefs shall be limited to rebuttal of matters raised in the briefs filed pursuant to subrule (2).

(4) An appendix containing authorities cited in all briefs filed under any of subrules (1) to (3) shall be filed with the responsible Secretariat within 10 days after the last day on which a brief under subrule (3) may be filed.

(5) Any number of participants may join in a single brief and any participant may adopt by reference any part of the brief of another participant.

(6) A participant may file a brief without appearing to present oral argument.

(7) Where a panel review of a final determination made by an investigating authority of the United States with respect to certain goods involves issues that may relate to the final determination of the other investigating authority with respect to those goods, the latter investigating authority may file an *amicus curiae* brief in the panel review in accordance with subrule (2).

Failure To File Briefs

58. (1) In respect of a panel review of a final determination made in the United States or Canada, where a participant fails to file a brief within the time period fixed and no motion pursuant to rule 20 is pending, on a motion of another participant, the panel may order that the participant who fails to file a brief is not entitled

(a) To present oral argument;
(b) To service of any further pleadings, orders or decisions in the panel review; or

(c) To further notice of the proceedings in the panel review.

(2) Where

(a) No brief is filed by any complainant or by any participant in support of any of the complainants within the time periods established pursuant to these rules, and

(b) No motion pursuant to rule 20 is pending, the panel may, on its own motion or pursuant to the motion of a participant, issue an order to show cause why the panel review should not be dismissed.

(3) If, pursuant to an order under subrule (2), good cause is not shown, the panel shall issue an order dismissing the panel review.

(4) Where no brief is filed by an investigating authority, or by an interested person in support of the investigating authority, within the time period fixed in subrule 57(2), a panel may issue a decision referred to in rule 72.

Content of Briefs and Appendices

59. (1) Every brief filed pursuant to subrule 57(1) or (2) shall contain information, in the following order, divided into five parts:

Part I:

(a) A table of contents; and
(b) A table of authorities cited:

The table of authorities shall contain references to all treaties, statutes and regulations cited, any cases primarily

relied on in the briefs, set out alphabetically, and all other documents referred to except documents from the administrative record. The table of authorities shall refer to the page(s) of the brief where each authority is cited and mark, with an asterisk in the margin, those authorities primarily relied on.

Part II: A statement of the case:

(a) In the brief of a complainant or of a participant filing a brief pursuant to subrule 57(1), this Part shall contain a concise statement of the relevant facts;

(b) In the brief of an investigating authority or of a participant filing a brief pursuant to subrule 57(2), this Part shall contain a concise statement of the position of the investigating authority or the participant with respect to the statement of facts set out in the briefs referred to in paragraph (a), including a concise statement of other facts relevant to its case; and

(c) In all briefs, references to evidence in the administrative record shall be made by page and, where practicable, by line.

Part III: A statement of the issues:

(a) In the brief of a complainant or of a participant filing a brief pursuant to subrule 57(1), this Part shall contain a concise statement of the issues; and

(b) In the brief of an investigating authority or of a participant filing a brief pursuant to subrule 57(2), this Part shall contain a concise statement of the position of the investigating authority or the participant with respect to each issue relevant to its case.

Part IV: Argument:

This Part shall consist of the argument setting out concisely the points of law relating to the issues, with applicable citations to authorities and the administrative record.

Part V: Relief:

This part shall consist of a concise statement precisely identifying the relief requested.

(2) Paragraphs in Parts I to V of a brief may be numbered consecutively.

(3) A reply brief filed pursuant to rule 57(3) shall include a table of contents and a table of authorities, indicating those principally relied upon in the argument.

Appendix to the Briefs

60. (1) Authorities referred to in the briefs shall be included in an appendix, which shall be organized as follows: A table of contents, copies of all treaty and statutory references, references to regulations, cases primarily relied on in the briefs, set out alphabetically, and all other documents referred to in the briefs except documents from the administrative record.

(2) The appendix required under subrule 57(4) shall be compiled by a participant who filed a brief under subrule 57(1) and who was so designated by all the participants who filed a brief. Each participant who filed a brief under subrule 57(2) shall provide the designated participant with a copy of each authority on which it primarily relied in its brief that was not primarily relied on in any other brief filed under subrule 57(1). Each participant who filed a brief under subrule 57(3) shall provide the designated participant with a copy of each authority on which it primarily relied in its brief that was not primarily relied on in briefs filed pursuant to subrule 57(1) or (2).

(3) The costs for compiling the appendix shall be borne equally by all participants who file briefs.

Motions

61. (1) A motion shall be made by Notice of Motion in writing (model form provided in the Schedule) unless the circumstances make it unnecessary or impracticable.

(2) Every Notice of Motion, and any affidavit in support thereof, shall be accompanied by a proposed order of the panel (model form provided in the Schedule) and shall be filed with the responsible Secretariat, together with proof of service on all participants.

(3) Every Notice of Motion shall contain the following information:

(a) The title of the panel review, the Secretariat file number for that panel review and a brief descriptive title indicating the purpose of the motion;

(b) A statement of the precise relief requested;

(c) A statement of the grounds to be argued, including a reference to any rule, point of law or legal authority to be relied on, together with a concise argument in support of the motion; and

(d) Where necessary, references to evidence in the administrative record identified by page and, where practicable, by line.

(4) The pendency of any motion in a panel review shall not alter any time period fixed in these rules or by an order or decision of the panel.

(5) A Notice of Motion to which all participants consent shall be entitled a Consent Motion.

62. Subject to subrules 20(2) and 76(5), unless the panel otherwise orders, a participant may file a response to a Notice of Motion within 10 days after the Notice of Motion is filed.

63. (1) A panel may dispose of a motion based upon the pleadings filed pertaining to the motion.

(2) The panel may hear oral argument or, subject to subrule 26(b), direct that

a motion be heard by means of a telephone conference call with the participants.

(3) A panel may deny a motion before responses to the Notice of Motion have been filed.

64. Where a panel chooses to hear oral argument or, pursuant to subrule 63(2), directs that a motion be heard by means of a telephone conference call with the participants, the responsible Secretary shall, at the direction of the chairperson, fix a date, time and place for the hearing of the motion and shall notify all participants of the same.

Part VI—Oral Proceedings

Location

65. Oral proceedings in a panel review shall take place at the office of the responsible Secretariat or at such other location as the responsible Secretary may arrange.

Pre-Hearing Conference

66. (1) A panel may hold a pre-hearing conference, in which case the responsible Secretary shall give notice of the conference to all participants.

(2) A participant may request that the panel hold a pre-hearing conference by filing with the responsible Secretariat a written request setting out the matters that the participant proposes to raise at the conference.

(3) The purpose of a pre-hearing conference shall be to facilitate the expeditious advancement of the panel review by addressing such matters as

(a) The clarification and simplification of the issues;

(b) The procedure to be followed at the hearing of oral argument; and

(c) Any outstanding motions.

(4) Subject to subrule 26(b), a pre-hearing conference may be conducted by means of a telephone conference call.

(5) Following a pre-hearing conference, the panel shall promptly issue an order setting out its rulings with respect to the matters considered at the conference.

Oral Argument

67. (1) A panel shall commence the hearing of oral argument no later than 30 days after the expiration of the time period fixed under subrule 57(3) for filing reply briefs. At the direction of the panel, the responsible Secretary shall notify all participants of the date, time and place for the oral argument.

(2) Oral argument shall be subject to the time constraints set by the panel and shall, unless the panel otherwise orders, be presented in the following order:

(a) The complainants and any participant who filed a brief in support

of the allegations set out in a Complaint or partly in support of the allegations set out in a Complaint and partly in opposition to the allegations set out in a Complaint;

(b) The investigating authority and any participant who filed a brief in opposition to the allegations set out in a Complaint, other than a participant referred to in subrule (a); and

(c) Argument in reply, at the discretion of the panel.

(3) If a participant fails to appear at oral argument, the panel may hear argument on behalf of the participants who are present. If no participant appears, the panel may decide the case on the basis of briefs.

(4) Oral argument on behalf of a participant on a motion or at a hearing shall be conducted by the counsel of record for that participant or, where the participant is an individual appearing *pro se*, by the participant.

(5) Oral argument shall be limited to the issues in dispute.

Subsequent Authorities

68. (1) A participant who has filed a brief may bring to the attention of the panel,

(a) At any time before the conclusion of oral argument, an authority that is relevant to the panel review;

(b) At any time after the conclusion of oral argument and before the panel has issued its decision,

(i) An authority that was reported subsequent to the conclusion of oral argument, or

(ii) With the leave of the panel, an authority that is relevant to the panel review and that came to the attention of counsel of record after the conclusion of oral argument, by filing with the responsible Secretariat a written request, setting out the citation of the decision or judgment, the page reference of the brief of the participant to which the decision or judgment relates and a concise statement, of no more than one page in length, of the relevance of the decision or judgment.

(2) A request referred to in subrule (1) shall be filed as soon as possible after the issuance of the decision or judgment by the court.

(3) Where a request referred to in subrule (1) is filed with the responsible Secretariat, any other participant may, within five days after the date on which the request was filed, file a concise statement, of no more than one page in length, in response.

Oral Proceedings in Camera

69. During that part of oral proceedings in which proprietary information or privileged information is

presented, a panel shall not permit any person other than the following persons to be present:

(a) The person presenting the proprietary information or privileged information;

(b) A person who has been granted access to the proprietary information or privileged information under a Proprietary Information Access Order or an order of the panel;

(c) In the case of privileged information, a person as to whom the confidentiality of the privileged information has been waived; and

(d) Officials of, and counsel for, the investigating authority.

Part VII—Decisions and Completions of Panel Reviews

Orders, Decisions and Terminations

70. The responsible Secretary shall cause notice of every decision of a panel issued pursuant to rule 72 to be published in the official publications of the involved Parties.

71. (1) Where a Notice of Motion requesting dismissal of a panel review is filed by a participant, the panel may issue an order dismissing the panel review.

(2) Where a Notice of Motion requesting termination of a panel review is filed by a participant and is consented to by all the participants, and an affidavit to that effect is filed, or where all participants file Notices of Motion requesting termination, the panel review is terminated and, if a panel has been appointed, the panelists are discharged.

(3) A panel review is deemed to be terminated on the day after the expiration of the limitation period established pursuant to subrule 39(1) if no Complaint has been filed in a timely manner. The responsible Secretariat shall issue a Notice of Completion of Panel Review.

72. A panel shall issue a written decision with reasons, together with any dissenting or concurring opinions of the panelists, in accordance with Article 1904.8 of the Agreement. The decision will normally be released by noon on the date of issuance.

Panel Review of Action on Remand

73. (1) An investigating authority shall give notice of the action taken pursuant to a remand of the panel by filing with the responsible Secretariat a Determination on Remand within the time specified by the panel.

(2) If, on remand, the investigating authority has supplemented the administrative record,

(a) The investigating authority shall file with the responsible Secretariat two

copies of an Index listing each item in the supplementary remand record, together with proof of service of the Index on the counsel of record of each of the participants, or where a participant is not represented by counsel, on the participant, and two copies of each non-privileged item listed in that Index, within five days after the date on which the investigating authority filed the Determination on Remand with the panel;

(b) Any participant who intends to challenge the Determination on Remand shall file a written submission with respect to the Determination on Remand within 20 days after the date on which the investigating authority filed the Index and supplementary remand record; and

(c) Any response to the written submissions referred to in subrule (b) shall be filed by the investigating authority, and by any participant supporting the investigating authority, within 20 days after the last day on which written submissions in opposition to the Determination on Remand may be filed.

(3) If, on remand, the investigating authority has not supplemented the record,

(a) Any participant who intends to challenge the Determination on Remand shall file a written submission within 20 days after the date on which the investigating authority filed the Determination on Remand with the panel; and

(b) Any response to the written submissions referred to in subrule (a) shall be filed by the investigating authority, and by any participant filing in support of the investigating authority, within 20 days after the last day on which such written submissions may be filed.

(4) In the case of a panel review of a final determination made in Mexico, where a participant who fails to file a brief under rule 57 files a written submission pursuant to subrule (2) or (3), the submission shall be disregarded by the panel.

(5) If no written submissions are filed under subrule (2)(b) or (3)(a) within the time periods established by these rules, and if no motion pursuant to rule 20 is pending, the panel shall, within 10 days after the later of the due date for such written submissions and the date of the denial of a motion pursuant to rule 20, issue an order affirming the investigating authority's Determination on Remand.

(6) Where a Determination on Remand is challenged, the panel shall issue a written decision pursuant to rule 72, either affirming the Determination on

Remand or remanding it to the investigating authority, no later than 90 days after the Determination on Remand is filed.

74. In setting the date by which a Determination on Remand shall be due from the investigating authority, the panel shall take into account, among other factors,

(a) The date that any Determination on Remand with respect to the same goods is due from the other investigating authority; and

(b) The effect the Determination on Remand from the other investigating authority might have on the deliberations of the investigating authority with respect to the making of a final Determination on Remand.

Re-Examination of Orders and Decisions

75. A clerical error in an order or decision of a panel, or an error in an order or decision of a panel arising from any accidental oversight, inaccuracy or omission, may be corrected by the panel at any time during the panel review.

76. (1) A participant may, within 10 days after a panel issues its decision, file a Notice of Motion requesting that the panel re-examine its decision for the purpose of correcting an accidental oversight, inaccuracy or omission, which shall set

(a) The oversight, inaccuracy or omission with respect to which the request is made;

(b) The relief requested; and

(c) If ascertainable, a statement as to whether other participants consent to the motion.

(2) The grounds for a motion referred to in subrule (1) shall be limited to one or both of the following grounds:

(a) That the decision does not accord with the reasons therefor; or

(b) That some matter has been inaccurately overlooked, stated inaccurately or omitted by the panel.

(3) No Notice of Motion referred to in subrule (1) shall set out any argument already made in the panel review.

(4) There shall be no oral argument in support of a motion referred to in subrule (1).

(5) Except as the panel may otherwise order under subrule (6)(b), no participant shall file a response to a Notice of Motion filed pursuant to subrule (1).

(6) Within seven days after the filing of a Notice of Motion under subrule (1), the panel shall

(a) Issue a decision ruling on the motion; or

(b) Issue an order identifying further action to be taken concerning the motion.

(7) A decision or order under subrule (6) may be made with the concurrence of any three panelists.

Part VIII—Completion of Panel Review

77. (1) Subject to subrule (2), when a panel issues:

(a) An order dismissing a panel review under subrule 58(3) or 71(1),

(b) A decision under rule 72 or subrule 73(6) that is the final action in the panel review, or

(c) An order under subrule 73(5), the panel shall direct the responsible Secretary to issue a Notice of Final Panel Action (model form provided in the Schedule) on the eleventh day thereafter.

(2) Where a motion is filed pursuant to subrule 76(1) regarding a decision referred to in subrule (1)(b), the responsible Secretary shall issue the Notice of Final Panel Action on the day on which the panel

(a) Issues a ruling finally disposing of the motion; or

(b) Directs the responsible Secretary to issue the Notice of Final Panel Action, the issuance of which shall constitute a denial of the motion.

78. If no Request for an Extraordinary Challenge Committee is filed, the responsible Secretary shall publish a Notice of Completion of Panel Review in the official publications of the involved Parties, effective.

(a) On the day on which a panel is terminated pursuant to subrule 71(2); or

(b) In any other case, on the day after the expiration of the limitation period established pursuant to subrules 37(1) and 37(2)(a) of the NAFTA

Extraordinary Challenge Committee Rules.

79. Where a Request for an Extraordinary Challenge Committee has been filed, the responsible Secretary shall publish a Notice of Completion of Panel Review in the official publications of the involved Parties, effective on the day after the day referred to in rule 64 or subrule 65(a) of the NAFTA Extraordinary Challenge Committee Rules.

80. Panelists are discharged from their duties on the day on which a Notice of Completion of Panel Review is effective, or on the day on which an Extraordinary Challenge Committee vacates a panel review pursuant to subrule 65(b) of the NAFTA Extraordinary Challenge Committee Rules.

Stays and Suspensions

81. Where a panelist becomes unable to fulfill panel duties, is disqualified or dies, panel proceedings and the running of time periods shall be suspended, pending the appointment of a substitute

panelist in accordance with the procedures set out in Annex 1901.2 to Chapter Nineteen of the Agreement.

82. Where a panelist is disqualified, dies or otherwise becomes unable to fulfill panel duties, after the oral argument, the chairperson may order that the matter be reheard, on such terms as are appropriate, after selection of a substitute panelist.

83. (1) A Party may make a request, pursuant to Article 1905.11(a)(ii) of the Agreement, that an ongoing panel review be stayed by filing the request with the responsible Secretariat.

(2) A Party who files a request under subrule (1) shall forthwith give written notice of the request to the other involved Party and to the other involved Secretariat.

(3) On receipt of a request under subrule (1), the responsible Secretary shall

(a) Immediately give written notice of the stay of the panel review to all participants in the panel review; and

(b) Publish a notice of the stay of the panel review in the official publications of the involved Parties.

84. On receipt of a report containing an affirmative finding with respect to a ground specified in Article 1905.1 of the Agreement, the responsible Secretary for panel reviews referred to in Article 1905.11(a)(i) of the Agreement shall

(a) Immediately give notice in writing to all participants in those reviews; and

(b) Publish a notice of the affirmative finding in the official publications of the involved Parties.

85. (1) A Party who intends to suspend the operation of Article 1904 of the Agreement pursuant to Article 1905.8 or 1905.9 of the Agreement shall endeavour to give written notice of that intention to the other involved Party and to the involved Secretaries at least five days prior to the suspension.

(2) On receipt of a notice under subrule (1), the involved Secretaries shall publish a notice of the suspension in the official publications of the involved Parties.

Schedule—Procedural Forms

Forms (1) through (7) follow.

Form (1)
Article 1904 Binational Panel Review
Pursuant to the North American Free
Trade Agreement

In the matter of:

(Title of Final Determination)
*Notice of Intent to Commence Judicial
Review*

Pursuant to Article 1904 of the North
American Free-Trade Agreement, notice
is hereby served that

(interested person filing notice) intends
to commence judicial review in the

(name of the court)
of the final determination referenced
below. The following information is
provided pursuant to Rule 33 of the
NAFTA Article 1904 Panel Rules:

1. _____ XXXX

(The name of the interested person
filing this notice)

2. _____ XXXX

(The name of counsel for the
interested person, if any)

3. _____ XXXX

_____ XXXX

_____ XXXX

(The service address, as defined by
Rule 3 of the *NAFTA Article 1904 Panel
Rules*, including facsimile number, if
any)

4. _____ XXXX

(The telephone number of counsel for
the interested person or the telephone
number of the interested person, if not
represented by counsel)

5. _____ XXXX

(The title of the final determination
for which notice of intent to commence
judicial review is served)

6. _____ XXXX

(The investigating authority that
issued the final determination)

7. _____ XXXX

(The file number of the investigating
authority)

8. (a) _____ XXXX

(The citation and date of publication
of the final determination in the **Federal
Register**, *Canada Gazette* or *Diario
Oficial de la Federacion*); or

(b) _____ XXXX

(If the final determination was not
published, the date notice of the final
determination was received by the other
Party)

Date

Signature of Counsel (or interested
person, if not represented by counsel)
Form (2)

Article 1904 Binational Panel Review
Pursuant to the North American Free-
Trade Agreement

In the matter of:

(Title of Panel Review)

Secretariat File No. _____
Request for Panel Review

Pursuant to Article 1904 of the North
American Free-Trade Agreement, panel
review is hereby requested of the final
determination referenced below. The
following information is provided
pursuant to Rule 34 of the *NAFTA
Article 1904 Panel Rules*:

1. _____ XXXX

(The name of the Party or the
interested person filing this request for
panel review)

2. _____ XXXX

(The name of counsel for the Party or
the interested person, if any)

3. _____ XXXX

_____ XXXX

_____ XXXX

(The service address, as defined by
Rule 3 of the *NAFTA Article 1904 Panel
Rules*, including facsimile number, if
any)

4. _____ XXXX

(The telephone number of counsel for
the Party or the interested person or the
telephone number of the interested
person, if not represented by counsel)

5. _____ XXXX

(The title of the final determination
for which panel review is requested)

6. _____ XXXX

(The investigating authority that
issued the final determination)

7. _____ XXXX

(The file number of the investigating
authority)

8. (a) _____ XXXX

(The citation and date of publication
of the final determination in the **Federal
Register**, *Canada Gazette* or *Diario
Oficial de la Federacion*); or

(b) _____ XXXX

(If the final determination was not
published, the date notice of the final
determination was received by the other
Party)

9. Yes _____ No _____ Non-
Applicable _____

(Where a Notice of Intent to
Commence Judicial Review has been
served, is the sole reason for requesting
review of the final determination to
require review by a panel?)

10. The Service List, as defined by
Rule 3 of the *NAFTA Article 1904 Panel
Rules*, is attached.

Date

Signature of Counsel (or interested
person, if not represented by counsel)
Form (3)

Article 1904 Binational Panel Review
Pursuant to the North American Free
Trade Agreement

In the matter of:

(Title of Panel Review)

Secretariat File No. _____
Complaint

1. _____ XXXX

(The name of the interested person
filing the complaint)

2. _____ XXXX

(The name of counsel for the
interested person, if any)

3. _____ XXXX

XXXX
XXXX
(The service address, as defined by Rule 3 of the *NAFTA Article 1904 Panel Rules*, including facsimile number, if any)

4. XXXX
(The telephone number of counsel for the interested person or telephone number of the interested person, if not represented by counsel)

5. Statement of the Precise Nature of the Complaint (See Rule 39 of the *NAFTA Article 1904 Panel Rules*)

A. The Applicable Standard of Review

B. Allegations of Errors of Fact or Law

C. Challenges to the Jurisdiction of the Investigating Authority

6. Statement of the Interested Person's Entitlement to File a Complaint under Rule 39 of the *NAFTA Article 1904 Panel Rules*

7. For Panel Reviews of Determinations Made in Canada:

(a) Complainant intends to use the specified language in pleadings and oral proceedings (Specify one)
English _____ French _____

(b) Complainant requests simultaneous translation of oral proceedings (Specify one)
Yes _____ No _____

Date _____

Signature of Counsel (or interested person, if not represented by counsel) Form (4)
Article 1904 Binational Panel Review Pursuant to the North American Free Trade Agreement
In the matter of: _____

(Title of Panel Review)
Secretariat File No. _____
Notice of Appearance

1. XXXX
(The name of the investigating authority or the interested person filing this notice of appearance)

2. XXXX
(The name of counsel for the investigating authority or the interested person, if any)

3. XXXX
XXXX
XXXX
(The service address, as defined by Rule 3 of the *NAFTA Article 1904 Panel Rules*, including facsimile number, if any)

4. XXXX
(The telephone number of counsel for the investigating authority or the interested person or the telephone number of the interested person, if not represented by counsel)

5. This Notice of Appearance is made: _____ in support of some or all of the allegations set out in a Complaint; _____ in opposition to some or all of the allegations set out in a Complaint; or _____ in support of some of the allegations set out in a Complaint and in opposition to some of the allegations set out in a Complaint.

6. Statement as to the basis for the interested person's entitlement to file a Notice of Appearance under Rule 40 of the *NAFTA Article 1904 Panel Rules*

7. For Notices of Appearance Filed by the Investigating Authority
Statement by the Investigating Authority regarding any admissions with respect to the allegations set out in the Complaints

8. For Panel Reviews of Determinations Made in Canada:

(a) I intend to use the specified language in pleadings and oral proceedings (Specify one)
English _____ French _____

(b) I request simultaneous translation of oral proceedings (Specify one)
Yes _____ No _____

Date _____

Signature of Counsel (or interested person, if not represented by counsel) Form (5)
Article 1904 Binational Panel Review Pursuant to the North American Free Trade Agreement
In the matter of: _____

(Title of Panel Review)
Secretariat File No. _____
Notice of Motion
(descriptive title indicating the purpose of the motion)

1. XXXX
(The name of the investigating authority or the interested person filing this notice of motion)

2. XXXX
(The name of counsel for the investigating authority or the interested person, if any)

3. XXXX
XXXX
XXXX
(The service address, as defined by Rule 3 of the *NAFTA Article 1904 Panel Rules*, including facsimile number, if any)

4. XXXX
(The telephone number of the counsel for the investigating authority or the interested person or the telephone number of the interested person, if not represented by counsel)

5. Statement of the precise relief requested

6. Statement of the grounds to be argued, including references to any rule, point of law, or legal authority to be relied on

7. Arguments in support of the motion, including references to evidence in the administrative record by page and, where practicable, by line

8. Draft order attached (see Rule 61 and Form (6) of the *NAFTA Article 1904 Panel Rules*)

Date _____

Signature of Counsel (or interested person, if not represented by counsel) Form (6)
Article 1904 Binational Panel Review Pursuant to the North American Free Trade Agreement
In the matter of: _____

(Title of Panel Review)
Secretariat File No. _____
Order
Upon consideration of the motion for XXXX,
(relief requested)
filed on behalf of _____ XXXX,
and upon all
(participant filing motion)
other papers and proceedings herein,
it is hereby Ordered that the motion is _____ X

Issue Date _____

Panelist name _____

Panelist name _____

Panelist name _____

Panelist name _____

Panelist name Form (7)
Article 1904 Binational Panel Review Pursuant to the North American Free Trade Agreement
In the matter of: _____

(Title of Panel Review)
Secretariat File No. _____
Notice of Final Panel Action
Under the direction of the panel, pursuant to rule 77 of the *NAFTA Article 1904 Panel Rules*, Notice is hereby given that the panel has taken its final action in the above-referenced matter.

This Notice is effective on _____ XXXX.

Issue Date _____

Signature of the Responsible Secretary _____

Dated: April 4, 2008.

Michelle O'Neill,

Deputy Under Secretary for International Trade.

[FR Doc. E8-7621 Filed 4-9-08; 8:45 am]

BILLING CODE 3510-GT-P

DEPARTMENT OF COMMERCE

International Trade Administration

(C-533-825)

Polyethylene Terephthalate Film, Sheet, and Strip from India: Notice of Partial Rescission of Administrative Review of the Countervailing Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: April 10, 2008.

FOR FURTHER INFORMATION CONTACT: Elfi Blum, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-0197.

SUPPLEMENTARY INFORMATION:

Background

On July 3, 2007, the Department of Commerce (the Department) published a notice of opportunity to request an administrative review of the countervailing duty order on Polyethylene Terephthalate (PET) Film, Sheet, and Strip from India. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 72 FR 36420 (July 3, 2006). On July 30, 2006, MTZ Polyfilms, Ltd. (MTZ) and Jindal Poly Films Limited of India (Jindal) timely requested that the Department conduct an administrative review of merchandise MTZ and Jindal produced and exported.

The Department published a notice of the initiation of the countervailing duty administrative review of PET Film from India for MTZ and Jindal for the period January 1, 2006 through December 31, 2006. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 72 FR 48613 (August 24, 2007). On October 3, 2007, Jindal withdrew its request for an administrative review.

Partial Rescission of Review

The Department's regulations at section 351.213(d)(1) provide that the Department will rescind an administrative review if the party that

requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation of the requested review, or withdraws its request at a later date if the Department determines that it is reasonable to extend the time limit for withdrawing the request. Jindal submitted its request within the 90 day limit set by the regulations. Since no other parties requested a review of Jindal, the Department is rescinding the administrative review of the countervailing duty order on PET film, sheet and strip from India for the period January 1, 2006 through December 31, 2006, for Jindal. MTZ remains subject to this administrative review. The preliminary results for the administrative review of MTZ are currently due July 30, 2008.

Assessment

The Department will instruct U.S. Customs and Border Protection (CBP) to assess countervailing duties on all appropriate entries. Jindal shall be assessed countervailing duties at rates equal to the cash deposit of the estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department will issue appropriate assessment instructions to CBP 15 days after the date of publication of this notice of rescission of administrative review.

Cash Deposit Rates

Jindal's cash deposit rate continues to be the rate established in the final result of the last administrative review for Jindal. This cash deposit requirement shall remain in effect until publication of the final results of the next administrative review for Jindal.

Notification Regarding APOs

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation that is subject to sanction.

This notice is issued and published in accordance with sections 751(a)(1) and 777(i) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: April 2, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8-7628 Filed 4-9-08; 8:45 am]

BILLING CODE 3510-DS-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648-XH10

Caribbean Fishery Management Council (CFMC); Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: CFMC will host a meeting of the Council Coordination Committee (CCC), consisting of the Regional Fishery Management Council chairs, vice chairs, and executive directors on May 6-9, 2008. The intent of this meeting is to discuss issues of relevance to the Councils, including FY 2008 budget allocations, implementation of provisions from the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA), and scientific fisheries research activities, among others.

DATES: The meeting will be held on May 6, 2008 through May 9, 2008. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meeting will be held at the Marriott Frenchman's Reef & Morning Star Hotel, 5 Estate Bakkeroe, St. Thomas, U.S. Virgin Islands.

FOR FURTHER INFORMATION CONTACT: Caribbean Fishery Management Council, 268 Munoz Rivera Ave., Suite 1108, San Juan, Puerto Rico; telephone (787) 766-5926, or e-mail at diana_martino_cfmc@yahoo.com, or miguel_rolon_cfmc@yahoo.com

SUPPLEMENTARY INFORMATION: The meeting will begin at 8:30 a.m. on Tuesday, May 6, 2008, recess at 5 p.m., or when business is complete; reconvene at 8:30 a.m. on Wednesday, May 7, 2008, and recess at 11:30 a.m.; reconvene at 8:30 a.m. on Thursday, May 8, 2008, and recess at 5:30 p.m.; and, if needed, will reconvene on May 9, 2008, and adjourn by noon, or when business is complete.

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSRA) of 2006 established the Council Coordination Committee (CCC) by amending Section

302 (16 U.S.C. 1852) of the Magnuson-Stevens Act. The Committee consists of the chairs, vice chairs, and executive directors of each of the eight Regional Fishery Management Councils authorized by the Magnuson-Stevens Act or other Council members or staff. The CFMC will host this meeting and provide reports to the Committee for its information and discussion. The main topics of discussion will be the FY 2008 budget allocation, implementation of the provisions of the MSRA, and related guidance and technical regulatory changes, among others.

Agenda

Tuesday morning, May 6, 2008

- Opening remarks
U.S.V.I. Government Officials
CFMC
NOAA Fisheries
Separate Sessions NMFS and Councils

Tuesday afternoon, May 6, 2008

- MSRA Implementation Issues
Discuss agency progress on NS1 Guidelines concerning ACL's/AMs
Discuss agency progress on NEPA compliance procedures
Discuss agency progress on NMFS guidance regarding implementation of LAPPs
Discuss and review progress regarding incorporation of SSC into council specification setting processes, and its role as peer review body, as well as those of other advisory roles
Discuss progress on developing 5-year research programs with SSC
Discuss Councils' efforts to end overfishing and status of rebuilding stocks that are overfished (each council will address this item.)

Wednesday morning, May 7, 2008

- Other MSRA implementation/legislative issues
Progress report on MRIP
Coastal States Organization (CSO) perspective on HR 21
Receive/discuss status of: HR 4087; HR 5425; or any other bill relevant to councils or NMFS
U.S. Coast Guard report

Thursday morning, May 8, 2008

- Council administrative matters
Discuss FY09 Appropriation Bill, and how to address its impact on councils.
Discuss FY09 stipends for SSC and need for a nationally consistent payment level
Discuss FY09 stipends for Industry Advisors
Discuss FY10 budget formulation activity

Discuss status of SOPPs in terms of agency approval and need to have a national "template"

Discuss upcoming 5-year grant award process (FY2010–14) and related procedures

Thursday afternoon, May 8, 2008

- Continue Council administrative matters
- Issues joint concern/interest
NOAA/NMFS
Marine Sanctuary Program
MPAs and FAC Report
Use of performance metrics for budget allocation purposes, e.g., Councils' FSSI scoring system
Discuss FY 2008 budget needs/relief for Councils

Friday morning, May 9, 2008

- Councils only session (if needed)
The order in which the agenda items are addressed may change. The CCC will meet as late as necessary to complete scheduled business.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Miguel A. Rolon at (787) 766–5926 at least 5 working days prior to the meeting.

Dated: April 7, 2008.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. E8–7523 Filed 4–9–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XH11

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's (Council) Herring Advisory Panel will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Wednesday, April 30, 2008, at 10 a.m.

ADDRESSES: The meeting will be held at the Holiday Inn, One Newbury Street,

Peabody, MA 01960; telephone: (978) 535–4600.

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 items of discussion in the panel's agenda are as follows:

1. At the beginning of the meeting, there will be an opportunity for public comment on the Herring Amendment 4 Scoping Document.

2. The Herring Advisory Panel will review the Herring Amendment 4 Scoping Document and develop related Advisory Panel recommendations and suggestions for Herring Committee consideration.

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 Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: April 7, 2008.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. E8–7524 Filed 4–9–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XH12

Western 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 Western Pacific Fishery Management Council (Council) will hold meetings of its Pelagics Plan Team (PPT), in Honolulu, HI, to discuss fishery issues and develop recommendations for future management.

DATES: The meeting of the PPT will be held April 29, 2008 through May 1, 2008, from 8:30 a.m. to 5 p.m. each day.

ADDRESSES: The meeting will be held at the Council Office Conference Room, Western Pacific Fishery Management Council, 1164 Bishop St., Suite 1400, Honolulu, HI 96813; telephone: (808) 522-8220.

FOR FURTHER INFORMATION CONTACT: Kitty M. Simonds, Executive Director; telephone: (808) 522-8220.

SUPPLEMENTARY INFORMATION: The PPT will meet between April 29 and May 1, 2008 at the Council Conference Room to discuss the following agenda items:

Tuesday April 29, 2008, 8:30 a.m.

1. Introduction
2. Annual Report review
 - a. Review 2007 Annual Report modules and recommendations
 - i. American Samoa
 - ii. CNMI
 - iii. Guam
 - iv. Hawaii
 - v. International
 - vi. Recreational
 - b. 2007 Annual Report region wide recommendations

Wednesday & Thursday, April 30–May 1, 2008, 8:30 a.m.

3. Summary of current Fishery Management Plan amendment actions
4. Hawaii Swordfish Fishery Effort
5. Cost-earning study for the Hawaii longline fishery
6. Species specific analyses of shark catch data from the Hawaii Longline fishery, 1995–1996
7. Ecological Risk Assessment (ERA) for Hawaii based longline fisheries
8. Hana Fish Aggregating Device (FAD) catch data
9. Offshore handline fishery
10. Cooperative Research
11. Protected species issues
12. Recreational fisheries developments (Marine Recreational Improvement Program)
13. Other business
14. Public comments
15. Pelagic Plan Team Recommendations

The order in which the agenda items are addressed may change. The PPT will meet as late as necessary to complete scheduled business.

Although non-emergency issues not contained in this agenda may come

before the PPT for discussion, those issues may not be the subject of formal action during these meetings. Plan Team action will be restricted to those issues specifically listed in this document and any issue arising after publication of this document that requires emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to 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: April 7, 2008.

Tracey L. Thompson,
Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. E8-7525 Filed 4-9-08; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF DEFENSE

Department of the Air Force

[USAF-2008-0007]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to Add a System of Records.

SUMMARY: The Department of the Air Force 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 May 12, 2008 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCISI, 1800 Air Force Pentagon, Suite 220, Washington, DC 20330-1800.

FOR FURTHER INFORMATION CONTACT: Ms. Novella Hill at (703) 696-6518.

SUPPLEMENTARY INFORMATION: The Department of the Air Force 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 March 28, 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: April 4, 2008.

L.M. Bynum,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

F014 AF/A2FM A

SYSTEM NAME:

Weaponizing Intelligence Combat Capability-Training Documentation System (WICC-TDS).

SYSTEM LOCATION:

Headquarters Air Combat Command (ACC/A2RT), ACC Network Operations and Security Center (NOSC), 37 Elm Street, North Computer Room, Langley AFB, VA 23665-2009.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All personnel involved in intelligence functions, activities or organizations to include active duty, Guard, and reserve personnel as well as Department of Defense (DoD) civilians and contractors.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's Name, Social Security Number (SSN), Gender, Rank, unclassified e-Mail address, SECRET Internet Protocol Routed Network (SIPRNET) e-Mail address, Sensitive Compartmented Information (SCI) system e-Mail address, Primary Air Force Specialty Code (AFSC), Duty AFSC, Control AFSC, Skill Level, Special Experience Identifiers (SEIs) (up to three), formal schools completed, duty title, Mission Design Series (MDS) assigned, work center, Position Number Unit Manning Document (UMD), Personnel Accounting Symbol (PAS) Code, unit type, duty location, street address, duty location base, state, zip code, country, Defense Switched Network (DSN) telephone number, DSN fax number, Major Command, home telephone, work telephone, mobile telephone, Air Expeditionary Force (AEF) Tasked, Supervisor's rank and name, Status (Active duty, Guard, Reserve), access required (trainee,

supervisor/trainer, certifier/evaluator, Senior Intelligence Officer (SIO)/Commander, Unit Systems Administrator, Higher Headquarters), and training and evaluation records.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. 9832, Property Accountability; AFD 14-2, Intelligence Rules and Procedures; AFI 14-202, Volume 1, Intelligence Training; Volume 2, Intelligence Standardization/Evaluation Program; and Volume 3, General Intelligence Rules; and E.O. 9397 (SSN).

PURPOSE(S):

Data collected is used to identify individuals and track their intelligence qualifications. Training and evaluation records will assist supervisors in managing personnel and programs.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, 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:

The DoD 'Blanket Routine Uses' published at the beginning of the Air Force's compilation of record system notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

By Social Security Number (SSN).

SAFEGUARDS:

Records are accessed by users with the appropriate profiles or roles and by persons responsible for servicing the record system in performance of their official duties. Records are maintained in secure, limited access, or monitored areas. Database is monitored and access is password protected. Physical entry by unauthorized persons is restricted through the use of locks, guards, passwords, or other administrative procedures. Archived data is stored on discs, or magnetic tapes, which are kept in a locked or controlled access area. Access to personal information is limited to those individuals who require the records to perform their official assigned duties.

RETENTION AND DISPOSAL:

Records will be deleted two years after individual's mission qualification lapses.

SYSTEM MANAGER(S) AND ADDRESS:

Headquarters Air Combat Command/A2RT, Weaponizing Intelligence Combat Capability-Training Documentation System (WICC-TDS), 209 Thornell Ave, Bldg 623, Langley AFB, VA 23665-2717.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to Headquarters Air Combat Command/A2RT, 209 Thornell Ave, Bldg 623, Langley AFB, VA 23665-2717.

For verification purposes individuals should provide full name and Social Security Number.

Visitors should present picture identification such as a valid driver's license, military or civilian employment identification card or any other similar picture identification.

RECORD ACCESS PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to Headquarters Air Combat Command/A2RT, 209 Thornell Ave, Bldg 623, Langley AFB, VA, 23665-2717.

For verification purposes individuals should provide full name and Social Security Number.

Visitors should present picture identification such as a valid driver's license, military or civilian employment.

CONTESTING RECORDS PROCEDURES:

The Air Force rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 33-332, Privacy Act Program; 32 CFR part 806b; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information is obtained from the user entry only.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8-7613 Filed 4-9-08; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of Secretary of Defense

[DOD-2008-OS-0036]

Privacy Act of 1974; System of Records

AGENCY: Defense Intelligence Agency, DoD.

ACTION: Notice to alter a system of records.

SUMMARY: The Defense Intelligence Agency is proposing to alter a system of records in its existing inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The proposed action will be effective on May 12, 2008 unless comments are received that would result in a contrary determination.

ADDRESSES: Freedom of Information Office, Defense Intelligence Agency (DAN-1A), 200 MacDill Blvd., Washington, DC 20340-5100.

FOR FURTHER INFORMATION CONTACT: Ms. Theresa Lowery at (202) 231-1193.

SUPPLEMENTARY INFORMATION: The Defense Intelligence Agency system of records notices 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 March 28, 2008, to the House Committee on Oversight and Government 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: April 4, 2008.

L.M. Bynum,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

LDIA 0271

SYSTEM NAME:

Investigations and Complaints (July 19, 2006, 71 FR 41006).

CHANGES:

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "5 U.S.C. 301, Departmental Regulations; Pub. L. 95-452, the Inspector General

Act of 1978; DoD Instruction 5106.3, Inspector General, DoD Inspection Program; DIA Directive 5100.200, Office of the Inspector General Policies and Procedures; and EO 9397 (SSN)."

* * * * *

CONTESTING RECORD PROCEDURES:

Delete entry and replace with "DIA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DIA Instruction 5400.001 "Defense Intelligence Agency Privacy Act Program;" 32 CFR part 319—Defense Intelligence Agency Privacy Program; or may be obtained from the system manager."

* * * * *

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Delete entry and replace with "Parts of this system may be exempt under 5 U.S.C. 552a(k)(1), (k)(2), (k)(5), or (k)(7), as applicable.

Information specifically authorized to be classified under E.O. 12958, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

An exemption rule for this exemption has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 505. For additional information contact the system manager."

* * * * *

LDIA 0271

SYSTEM NAME:

Investigations and Complaints.

SYSTEM LOCATION:

Defense Intelligence Agency, Washington, DC 20340–5100.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former civilian and military personnel who filed a complaint acted upon by the Inspector General, DIA, or who were the subject of an Inspector General, DIA, investigation or inquiry.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's name, address, Social Security (SSN), and to include documents relating to the organization, planning and execution of internal/external investigations and records created because of investigations conducted by the Office of the Inspector General, including reports of investigations, records of action taken and supporting papers. These files include investigations of both organizational elements and individuals.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; Pub. L. 95–452, the Inspector General Act of 1978; DoD Instruction 5106.3, Inspector General, DoD Inspection Program; DIA Directive 5100.200, Office of the Inspector General Policies and Procedures; and EO 9397 (SSN).

PURPOSE(S):

Information is collected to determine the facts and circumstances surrounding a complaint filed with the office of the Inspector General by a Defense Intelligence Agency employee or to determine the facts and circumstances of matters under Inspector General inquiry of investigation. Information collected by the Inspector General is for providing the Director, DIA, with a sound basis for just and intelligence action. Records are used as a basis for recommending actions to the Command Element and other DIA elements. Depending upon the nature of the information it may be passed to appropriate elements within the DoD, the Department of State, Department of Justice, Central Intelligence Agency and to other appropriate Government agencies.

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:

The 'Blanket Routine Uses' set forth at the beginning of the DIA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

Filed by subject matter and case number.

SAFEGUARDS:

Records are maintained in a building protected by security guards and are stored in vaults, safes or locked cabinets and are accessible only to authorized personnel who are properly screened, cleared and trained in the protection of privacy information. Electronic records are maintained on a classified and password protected system.

RETENTION AND DISPOSAL:

Records are held in current files for 5 years after completion and adjudication of all actions and retired to the Washington National Records Center. Investigations will be offered to the National Archives and complaints destroyed when 20 years old.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Inspector General's Office, Defense Intelligence Agency, Washington, DC 20340–5100.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Freedom of Information Act Office (DAN–1A/FOIA), Defense Intelligence Agency, 200 MacDill Blvd., Washington, DC 20340–5100.

Individual should provide their full name, current address, telephone number and Social Security Number (SSN).

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Freedom of Information Act Office (DAN–1A/FOIA), Defense Intelligence Agency, 200 MacDill Blvd., Washington, DC 20340–5100.

Individual should provide their full name, current address, telephone

number and Social Security Number (SSN).

CONTESTING RECORD PROCEDURES:

DIA's rules for accessing records, for contesting contents and appealing initial agency determinations are published in DIA Instruction 5400.001 "Defense Intelligence Agency Privacy Act Program;" 32 CFR part 319—Defense Intelligence Agency Privacy Program; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Personal interviews, personal history statements, abstracts or copies of pertinent medical records, abstracts from personnel records, results of tests, physician's notes, observations from employee's behavior, related notes, papers from counselors and/or clinical directors.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Parts of this system may be exempt under 5 U.S.C. 552a(k)(1), (k)(2), (k)(5), or (k)(7), as applicable.

Information specifically authorized to be classified under E.O. 12958, as implemented by DoD 5200.1-R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

An exemption rule for this exemption has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in

32 CFR part 505. For additional information contact the system manager.

[FR Doc. E8-7610 Filed 4-9-08; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

[DOD-2007-OS-0102]

Privacy Act of 1974; Systems of Records

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice to Delete Two Systems of Records.

SUMMARY: The Defense Logistics Agency is deleting two systems of records notices to its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: Please insert the effective date for the deletions as the date published in the **Federal Register**.

ADDRESSES: Send comments to the Privacy Act Officer, Headquarters, Defense Logistics Agency, ATTN: DP, 8725 John J. Kingman Road, Stop 2533, Fort Belvoir, VA 22060-6221.

FOR FURTHER INFORMATION CONTACT: Ms. Jody Sinkler at (703) 767-5045.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency 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 specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: April 3, 2008.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

S322.60 DMDC

SYSTEM NAME:

Archival Purchase Card File (June 4, 2002, 67 FR 38488).

REASON:

The Defense Manpower Data Center (DMDC) no longer receives Privacy Act program support from the Defense Logistics Agency (DLA). DMDC will receive privacy support from the Office of the Secretary of Defense (OSD) under

Administrative Instruction 81. The above system notice was transferred to the OSD's inventory of Privacy Act systems of records as DMDC 09, Archival Purchase Card File on February 19, 2008, 73 FR 9100; therefore, DLA is deleting this notice from its Privacy Act systems of records inventory.

S322.70 DMDC

SYSTEM NAME:

DMDC Defense Biometric Identification Data System (DBIDS)(November 18, 2004, 69 FR 67552).

REASON:

The Defense Manpower Data Center (DMDC) no longer receives Privacy Act program support from the Defense Logistics Agency (DLA). DMDC will receive privacy support from the Office of the Secretary of Defense (OSD) under Administrative Instruction 81. The above system notice was transferred to the OSD's inventory of Privacy Act systems of records as DMDC 10, Defense Biometric Identification Data System (DBIDS) on February 19, 2008, 73 FR 9100; therefore, DLA is deleting this notice from its Privacy Act systems of records inventory.

[FR Doc. E8-7612 Filed 4-9-08; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Navy

[USN-2008-0024]

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DoD.

ACTION: Notice to Amend a System of Records.

SUMMARY: The Department of the Navy is amending a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on May 12, 2008 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the Department of the Navy, PA/FOIA Policy Branch, Chief of Naval Operations (DNS-36), 2000 Navy Pentagon, Washington, DC 20350-2000.

FOR FURTHER INFORMATION CONTACT: Mrs. Doris Lama at (202) 685-6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy systems of

records notices 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 specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: April 4, 2008.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

NM05000-1

SYSTEM NAME:

General Correspondence Files
(November 16, 2004, 69 FR 67128).

CHANGES:

* * * * *

SYSTEM LOCATION:

In para 1, delete "<http://neds.daps.dla.mil/sndl.htm>" and replace with "<http://doni.daps.dla.mil/sndl.aspx>".

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Under "Record Holders" replace "<http://neds.daps.dla.mil/sndl.htm>" with "<http://doni.daps.dla.mil/sndl.aspx>".

NOTIFICATION PROCEDURE:

In para 1, replace "<http://neds.daps.dla.mil/sndl.htm>" with "<http://doni.daps.dla.mil/sndl.aspx>".

RECORD ACCESS PROCEDURES:

In para 1, replace "<http://neds.daps.dla.mil/sndl.htm>" with "<http://doni.daps.dla.mil/sndl.aspx>".

* * * * *

NM05000-1

SYSTEM NAME:

General Correspondence Files.

SYSTEM LOCATION:

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>.

Commander, U.S. Joint Forces Command, 1562 Mitscher Avenue, Suite 200, Norfolk, VA 23551-2488.

Commander, U.S. Pacific Command, P.O. Box 64028, Camp H.M. Smith, HI 96861-4028.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have initiated correspondence with the Department of the Navy.

CATEGORIES OF RECORDS IN THE SYSTEM:

Incoming correspondence which may include name, address, telephone number, organization, date of birth, and Social Security Number (SSN) of correspondent and supporting documentation. Files also contain copy of response letter and documentation required to prepare the response.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; and E.O. 9397 (SSN).

PURPOSE(S):

To maintain a record of correspondence received and responses made.

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:

The DoD 'Blanket Routine Uses' that appear at the beginning of the Navy's compilation of systems notices 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, organization, and date of correspondence.

SAFEGUARDS:

Access is provided on need-to-know basis only. Manual records are maintained in file cabinets under the control of authorized personnel during working hours. The office space in which the file cabinets are located is locked outside of official working hours. Computer terminals are located in supervised areas. Access to computerized data is controlled by password or other user code system.

RETENTION AND DISPOSAL:

Retained for two years and then destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Commanding officer of the activity in question. 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 this system of records contains information about themselves should address written inquiries to the commanding officer of the activity in question. Official mailing addresses are published in the Standard Navy Distribution List that is available at <http://doni.daps.dla.mil/sndl.aspx>.

The request should contain full name and date individual wrote to the activity or received a response. Request must be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the commanding officer of the activity in question. Official mailing addresses are published in the Standard Navy Distribution List that is available at <http://doni.daps.dla.mil/sndl.aspx>.

The request should contain full name and date individual wrote to the activity or received a response. Request must be signed.

CONTESTING RECORD PROCEDURES:

The Navy's rules for accessing records, and 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 manager.

RECORD SOURCE CATEGORIES:

Individual concerned and records collected by the activity to respond to the request.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8-7608 Filed 4-9-08; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Navy

[USN-2008-0025]

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DoD.

ACTION: Notice to Amend a System of Records.

SUMMARY: The Department of the Navy is amending a system of records notice in its existing inventory of record

systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on May 12, 2008 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the Department of the Navy, PA/FOIA Policy Branch, Chief of Naval Operations (DNS-36), 2000 Navy Pentagon, Washington, DC 20350-2000.

FOR FURTHER INFORMATION CONTACT: Mrs. Doris Lama at (202) 685-6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy systems of records notices 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 specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: April 4, 2008.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

NM05380-1

SYSTEM NAME:

Combined Federal Campaign/Navy and Marine Corps Relief Society (November 16, 2004, 69 FR 67128).

CHANGES:

* * * * *

SYSTEM LOCATION:

In para 1, delete "<http://neds.daps.dla.mil/sndl.htm>" and replace with "<http://doni.daps.dla.mil/sndl.aspx>".

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Replace "<http://neds.daps.dla.mil/sndl.htm>" with "<http://doni.daps.dla.mil/sndl.aspx>".

NOTIFICATION PROCEDURE:

Replace "<http://neds.daps.dla.mil/sndl.htm>" with "<http://doni.daps.dla.mil/sndl.aspx>".

RECORD ACCESS PROCEDURES:

Replace "<http://neds.daps.dla.mil/sndl.htm>" with "<http://doni.daps.dla.mil/sndl.aspx>".

* * * * *

NM05380-1

SYSTEM NAME:

Combined Federal Campaign/Navy and Marine Corps Relief Society.

SYSTEM LOCATION:

Organizational elements of the Department of the Navy. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at <http://doni.daps.dla.mil/sndl.aspx>.

Commander, U.S. Joint Forces Command, 1562 Mitscher Avenue, Suite 200, Norfolk, VA 23551-2488.

Commander, U.S. Pacific Command, P.O. Box 64028, Camp H.M. Smith, HI 96861-4028.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All assigned personnel.

CATEGORIES OF RECORDS IN THE SYSTEM:

Names, addresses, Social Security Numbers(SSN), payroll identifying data, contributor cards and lists.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; and, E.O. 9397 (SSN), 10927 and 12353.

PURPOSE(S):

To manage the Combined Federal Campaign and Navy and Marine Corps Relief Society Fund drives and provide the respective campaign coordinator with necessary information. Payroll deduction contribution data is supplied to the Defense Finance and Accounting Service.

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:

The DoD 'Blanket Routine Uses' that appear at the beginning of the Navy's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Manual and computerized records.

RETRIEVABILITY:

Name, Social Security Number (SSN), and organization.

SAFEGUARDS:

Access provided on need-to-know basis only. Manual records maintained in file cabinets under the control of authorized personnel during working hours. The office space in which the file cabinets are located is locked outside of official working hours. Computer terminals are located in supervised areas. Access to computerized data controlled by password or other user code system.

RETENTION AND DISPOSAL:

Records are maintained for one year or completion of next equivalent campaign and then destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Commanding officer of the activity in question. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at <http://doni.daps.dla.mil/sndl.aspx>.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the commanding officer of the naval activity where currently or previously employed. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at <http://doni.daps.dla.mil/sndl.aspx>.

The request should include full name, Social Security Number (SSN), address of the individual concerned, and should be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the commanding officer of the naval activity where currently or previously employed. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at <http://doni.daps.dla.mil/sndl.aspx>.

The request should include full name, Social Security Number (SSN), address of the individual concerned, and should be signed.

CONTESTING RECORD PROCEDURES:

The Department of the Navy's rules for accessing records, and 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 manager.

RECORD SOURCE CATEGORIES:

Individual; payroll files; personnel files.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8-7609 Filed 4-9-08; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE**Department of the Navy**

[USN-2008-0026]

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DoD.

ACTION: Notice to Amend a System of Records.

SUMMARY: The Department of the Navy is amending a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on May 12, 2008 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the Department of the Navy, PA/FOIA Policy Branch, Chief of Naval Operations (DNS-36), 2000 Navy Pentagon, Washington, DC 20350-2000.

FOR FURTHER INFORMATION CONTACT: Mrs. Doris Lama at (202) 685-6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy systems of records notices 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 specific changes to the record system being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: April 4, 2008.

L.M. Bynum,
Alternate OSD Federal Register Liaison
Officer, Department of Defense.

NM05512-1

SYSTEM NAME:

Vehicle Parking Permit and License Control System (July 6, 2005, 70 FR 38897).

CHANGES:

* * * * *

SYSTEM LOCATION:

In para 1, delete "<http://neds.daps.dla.mil/sndl.htm>" and replace with "<http://doni.daps.dla.mil/sndl.aspx>".

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete "<http://neds.daps.dla.mil/sndl.htm>" and replace with "<http://doni.daps.dla.mil/sndl.aspx>".

NOTIFICATION PROCEDURE:

In para 1, replace "<http://neds.daps.dla.mil/sndl.htm>" with "<http://doni.daps.dla.mil/sndl.aspx>".

RECORD ACCESS PROCEDURES:

In para 1, replace "<http://neds.daps.dla.mil/sndl.htm>" with "<http://doni.daps.dla.mil/sndl.aspx>".

* * * * *

NM05512-1

SYSTEM NAME:

Vehicle Parking Permit and License Control System

SYSTEM LOCATION:

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>.

Commander, U.S. Joint Forces Command, 1562 Mitscher Avenue, Suite 200, Norfolk, VA 23551-2488.

Commander, U.S. Pacific Command, P.O. Box 64028, Camp H.M. Smith, HI 96861-4028.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who apply for parking or who have registered their vehicles, boats, or trailers at a Navy, Marine Corps, Pacific Command, or Joint Forces Command installation; individuals who have applied for a Government Motor Vehicle Operator's license; and individuals who possess a Government Motor Vehicle Operator's license with authority to operate government vehicles.

CATEGORIES OF RECORDS IN THE SYSTEM:

File contains records of each individual who has registered a vehicle on the installation concerned to include parking permit information, decal data, insurance information, state of registration and identification. Applications may contain such information as name, date of birth, Social Security Number (SSN), Driver's

license information (i.e., height, weight, hair and eye color), place of employment, driving record, Military I.D. information, etc. File also contains records/notations of traffic violations, citations, suspensions, applications for government vehicle operator's I.D. card, operator qualifications and record licensing examination and performance, record of failures to qualify for a Government Motor Vehicle Operator's permit, record of government motor vehicle and other vehicle's accidents, and information on student driver training.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; and E.O. 9397 (SSN).

PURPOSE(S):

To track the issuance of parking permits and to provide a record of each individual who has registered a vehicle at an installation to include a record on individuals authorized to operate official government vehicles.

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:

The DoD 'Blanket Routine Uses' that appear at the beginning of the Navy's compilation of systems of records notices 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:

Individual's name, Social Security Number, state license plate number, case number, and organization.

SAFEGUARDS:

Limited access provided on a need-to-know basis only. Information maintained on computers is password protected. Files maintained in locked and/or guarded office.

RETENTION AND DISPOSAL:

Records are maintained for one year after transfer or separation from the installation concerned. Paper records are then destroyed and records on magnetic tapes erased.

SYSTEM MANAGER(S) AND ADDRESS:

Commanding officer of the activity in question. 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 this system of records contains information about themselves should address written inquiries to the Commanding Officer or head of the activity where assigned. 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 individual's full name, Social Security Number (SSN), and the request must be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves should address written inquiries to the Commanding Officer or head of the activity where assigned. 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 individual's full name, Social Security Number (SSN), and the request must be signed.

CONTESTING RECORD PROCEDURES:

The Navy's rules for accessing records, and 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 manager.

RECORD SOURCE CATEGORIES:

Individual concerned, driving record, insurance papers, activity correspondence, investigators reports, and witness statements.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E8-7615 Filed 4-9-08; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Navy

[USN-2008-0027]

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DoD.

ACTION: Notice to Alter a System of Records.

SUMMARY: The Department of the Navy proposes to alter a system of records notice in its existing inventory of records systems subject to the Privacy

Act of 1974, (5 U.S.C. 552a), as amended. The alteration consists of redefining the purpose and routine uses for the system.

DATES: This proposed action will be effective without further notice on May 12, 2008 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the Department of the Navy, PA/FOIA Policy Branch, Chief of Naval Operations (DNS-36), 2000 Navy Pentagon, Washington, DC 20350-2000.

FOR FURTHER INFORMATION CONTACT: Mrs. Doris Lama at (202) 685-325-6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy's systems of records notices 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 reports, as required by 5 U.S.C. 552a(r), of the Privacy Act of 1974, as amended, was submitted on March 28, 2008, to the House Committee on Oversight and Government 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: April 4, 2008.

L.M. Bynum,

Alternate, OSD Federal Register Liaison Officer, Department of Defense.

N05520-4

SYSTEM NAME:

NCIS Investigative Files System (June 30, 1998, 63 FR 35575).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete para 2 and replace with "Decentralized Segments—Located at the Naval Criminal Investigative Service (NCIS) Field Offices (FO), Resident Agencies (RA), and Polygraph sites worldwide. Law Enforcement Information Exchange (LInX) secure remote computer server sites. Naval Criminal Investigative Service Regional Offices retain copies of certain portions of some investigative files and related documentation. The number and location of these Naval Criminal Investigative Service Field Offices, Naval Criminal Investigative Service

Resident Agencies, and Polygraph sites are subject to change in order to meet the requirements of the Department of the Navy."

Delete para 3.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete para 2 and replace with "Active, reserve, and inactive members of the naval service; civilians, to include applicants for employment with NCIS; both citizen and alien employees located in both the U.S. and in overseas areas and including temporary, part-time, and advisory personnel employed by the Department of the Navy; industrial and contractor personnel; civilian personnel being considered for sensitive positions, boards, conferences, etc. Civilian personnel who worked or resided overseas, e.g., Red Cross personnel. Civilian and military personnel accused, suspected, a witness to, or victims of felonious type offenses, or lesser offenses impacting on the good order, discipline, morale or security of the Department of the Navy; civilian personnel seeking access to or seeking to conduct or operate any business or other function aboard a Department of the Navy installation, facility or ship; civilians and civilian or military personnel who are subjects, co-subjects, witnesses, and victims in law enforcement and investigative cases in which law enforcement and investigative authorities (Federal, state, local, tribal, and foreign) have requested laboratory analysis of submitted evidence for law enforcement purposes; civilian or military personnel involved in the loss, compromise, or unauthorized disclosure of classified material/information; civilian and military personnel who were/are of counterintelligence interest to the Department of the Navy. Persons under investigation and parties to the communications whose communications have been intercepted during wire, electronic or oral surveillance operations conducted by or on behalf of NCIS."

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete and replace with "Official investigative reports prepared by NCIS, DON, Department of Defense (DoD), or other Federal, state, local, tribal, or foreign law enforcement or investigative bodies.

Biographic data, intelligence/counterintelligence debriefing reports, information concerning U.S. personnel who are missing, captured, or detained by a hostile entity. The information may be of criminal, counterintelligence, or general investigative interest.

Preliminary Investigation Reports (PIR) document receipt of information that at the initial stage indicates an incident occurred involving one or more criminal offenses, however it was subsequently determined that no criminal offense occurred or that the incident and offenses did not fall within NCIS' jurisdiction and or responsibility to investigate.

Polygraph Data.

A listing of persons who submitted to polygraph examination by NCIS examiners. The data includes the examinee's name, location and results of the examination and the identity of the examiner. Also, copies of examination records created in support of criminal investigations. This data includes statistical and technical data sheets, questions sheets, charts, numerical evaluation forms, subject statements, consent forms, medical waivers, interview logs, personal data sheets, and related documents.

Case Control and Management documents which serve as the basis for recording, conducting, controlling, and guiding the investigative activity. Records identifying confidential sources and contacts with them. Index to persons reported by 'Name Only.'

Forensic Laboratory Report Records. Records reporting and documenting laboratory analysis of submitted evidence. Fingerprint Card Files. Fingerprint card and related correspondence obtained by DON designated law enforcement officials and submitted to NCIS Headquarters for quality review and forwarding to the Federal Bureau of Investigations in support of criminal investigations.

Personnel Security and Suitability Investigations. Requests for and results of investigations or inquiries conducted by U.S. Navy or other DoD, Federal, state, or local investigative agency. Record includes: Personal history statements; fingerprint cards; personnel security questionnaire; medical and/or educational records and waivers for release; requests for and National Agency checks; local agency checks; military records; birth records; employment records; credit records and waivers for release; interviews of education, employment, and credit references; interviews of listed and developed character references; interviews of neighbors; and other similar records."

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with "10 U.S.C. 5013, Secretary of the Navy; 18 U.S.C. 2510–2520 and 3504; 47 U.S.C. 605; DoD Directive 5210.48, Polygraph and Credibility Assessment Program;

DoD Regulation 5240.1–R, Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons; DoD Directive 5505.9, Interception of Wire, Electronic, and Oral Communications for Law Enforcement; Secretary of the Navy Instruction 5430.107, Mission and Functions of the Naval Criminal Investigative Service; Secretary of the Navy M–5510.30, Department of the Navy Personnel Security Program; Secretary of the Navy M–5510.36, Department of the Navy Information Security Program; OPNAVINST 5530.14, Navy Physical Security and Law Enforcement; MCO 558.2, Law Enforcement Manual; E.O. 9397 (SSN); E.O. 10450, Security Requirements for Government Employees, in particular sections 2, 3, 4, 5, 6, 7, 8, 9, and 14; and E.O. 12333, United States Intelligence Activities."

PURPOSE(S):

Delete para 2 and replace with "The records in this system are used for the following purposes: suitability for access or continued access to classified information; suitability for promotion, employment, or assignment; suitability for access to military installations or industrial firms engaged in government projects/contracts; suitability for awards or similar benefits; use in current law enforcement investigation or program of any type including applicants; use in judicial or adjudicative proceedings including litigation or in accordance with a court order; to assist Federal, state, and local agencies that perform law enforcement or quasi-law enforcement functions; to assist Federal, state, and local agencies that perform victim/witness assistance services, child protection services or family support or sailor services; insurance claims including workmen's compensation; provide protective operations under the DoD Distinguished Visitor Protection Program and to assist the U.S. Secret Service in meeting its responsibilities; assist local law enforcement agencies in meeting their responsibilities for complying with Congressionally mandated records checks such as Brady Handgun Violence Prevention Act checks; used for public affairs or publicity purposes such as wanted persons announcements, etc.; referral of matters under their cognizance to Federal, state or local law enforcement authorities including criminal prosecution, civil court action or regulatory order; advising higher authorities and naval commands of the important developments impacting on security, good order or discipline; reporting of statistical data to naval

commands and higher authority; input into the Defense Security Service managed Defense Clearance Index of Investigations (DCII) database under system notice V5–02. Wire, Electronic, and Oral Interceptions Index is maintained to enable NCIS to quickly locate records of intercept activities in response to motions for discovery and inquiries."

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Delete entry and replace with "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:

(1) To any criminal, civil, or regulatory law enforcement authority (whether Federal, state, local, tribal, or foreign) where the information is relevant to the recipient entity's law enforcement responsibilities.

(2) To a governmental entity lawfully engaged in collecting criminal law enforcement, criminal law enforcement intelligence, or national security intelligence information for law enforcement or intelligence purposes.

(3) To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal Government, when necessary to accomplish an agency function related to this system of records.

(4) In an appropriate proceeding before a court, or administrative or adjudicative body, when NCIS determines that the records are arguably relevant to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

(5) To an actual or potential party to litigation or the party's authorized representative for the purpose of negotiation or discussion of such matters as settlement, plea bargaining, or in informal discovery proceedings.

(6) To a former employee of NCIS for purposes of: Responding to an official inquiry by a Federal, state, or local government entity or professional licensing authority, in accordance with applicable NCIS regulations; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where NCIS requires information and/or consultation assistance from the former employee

regarding a matter within that person's former area of responsibility.

(7) To such recipients and under such circumstances and procedures as are mandated by Federal statute or treaty.

(8) To complainants and/or victims to the extent necessary to provide such persons with information and explanations concerning the progress and/or results of the investigation or case arising from the matters of which they complained and/or of which they were a victim.

(9) To commercial insurance companies in those instances in which they have a legitimate interest in the results of the investigation, but only to that extent and provided an unwarranted invasion of privacy is not involved.

(10) To the White House for the purpose of personnel actions requiring approval of the President of the United States as provided for in DoD Instruction 1320.4.

(11) To any person or entity if deemed by NCIS to be necessary in order to elicit information or cooperation from the recipient for use by NCIS in the performance of an authorized law enforcement activity.

(12) To any individual, organization, or governmental entity in order to notify them of a serious terrorist threat for the purpose of guarding against or responding to such a threat.

The DoD Blanket Routine Uses that appear at the beginning of the Navy's compilation of systems notices also apply to this system."

* * * * *

RETRIEVABILITY:

Delete entry and replace with "NCIS closed case paper files are filed by numeric sequential number, alphabetic by company and topical title, and geographic location; microfilm files are filed by dossier number and location; and electronic/optically imaged files by case or control number, name, and Social Security Number (SSN).

In order to locate the file it is necessary to query the Defense Clearance Index of Investigations. Open case files may also be retrieved from NCIS automated systems by a case number assigned at the time the investigation was initiated.

Copies of the files in the Naval Criminal Investigative Service Field Offices, Naval Criminal Investigative Service Resident Agencies, and Polygraph sites are retrieved by name. Polygraph sites can also retrieve copies of the file by polygraph approval number. Wire, Electronic, and Oral Intercept Index records are retrieved by a combination of name, address, Social

Security Number, telephone number/radio call sign, or case designation."

SAFEGUARDS:

Delete entry and replace with "Buildings employ alarms, security guards, and or rooms with security controlled areas accessible only to authorized persons. Classified and highly sensitive paper records are maintained in General Service Administrative approved security containers. Paper and microform records in NCIS records office are stored on open shelves and in filing cabinets in security controlled areas accessible only to authorized persons. Electronically, digital, and optically stored records are maintained in 'fail-safe' system software with password protected access. Records are accessible only to authorized persons with a need-to-know who are properly screened, cleared and trained. Noncurrent hardcopy and master copy of microfilmed files are retired to the Washington National Records Center where retrieval is restricted to authorized NCIS personnel.

NCIS employees authorized to work offsite will safeguard government/agency records from unauthorized disclosure or damage by transporting only unclassified records in approved locked briefcases, satchels, or boxes. When not in use by the offsite employee, all records or case-related material is stored in a locked file cabinet or desk in the areas designated that is accessible only to authorized persons. Some documents will be prepared on government computers by NCIS employees at designated offsite locations. When offsite, computers may be connected securely to the Navy networks using approved virtual private network (VPN) software, and data and documents on government computers are protected using encryption. No data is authorized to be transferred to or stored on any employee's personal computer. Documents prepared at designated offsite locations and or temporarily held for the purposes of offsite work will not be printed at any unauthorized offsite location."

RETENTION AND DISPOSAL:

Delete entry and replace with "Counterintelligence (CI)/Counterterrorism (CT) Records: CI records are retained in the active file until the case is closed, then retired to the NCIS records office; then destroyed 25 years after the date of last action. Major CI/CT investigations are retired to the NCIS records office upon case closure; then transferred to the National Archives when 50 years old.

Copies may be retained at NCIS Field Offices for one year after case closure unless extended retention is authorized. Source records are retained in the active file until the operation is complete; then destroyed 75 years after the date of the last action.

Reciprocal CI/CT investigative files regarding individuals or organizations under investigative jurisdiction of the requesting agency are disposed of as prescribed above for CI/CT investigative records; except when the request is for CI/CT personnel security matters; then the file is destroyed after one year.

CI defensive briefings are retained until case closure, retired to the NCIS records office; then destroyed after 15 years. Foreign national marriage and visa applicant investigations are retired to the NCIS records office upon case closure; then destroyed after one year except when the investigation surfaces significant derogatory material. These files are destroyed after five years.

Records pertaining to CI polygraph examinations conducted in support of CI activities are filed with the case file and disposed of in accordance with the guidance for the associated file.

CI Security Polygraph Program (CSP) records are maintained in the active file until no longer needed; then disposed of after the final quality control review as follows: (1) CSP cases favorably resolved are destroyed after the final quality assurance review, except at NCIS Polygraph Units which retain the CSP investigative reports only; destroying it when no longer needed or after one year (2) CSP cases other than favorably resolved are destroyed 25 years after completion of the final quality assurance review, except when an existing criminal investigation exists.

In such cases the CSP Package is incorporated into the investigative file and disposed of in accordance with the disposition guidance for the dossier (3) audio tape recordings of routine CSP examinations with no significant responses are erased when no longer needed or after 90 days. Recordings referred for further investigation are incorporated into the investigative case file and disposed of in accordance with the disposition guidance for the dossier.

Personnel investigations: Completed NCIS investigative files on Personnel Security Investigations (PSI's) are destroyed after 15 years unless significant incidents or adverse information is developed, in which case they are destroyed after 25 years. PSI files on persons considered for affiliation with DoD will be destroyed within one year if the affiliation is not consummated. Special Agent applicant records are retained for one year if the

applicant declines offer of employment and five years if the applicant is rejected for employment. Non-DoD-affiliated applicant records are destroyed when no longer needed or after 90 days.

Records for applicants who are accepted are retired to NCIS records office upon case closure; then destroyed 10 years after release, separation, transfer, retirement, or resignation. Internal personnel inquiries records are retired to NCIS records office after case closure; then destroyed 15 years after case closure.

Limited inquiries records are retired to NCIS records office at inquiry closure; then destroyed after 5 years.

Support applicant records are retired to NCIS records office at case closure; then destroyed after 15 years.

Law Enforcement Records: Criminal investigative files are destroyed after 25 years, except (1) controlled death and criminal sex investigations and investigations created on or after January 1, 1988 and where DoDI 5505.11 requires submission of offender criminal history data to the FBI are destroyed 50 years after date of case closure (2) files of cases determined to be of historical value are transferred to NARA 50 years after the date of the last action, except Grand Jury material which is destroyed at the time of transfer. Copies may be retained at NCIS Field Offices for one year after case closure unless extended retention is authorized.

Incident Reports (IR) received from Navy Law Enforcement and Marine Corps Military Police offices pertaining to categories of investigations/reports under the jurisdiction of NCIS and created prior to 1 January 1988 are destroyed when 25 years old. Cases created on or after 1 January 1988 are destroyed when 50 years old. Cases referred but determined not under NCIS jurisdiction are destroyed when no longer needed. Copies may be retained at the submitting office for two years after case closure unless extended retention is authorized.

Criminal Initiative Operations files are retired to NCIS records office upon closure; then destroyed 15 years after closure for Group 1 records and five years for Group 2.

Protective Operations files involving protective details of distinguished persons are destroyed when five years old, except records where a threat or attempted threat materialized are destroyed when 25 years old.

Law enforcement source records are retired to NCIS records office after case closure and destroyed 15 years after the date of last action.

Preliminary Investigation Reports (PIR) Records are used to document the receipt of information that at the initial stage indicated an incident occurred involving one or more criminal offenses, however, it was subsequently determined that no criminal offense occurred or that the incident and offenses did not fall within NCIS' jurisdiction and or responsibility to investigate. These records are destroyed/deleted 5 years after case closure.

Reciprocal investigative files regarding requests for investigative assistance from other Federal, state and local law enforcement agencies are disposed of as prescribed for the criminal investigative reports and IRs, as appropriate. Polygraph examinations conducted for criminal investigations are quality assured and filed in the associated criminal investigation. Disposition is in accordance with the guidance for the investigative case file.

Wire, Electronic, Oral Interception Index computer entries are deleted upon destruction or transfer to NARA of the case file containing intercept information. Disposition of the case files is governed by the NARA approved retention period applied to the case dossier.

Hardcopy records used to create the index are destroyed upon verification that the indexing information has been fully and accurately entered into the automated index.

National Crime Information Center (NCIC) records that support Department of the Navy entries into the FBI's National Crime Information Center are destroyed after the related entry is deleted from the National Crime Information Center computer.

Microfiche copies are destroyed when all cases on the fiche are cleared from the National Crime Information Center.

Fingerprint card files are disposed of as follows:

(1) digital capture of one fingerprint card set is forwarded to the Federal Bureau of Investigation; and the card is destroyed when it is verified that the digitally copy was accurately captured and transferred

(2) second fingerprint card, indices, and related correspondence are destroyed when 5 years old.

Counterintelligence records retained solely for the purpose of determining whether the information may be permanently retained on persons not affiliated with DoD must be destroyed within 90 days, unless retention is required by law or specifically approved by the Secretary of the Navy.

Counterintelligence Security Polygraph packages forwarded to Naval

Criminal Investigative Service headquarters is destroyed when 35 years old. Files retained in the Naval Criminal Investigative Service Field Offices and Naval Criminal Investigative Service Resident Agencies and Polygraph sites are temporary and are destroyed after 90 days or earlier if no longer needed.

Destruction of records will be by shredding, burning, or pulping for paper records; burning for microform records; and magnetic erasing for computerized records. Optical digital data and CD ROM records are destroyed as specified by Department of the Navy, Information Assurance Remanence Publication 5239-26."

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N05520-4

SYSTEM NAME:

NCIS Investigative Files System.

SYSTEM LOCATION:

Primary System: Director, Naval Criminal Investigative Service, Washington Navy Yard, Building 111, 716 Sicard Street, SE., Washington, DC 20388-5380.

Decentralized Segments—Located at the Naval Criminal Investigative Service (NCIS) Field Offices (FO), Resident Agencies (RA), and Polygraph sites worldwide. Law Enforcement Information Exchange (LInX) secure remote computer server sites. Naval Criminal Investigative Service Regional Offices retain copies of certain portions of some investigative files and related documentation. The number and location of these Naval Criminal Investigative Service Field Offices, Naval Criminal Investigative Service Resident Agencies, and Polygraph sites are subject to change in order to meet the requirements of the Department of the Navy.

Consolidated Evidence Facilities maintain evidence inventory records.

Current locations of NCIS decentralized segments may be obtained from the Director, Naval Criminal Investigative Service, Washington Navy Yard, Building 111, 716 Sicard Street, SE., Washington, DC 20388-5380.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Persons in the following categories who require access to classified defense information and others who are of criminal, counterintelligence, security or general investigative interest to NCIS:

Active, reserve, and inactive members of the naval service; civilians, to include applicants for employment with NCIS; both citizen and alien employees located in both the U.S. and in overseas areas and including temporary, part-

time, and advisory personnel employed by the Department of the Navy; industrial and contractor personnel; civilian personnel being considered for sensitive positions, boards, conferences, etc. Civilian personnel who worked or resided overseas, e.g., Red Cross personnel. Civilian and military personnel accused, suspected, a witness to, or victims of felonious type offenses, or lesser offenses impacting on the good order, discipline, morale or security of the Department of the Navy; civilian personnel seeking access to or seeking to conduct or operate any business or other function aboard a Department of the Navy installation, facility or ship; civilians and civilian or military personnel who are subjects, co-subjects, witnesses, and victims in law enforcement and investigative cases in which law enforcement and investigative authorities (Federal, state, local, tribal, and foreign) have requested laboratory analysis of submitted evidence for law enforcement purposes; civilian or military personnel involved in the loss, compromise, or unauthorized disclosure of classified material/information; civilian and military personnel who were/are of counterintelligence interest to the Department of the Navy. Persons under investigation and parties to the communications whose communications have been intercepted during wire, electronic or oral surveillance operations conducted by or on behalf of NCIS.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5013, Secretary of the Navy; 18 U.S.C. 2510–2520 and 3504; 47 U.S.C. 605; DoD Directive 5210.48, Polygraph and Credibility Assessment Program; DoD Regulation 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons; DoD Directive 5505.9, Interception of Wire, Electronic, and Oral Communications for Law Enforcement; Secretary of the Navy Instruction 5430.107, Mission and Functions of the Naval Criminal Investigative Service; Secretary of the Navy M–5510.30, Department of the Navy Personnel Security Program; Secretary of the Navy M–5510.36, Department of the Navy Information Security Program; OPNAVINST 5530.14, Navy Physical Security and Law Enforcement; MCO 558.2, Law Enforcement Manual; E.O. 10450, Security Requirements for Government Employees, in particular sections 2, 3, 4, 5, 6, 7, 8, 9, and 14; E.O. 12333, United States Intelligence Activities and E.O. 9397 (SSN).

PURPOSE(S):

The information in this system is (was) collected to meet the investigative, counterintelligence, and security responsibilities of the Department of the Navy. This includes personal, personnel security, internal security, criminal, and other law enforcement matters all of which are essential to the effective operation of the Department of the Navy.

The records in this system are used for the following purposes: suitability for access or continued access to classified information; suitability for promotion, employment, or assignment; suitability for access to military installations or industrial firms engaged in government projects/contracts; suitability for awards or similar benefits; use in current law enforcement investigation or program of any type including applicants; use in judicial or adjudicative proceedings including litigation or in accordance with a court order; to assist Federal, state and local agencies that perform law enforcement or quasi-law enforcement functions; to assist Federal, state and local agencies that perform victim/witness assistance services, child protection services or family support or sailor services; insurance claims including workmen's compensation; provide protective operations under the DoD Distinguished Visitor Protection Program and to assist the U.S. Secret Service in meeting its responsibilities; assist local law enforcement agencies in meeting their responsibilities for complying with Congressionally mandated records checks such as Brady Handgun Violence Prevention Act checks; used for public affairs or publicity purposes such as wanted persons announcements, etc; referral of matters under their cognizance to Federal, state or local law enforcement authorities including criminal prosecution, civil court action or regulatory order; advising higher authorities and naval commands of the important developments impacting on security, good order or discipline; reporting of statistical data to naval commands and higher authority; input into the Defense Security Service managed Defense Clearance Index of Investigations (DCII) database under system notice V5–02. Wire, Electronic, and Oral Interceptions Index is maintained to enable NCIS to quickly locate records of intercept activities in response to motions for discovery and inquiries.

Users of the records in this system include NCIS employees who require access for operational, administrative, or supervisory purposes; DoD criminal

investigative and intelligence units; DoD components making suitability determinations.

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:

(1) To any criminal, civil, or regulatory law enforcement authority (whether Federal, state, local, tribal, or foreign) where the information is relevant to the recipient entity's law enforcement responsibilities.

(2) To a governmental entity lawfully engaged in collecting criminal law enforcement, criminal law enforcement intelligence, or national security intelligence information for law enforcement or intelligence purposes.

(3) To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal Government, when necessary to accomplish an agency function related to this system of records.

(4) In an appropriate proceeding before a court, or administrative or adjudicative body, when NCIS determines that the records are arguably relevant to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

(5) To an actual or potential party to litigation or the party's authorized representative for the purpose of negotiation or discussion of such matters as settlement, plea bargaining, or in informal discovery proceedings.

(6) To a former employee of NCIS for purposes of: responding to an official inquiry by a Federal, state, or local government entity or professional licensing authority, in accordance with applicable NCIS regulations; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where NCIS requires information and/or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

(7) To such recipients and under such circumstances and procedures as are mandated by Federal statute or treaty.

(8) To complainants and/or victims to the extent necessary to provide such persons with information and

explanations concerning the progress and/or results of the investigation or case arising from the matters of which they complained and/or of which they were a victim.

(9) To commercial insurance companies in those instances in which they have a legitimate interest in the results of the investigation, but only to that extent and provided an unwarranted invasion of privacy is not involved.

(10) To the White House for the purpose of personnel actions requiring approval of the President of the United States as provided for in DoD Instruction 1320.4.

(11) To any person or entity if deemed by NCIS to be necessary in order to elicit information or cooperation from the recipient for use by NCIS in the performance of an authorized law enforcement activity.

(12) To any individual, organization, or governmental entity in order to notify them of a serious terrorist threat for the purpose of guarding against or responding to such a threat.

The DoD Blanket Routine Uses that appear at the beginning of the Navy's compilation of systems notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Maintained on paper records in file folders, audio and audiovisual tapes, microimaging, electronic systems, magnetic tape, optical digital data disks, CD ROM, and computer output products. Some laboratory documents are stored in loose-leaf notebooks or bound record books.

RETRIEVABILITY:

NCIS closed case paper files are filed by numeric sequential number, alphabetic by company and topical title, and geographic location; microfilm files are filed by dossier number and location; and electronic/optically imaged files by case or control number, name, and Social Security Number (SSN).

In order to locate the file it is necessary to query the Defense Clearance Index of Investigations. Open case files may also be retrieved from NCIS automated systems by a case number assigned at the time the investigation was initiated.

Copies of the files in the Naval Criminal Investigative Service Field Offices, Naval Criminal Investigative Service Resident Agencies, and Polygraph sites are retrieved by name.

Polygraph sites can also retrieve copies of the file by polygraph approval

number. Wire, Electronic, and Oral Intercept Index records are retrieved by a combination of name, address, Social Security Number, telephone number/radio call sign, or case designation.

SAFEGUARDS:

Buildings employ alarms, security guards, and or rooms with security controlled areas accessible only to authorized persons. Classified and highly sensitive paper records are maintained in General Service Administrative approved security containers. Paper and microform records in NCIS records office are stored on open shelves and in filing cabinets in security controlled areas accessible only to authorized persons. Electronically, digital, and optically stored records are maintained in 'fail-safe' system software with password protected access. Records are accessible only to authorized persons with a need-to-know who are properly screened, cleared and trained. Noncurrent hardcopy and master copy of microfilmed files are retired to the Washington National Records Center where retrieval is restricted to authorized NCIS personnel.

NCIS employees authorized to work offsite will safeguard government/agency records from unauthorized disclosure or damage by transporting only unclassified records in approved locked briefcases, satchels, or boxes. When not in use by the offsite employee, all records or case-related material is stored in a locked file cabinet or desk in the areas designated that is accessible only to authorized persons. Some documents will be prepared on government computers by NCIS employees at designated offsite locations. When offsite, computers may be connected securely to the Navy networks using approved virtual private network (VPN) software, and data and documents on government computers are protected using encryption. No data is authorized to be transferred to or stored on any employee's personal computer. Documents prepared at designated offsite locations and or temporarily held for the purposes of offsite work will not be printed at any unauthorized offsite location.

RETENTION AND DISPOSAL:

Counterintelligence (CI) Records:

CI records are retained in the active file until the case is closed; then destroyed 25 years after the date of last action. Major CI investigations are retired to the NCIS records office upon case closure; then transferred to the National Archives and Records

Administration (NARA) when 25 years old.

Source records are retained in the active file until the operation is complete; then destroyed 75 years after the date of the last action.

Reciprocal CI investigative files regarding individuals or organizations under investigative jurisdiction of the requesting agency are disposed of as prescribed above for CI investigative records; except when the request is for CI personnel security matters; then the file is destroyed after one year. CI defensive briefings are retained until case closure, retired to the NCIS records office; then destroyed after 15 years. Foreign national marriage and visa applicant investigations are retired to the NCIS records office upon case closure; then destroyed after one year except when the investigation surfaces significant derogatory material. These files are destroyed after five years.

Records pertaining to CI polygraph examinations conducted in support of CI activities are filed with the case file and disposed of in accordance with the guidance for the associated file. CI Security Polygraph Program (CSP) records are maintained in the active file until no longer needed; then disposed of after the final quality control review as follows: (1) CSP cases favorably resolved are destroyed after the final quality assurance review, except at NCIS Polygraph Units which retain the CSP investigative reports only; destroying it when no longer needed or after one year (2) CSP cases other than favorably resolved are destroyed 25 years after completion of the final quality assurance review, except when an existing criminal investigation exists. In such cases the CSP Package is incorporated into the investigative file and disposed of in accordance with the disposition guidance for the dossier (3) audio tape recordings of routine CSP examinations with no significant responses are erased when no longer needed or after 90 days. Recordings referred for further investigation are incorporated into the investigative case file and disposed of in accordance with the disposition guidance for the dossier.

PERSONNEL INVESTIGATIONS:

Completed NCIS investigative files on Personnel Security Investigations (PSI's) are destroyed after 15 years unless significant incidents or adverse information is developed, in which case they are destroyed after 25 years. PSI files on persons considered for affiliation with DoD will be destroyed within one year if the affiliation is not consummated. Special Agent applicant records are retained for one year if the

applicant declines offer of employment and five years if the applicant is rejected for employment. Non-DoD-affiliated applicant records are destroyed when no longer needed or after 90 days.

Records for applicants who are accepted are retired to NCIS records office upon case closure; then destroyed 10 years after release, separation, transfer, retirement, or resignation. Internal personnel inquiries records are retired to NCIS records office after case closure; then destroyed 25 years after the date of last action or 10 years after termination of employment, whichever is later.

Limited inquiries records are retired to NCIS records office at inquiry closure; then destroyed after 5 years. Support applicant records are retired to NCIS records office at case closure; then destroyed after 15 years.

Law Enforcement Records:

Criminal investigative files are destroyed after 25 years, except (1) controlled death investigations which are destroyed 75 years after date of case closure (2) files of cases determined to be of historical value are transferred to NARA 25 years after the date of the last action, except Grand Jury material which is destroyed at the time of transfer. Incident Complaint Reports (ICR) received from Navy Shore Patrol and Marine Corps military police offices pertaining to categories of investigations/reports under the jurisdiction of NCIS are destroyed when 25 years old. Cases referred but determined not under NCIS jurisdiction are destroyed when no longer needed.

Criminal intelligence operations files are retired to NCIS records office upon closure; then destroyed 15 years after closure for Group 1 records and five years for Group 2. Protective operations files involving protective details of distinguished persons are destroyed when five years old, except records where a threat or attempted threat materialized are destroyed when 25 years old.

Law enforcement source (also called 'cooperating witness') records are retired to NCIS records office after case closure and destroyed 15 years after the date of last action. Information reports consisting of incidental information impacting on the security or discipline of commands or of interest to other law enforcement elements are destroyed when 25 years old.

Reciprocal investigative files regarding requests for investigative assistance from other Federal, state and local law enforcement agencies are disposed of as prescribed for the criminal investigative reports and ICRs, as appropriate.

Polygraph examinations conducted for criminal investigations are quality assured and filed in the associated criminal investigation. Disposition is in accordance with the guidance for the investigative case file.

Wire, Electronic, Oral Interception Index computer entries are deleted upon destruction or transfer to NARA of the case file containing intercept information. Disposition of the case files is governed by the NARA approved retention period applied to the case dossier. Hardcopy records used to create the index are destroyed upon verification that the indexing information has been fully and accurately entered into the automated index. National Crime Information Center (NCIC) records that support Department of the Navy entries into the FBI's National Crime Information Center are destroyed after the related entry is deleted from the National Crime Information Center computer.

Microfiche copies are destroyed when all cases on the fiche are cleared from the National Crime Information Center.

Laboratory fingerprint card files are disposed of as follows:

(1) One fingerprint card set is forwarded to the Federal Bureau of Investigation; the other set is destroyed when 75 years old.

(2) Fingerprint card indices and related correspondence are destroyed when all administrative needs have expired.

Counterintelligence records on persons not affiliated with DoD must be destroyed within 90 days or one year under criteria set forth in DoD Directive 5200.27, unless retention is required by law or specifically approved by the Secretary of the Navy. Files retained in the Naval Criminal Investigative Service Field Offices and Naval Criminal Investigative Service Resident Agencies and Polygraph sites are temporary and are destroyed after 90 days or one year, as appropriate.

Destruction of records will be by shredding, burning, or pulping for paper records; burning for microform records; and magnetic erasing for computerized records. Optical digital data and CD ROM records are destroyed as specified by NAVSO P-5239-26, 'Remanence Security Guidebook' of September 1993.

Counterintelligence (CI)/Counterterrorism (CT) Records: CI records are retained in the active file until the case is closed, then retired to the NCIS records office; then destroyed 25 years after the date of last action. Major CI/CT investigations are retired to the NCIS records office upon case closure; then transferred to the National Archives when 50 years old.

Copies may be retained at NCIS Field Offices for one year after case closure unless extended retention is authorized. Source records are retained in the active file until the operation is complete; then destroyed 75 years after the date of the last action.

Reciprocal CI/CT investigative files regarding individuals or organizations under investigative jurisdiction of the requesting agency are disposed of as prescribed above for CI/CT investigative records; except when the request is for CI/CT personnel security matters; then the file is destroyed after one year.

CI defensive briefings are retained until case closure, retired to the NCIS records office; then destroyed after 15 years. Foreign national marriage and visa applicant investigations are retired to the NCIS records office upon case closure; then destroyed after one year except when the investigation surfaces significant derogatory material. These files are destroyed after five years.

Records pertaining to CI polygraph examinations conducted in support of CI activities are filed with the case file and disposed of in accordance with the guidance for the associated file.

CI Security Polygraph Program (CSP) records are maintained in the active file until no longer needed; then disposed of after the final quality control review as follows: (1) CSP cases favorably resolved are destroyed after the final quality assurance review, except at NCIS Polygraph Units which retain the CSP investigative reports only; destroying it when no longer needed or after one year (2) CSP cases other than favorably resolved are destroyed 25 years after completion of the final quality assurance review, except when an existing criminal investigation exists.

In such cases the CSP Package is incorporated into the investigative file and disposed of in accordance with the disposition guidance for the dossier (3) audio tape recordings of routine CSP examinations with no significant responses are erased when no longer needed or after 90 days. Recordings referred for further investigation are incorporated into the investigative case file and disposed of in accordance with the disposition guidance for the dossier.

Personnel investigations: Completed NCIS investigative files on Personnel Security Investigations (PSI's) are destroyed after 15 years unless significant incidents or adverse information is developed, in which case they are destroyed after 25 years. PSI files on persons considered for affiliation with DoD will be destroyed within one year if the affiliation is not consummated. Special Agent applicant records are retained for one year if the

applicant declines offer of employment and five years if the applicant is rejected for employment. Non-DoD-affiliated applicant records are destroyed when no longer needed or after 90 days. Records for applicants who are accepted are retired to NCIS records office upon case closure; then destroyed 10 years after release, separation, transfer, retirement, or resignation. Internal personnel inquiries records are retired to NCIS records office after case closure; then destroyed 15 years after case closure.

Limited inquiries records are retired to NCIS records office at inquiry closure; then destroyed after 5 years.

Support applicant records are retired to NCIS records office at case closure; then destroyed after 15 years.

Law Enforcement Records: Criminal investigative files are destroyed after 25 years, except (1) controlled death and criminal sex investigations and investigations created on or after January 1, 1988 and where DoDI 5505.11 requires submission of offender criminal history data to the FBI are destroyed 50 years after date of case closure (2) files of cases determined to be of historical value are transferred to NARA 50 years after the date of the last action, except Grand Jury material which is destroyed at the time of transfer. Copies may be retained at NCIS Field Offices for one year after case closure unless extended retention is authorized.

Incident Reports (IR) received from Navy Law Enforcement and Marine Corps Military Police offices pertaining to categories of investigations/reports under the jurisdiction of NCIS and created prior to 1 January 1988 are destroyed when 25 years old. Cases created on or after 1 January 1988 are destroyed when 50 years old. Cases referred but determined not under NCIS jurisdiction are destroyed when no longer needed. Copies may be retained at the submitting office for two years after case closure unless extended retention is authorized.

Criminal Initiative Operations files are retired to NCIS records office upon closure; then destroyed 15 years after closure for Group 1 records and five years for Group 2.

Protective Operations files involving protective details of distinguished persons are destroyed when five years old, except records where a threat or attempted threat materialized are destroyed when 25 years old.

Law enforcement source records are retired to NCIS records office after case closure and destroyed 15 years after the date of last action.

Preliminary Investigation Reports (PIR) Records are used to document the receipt of information that at the initial stage indicated an incident occurred involving one or more criminal offenses, however, it was subsequently determined that no criminal offense occurred or that the incident and offenses did not fall within NCIS' jurisdiction and or responsibility to investigate. These records are destroyed/deleted 5 years after case closure.

Reciprocal investigative files regarding requests for investigative assistance from other Federal, state and local law enforcement agencies are disposed of as prescribed for the criminal investigative reports and IRs, as appropriate.

Polygraph examinations conducted for criminal investigations are quality assured and filed in the associated criminal investigation. Disposition is in accordance with the guidance for the investigative case file.

Wire, Electronic, Oral Interception Index computer entries are deleted upon destruction or transfer to NARA of the case file containing intercept information. Disposition of the case files is governed by the NARA approved retention period applied to the case dossier.

Hardcopy records used to create the index are destroyed upon verification that the indexing information has been fully and accurately entered into the automated index.

National Crime Information Center (NCIC) records that support Department of the Navy entries into the FBI's National Crime Information Center are destroyed after the related entry is deleted from the National Crime Information Center computer.

Microfiche copies are destroyed when all cases on the fiche are cleared from the National Crime Information Center.

Fingerprint card files are disposed of as follows:

(1) Digital capture of one fingerprint card set is forwarded to the Federal Bureau of Investigation; and the card is destroyed when it is verified that the digitally copy was accurately captured and transferred

(2) Second fingerprint card, indices, and related correspondence are destroyed when 5 years old.

Counterintelligence records retained solely for the purpose of determining whether the information may be permanently retained on persons not affiliated with DoD must be destroyed within 90 days, unless retention is required by law or specifically approved by the Secretary of the Navy.

Counterintelligence Security Polygraph packages forwarded to Naval Criminal Investigative Service headquarters is destroyed when 35 years old. Files retained in the Naval Criminal Investigative Service Field Offices and Naval Criminal Investigative Service Resident Agencies and Polygraph sites are temporary and are destroyed after 90 days or earlier if no longer needed.

Destruction of records will be by shredding, burning, or pulping for paper records; burning for microform records; and magnetic erasing for computerized records. Optical digital data and CD ROM records are destroyed as specified by Department of the Navy, Information Assurance Remanence Publication 5239-26.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Naval Criminal Investigative Service, Washington Navy Yard, Building 111, 716 Sicard Street, SE., Washington, DC 20388-5380.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Director, Naval Criminal Investigative Service, Washington Navy Yard, Building 111, Code 00JF, 716 Sicard Street, SE., Washington, DC 20388-5380.

Requests must contain the full name of the individual and at least one additional personal identifier such as date and place of birth, or Social Security Number (SSN). Persons submitting written requests must properly establish their identity to the satisfaction of the Naval Criminal Investigative Service. In addition, the requester must provide a notarized statement or an unsworn declaration in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).

If executed within the United States, its territories, possessions, or commonwealths: I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).

Attorneys or other persons acting on behalf of an individual must provide written authorization from that individual for their representative to act on their behalf.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this

system of records should address written inquiries to the Director, Naval Criminal Investigative Service, Washington Navy Yard, Building 111, Code 00JF, 716 Sicard Street, SE., Washington, DC 20388-5380.

Requests must contain the full name of the individual and at least one additional personal identifier such as date and place of birth and Social Security Number (SSN). Persons submitting written requests must properly establish their identity to the satisfaction of the Naval Criminal Investigative Service. In addition, the requester must provide a notarized statement or an unsworn declaration in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States: I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).

If executed within the United States, its territories, possessions, or commonwealths: I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).

Attorneys or other persons acting on behalf of an individual must provide written authorization from that individual for their representative to act on their behalf.

CONTESTING RECORD PROCEDURES:

The Navy's rules for accessing records, and 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 manager.

RECORD SOURCE CATEGORIES:

From individual, DoD and Military Department records; Federal Agency records; foreign law enforcement agencies, security, intelligence, investigatory, or administrative authorities; state, county, and municipal records; employment records of public schools, colleges, universities, technical and trade schools; hospital records; real estate agencies; credit bureaus; financial institutions which maintain credit information on individuals such as loan and mortgage companies, credit unions, banks, etc.; transportation companies (airlines, railroad, etc.); other private records sources deemed necessary in order to complete an investigation; miscellaneous records such as: telephone directories, city directories; Who's Who in America; Who's Who in Commerce and Industry; Who Knows What, a listing of experts in various

fields; American Medical Directory; Martindale-Hubbell Law Directory; U.S. Postal Guide; Insurance Directory; Dunn and Bradstreet; and the U.S. Navy BDEX (Biographical Index); any other type of miscellaneous records deemed necessary to complete the investigation or inquiry; the interview of individuals who have knowledge of the subject's background and activities; the interview of witnesses, victims, confidential sources, and or other individuals deemed necessary to complete the investigation.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2), since the information is compiled and maintained by the Naval Criminal Investigative Command, which performs as its principle function the enforcement of criminal laws.

Information specifically authorized to be classified under E.O. 12958, as implemented by DoD 5200.1-R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

Records maintained in connection with providing protective services to the President and other individuals under 18 U.S.C. 3506, may be exempt pursuant to 5 U.S.C. 552a(k)(3).

Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8, may be exempt pursuant to 5 U.S.C. 552a(k)(4).

Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

An exemption rule for this system has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 701, subpart G. For additional information, contact the system manager.

[FR Doc. E8-7617 Filed 4-9-08; 8:45 am]

BILLING CODE 5001-06-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 May 12, 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 email to oir_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: April 4, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Innovation and Improvement

Type of Review: New.

Title: National Writing Project Annual Performance Indicators.

Frequency: Annually.

Affected Public: Individuals or household; Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 280.

Burden Hours: 460.

Abstract: The purpose is to implement a data collection and review process for a new annual reporting for Government Performance Results Act (GPRA) purposes for the National Writing Project (NWP) program. These data are necessary to assess the performance of the NWP program in meeting its stated goals and objectives. The data collection will occur in phases over a 2-year period. Although all ED-grantees are required to provide performance data on an annual or periodic basis, the respondents for this data collection are participants in the NWP grant; therefore, their participation in the data collection is voluntary.

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 3445. 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. E8-7536 Filed 4-9-08; 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 June 9, 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: April 4, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of the Secretary

Type of Review: New.

Title: Generic Application Package for Discretionary Grant Programs.

Frequency: New Awards.

Affected Public: Individuals or household; Businesses or other for-profit; Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 12,012.

Burden Hours: 290,827.

Abstract: The Department is requesting an extension of the approval for the Generic Application Package that numerous ED discretionary grant programs use to provide to applicants the forms and information needed to apply for new grants under those grant program competitions. The Department will use this Generic Application Package for discretionary grant programs that: (1) Only use the standard ED or Federal-wide grant application forms that have been cleared separately through OMB and (2) only use selection criteria chosen from the menu of criteria in 34 CFR 75.210 of the Education Department General Administrative Regulations (EDGAR); statutory selection criteria or a combination of EDGAR and statutory selection criteria. The use of the standard ED grant application forms and the use of EDGAR and/or statutory selection criteria promotes the standardization and streamlining of ED discretionary grant application packages.

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 3655. 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. E8-7544 Filed 4-9-08; 8:45 am]

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 May 12, 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 oir_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: April 4, 2008.

Angela C. Arrington,
IC Clearance Official, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.

Title: William D. Ford Federal Direct Loan (Direct Loan) Program Electronic Debit Account (EDA) Application.

Frequency: On Occasion.

Affected Public: Individuals or household.

Reporting and Recordkeeping Hour Burden:

Responses: 251,129.

Burden Hours: 8,363.

Abstract: The EDA Application serves as the means by which a Direct Loan borrower requests and authorizes the automatic debiting of monthly student loan payments from the borrower's checking or savings account, or authorizes the debiting of an individual loan payment from the borrower's checking or savings account.

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 3584. 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. E8-7546 Filed 4-9-08; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No.: 6885-009]

Cinnamon Ranch; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests

April 3, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 6885-009.

c. *Date filed:* January 31, 2008.

d. *Applicant:* Richard Moss.

e. *Name of Project:* Cinnamon Ranch.

f. *Location:* On the Middle Creek and Birch Creek, in the Hammil Valley area of Mono County, near the Town of Benton, California. The project occupies 0.13 acre of Forest Service lands within Inyo National Forest and 7.4 acres of lands administered by the Bureau of Land Management (BLM).

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)-825(r).

h. *Applicant Contact:* Don Moss, 8381 Foppiano Way, Sacramento, CA 95829, 916-715-6023.

i. *FERC Contact:* Shana Murray, shana.murray@ferc.gov, 202-502-8333.

j. *Cooperating agencies:* We are asking Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues to cooperate with us in the preparation of the environmental document. Agencies who would like to request cooperating status should follow the instructions for filing comments described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. See, 94 FERC 61,076 (2001).

k. Pursuant to Section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* May 31, 2008.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Additional study requests and requests for cooperating agency status may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (<http://www.ferc.gov>) under the "e-Filing" link.

m. The application is not ready for environmental analysis at this time.

n. The Cinnamon Ranch Project consists of: (1) Two existing diversion flumes; (2) an existing 5,940-foot-long penstock; (3) a powerhouse containing a

turbine and generator for a total installed capacity of 150 kilowatts; and (4) an existing 5,176-foot-long, 12 kV transmission line. The project is estimated to generate an average of 421,184 kilowatt-hours annually. The dam and existing project facilities are owned by the applicant. The licensee proposes no changes to facilities or operations.

o. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll-free at 1-866-208-3676, or for TTY, (202) 502-8659. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. With this notice, we are initiating consultation with the California State Historic Preservation Officer (SHPO), as required by § 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36, CFR 800.4.

q. *Procedural schedule:* The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter—March 31, 2008.

Request Additional Information—March 31, 2008.

Issue Acceptance letter—June 30, 2008.

Issue Scoping Document 1 for comments—July 30, 2008.

Notice of application is ready for environmental analysis—September 30, 2008.

Notice of the availability of the EA—March 30, 2009.

Kimberly D. Bose,
Secretary.

[FR Doc. E8-7605 Filed 4-9-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4684-064]

Stillwater Hydro Associates, LLC; Notice of Application for Transfer of License, and Soliciting Comments, Motions To Intervene, and Protests

April 3, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Transfer of License.

b. *Project No.:* 4684-064.

c. *Date Filed:* March 7, 2008.

d. *Applicants:* Stillwater Hydro Partners LP (transferor); Stillwater Hydro Associates, LLC (transferee).

e. *Name and Location of Project:* The Stillwater Project is located on the Hudson River in Saratoga and Rensselaer Counties, New York.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a-825r.

g. *Applicant Contacts:* For the transferor: Charles A. Bouley, Stillwater Hydro Partners LP, 265 Genesee Street, Auburn, NY 13021. For the transferee: Dwight A. Bowler, Stillwater Hydro Associates LLC, C/O Champlain Spinners Hydro Company, Inc., 813 Jefferson Hill Road, Nassau, New York 12123.

h. *FERC Contact:* Robert Bell at (202) 502-6062.

i. *Deadline for filing comments, protests, and motions to intervene:* May 2, 2008.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings. Please include the Project Number on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing a document with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the documents on that resource agency.

j. *Description of Application:* The Applicants seek Commission approval to transfer the license for the Stillwater Project from Stillwater Hydro Partners LP to Stillwater Hydro Associates, LLC.

k. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at <http://www.ferc.gov> using the "FERRIS" link. Enter the docket number (P-9985) in the docket number field to access the document. For assistance, call toll-free 1-866-208-3676 or e-mail FERCOnlineSupport@ferc.gov. For TTY, call (202) 502-8659. A copy is also available for inspection and reproduction at the addresses in item g. above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

n. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and eight copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicants specified in the particular application.

o. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicants. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an

agency's comments must also be sent to the Applicants' representatives.

Kimberly D. Bose,
Secretary.

[FR Doc. E8-7604 Filed 4-9-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08-97-000]

Northern Natural Gas Company; Notice of Request Under Blanket Authorization

April 3, 2008.

Take notice that on March 25, 2008, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124, filed in Docket No. CP08-97-000, a prior notice request pursuant to sections 157.205, 157.208, 157.210, and 157.211 of the Federal Energy Regulatory Commission's regulations under the Natural Gas Act for authorization to install and operate the West Leg II Project, located within the states of Nebraska and Iowa, all as more fully set forth in the application, which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

Specifically, Northern proposes to install and operate: (i) Approximately 0.89 mile of a 30-inch diameter mainline extension to its existing SSC-Paulina C-Line mainline, located in Woodbury County, Iowa; (ii) approximately 10.94 miles of 8-inch diameter branch line loop beginning at a take-off valve on the existing 8-inch diameter Columbus A-Line, located in Colfax County, Nebraska, and ending in the existing Columbus #4 Town Border Station (TBS) yard, located in Platte County, Nebraska; (iii) modify and upgrade an existing TBS, the Columbus #4 TBS, located in Platte County, Nebraska, by replacing the inlet piping and regulator setting and associated fittings, valves, and piping; and (iv) appurtenant section 2.55(a) facilities. Northern estimates the cost of construction to be \$9,128,966. Northern states that the modifications proposed are necessary to provide an incremental 11 MMcf/d of natural gas effective

October 1, 2008, to meet the firm winter obligations as contracted with Archer Daniels Midland Company.

Any questions regarding the application should be directed to Michael T. Loeffler, Senior Director, Certificates and External Affairs, Northern Natural Gas Company, 1111 South 103rd Street, Omaha, Nebraska 68124, call (402) 398-7103 or Donna Martens, Senior Regulatory Analyst, at (402) 398-7138.

Any person or the Commission's Staff may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and, pursuant to section 157.205 of the Commission's Regulations under the Natural Gas Act (NGA) (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the Internet in lieu of paper. See 18 CFR 385.2001(a) (1) (iii) and the instructions on the Commission's Web site (<http://www.ferc.gov>) under the "e-Filing" link.

Kimberly D. Bose,
Secretary.

[FR Doc. E8-7607 Filed 4-9-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice Announcing Combined Notice of Initial Market-Based Rate Authorization Filings

April 3, 2008.

Effective April 3, 2008, the Federal Energy Regulatory Commission (FERC or Commission) will issue a separate combined notice of filing separately capturing initial market-based rate authorization filings.

As of this date, the Secretary of the Commission is making the following changes to the filing procedures for initial market-based rate authorization filings:

1. Filers requesting initial market-based rate authorization and certain

waivers and blanket approvals, particularly including blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by the applicants, must clearly state such request in the title or heading of the filing. For example:

Re: Name of Applicant(s), Docket No. ER08-____, (Title/Description) and request for blanket approval under 18 C.F.R. Part 34 of all future issuances of securities and assumptions of liability.

The notices issued under this method for ER dockets will be added to eLibrary and published in the **Federal Register** under the name "Combined Notice of Initial Market-Based Rate Filings." These notices will list initial market-based rate authorization filings added to eLibrary since publication of the last notice. Each filing will be listed with its identifying details as follows:

Name of Applicant(s)—This item will show the applicant name as it appears on the filing.

Docket Number—This item will contain a hyperlink to the eLibrary docket sheet for the docket number.

Description—This item will contain a brief description of the filing and a hyperlink that will open an image version of the filed document in eLibrary.

Filing Date—This item will show the date on which the document was filed with the Commission.

Accession Number—This item will contain a hyperlink that will open the document "Info" area of eLibrary for the filed document.

Comment Date—This item will indicate the comment deadline for the filing.

By this initiative, the Commission seeks to expedite the process for noticing initial market-based rate authorizations that also request blanket approvals for future issuances of securities and assumptions of liabilities, thereby also simplifying the manner in which the Commission's staff prepares notices. Consolidating notices in this manner also reduces the cost of publishing the notices in the **Federal Register**.

Kimberly D. Bose,
Secretary.

[FR Doc. E8-7601 Filed 4-9-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Docket No. EL08-52-000]

California Independent System Operator Corporation; Notice of Complaint

April 3, 2008.

Take notice that on April 1, 2008, the California Independent System Operator Corporation (CAISO) filed a complaint pursuant to section 206, 306 and 309 of the Federal Power Act, 16 U.S.C. 824e, 825e, and 825h, and section 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, 18 CFR 385.206 (2007), to modify the Transmission Control Agreement (TCA), under which the CAISO assumes Operational Control of the transmission facilities that constitute the ISO Controlled Grid. CAISO asserts that the TCA would be unjust and unreasonable and unduly discriminatory if Startrans IO, L.L.C. (Startrans IO), is precluded from becoming a party to the TCA and a Participating Transmission Owner (Participating TO), for the transmission rights that it proposes to acquire from the City of Vernon that are currently under the CAISO's Operational Control.

The CAISO states that the complaint and all attachments have been served upon the Public Utilities Commission of the State of California, the California Energy Commission, the California Electricity Oversight Board, the Participating TOs, Startrans IO, and all parties with effective Scheduling Coordinator Agreements under the CAISO Tariff. In addition, the complaint and all attachments have been posted on the CAISO Home Page.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically

should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5 p.m. Eastern Time on April 21, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8-7599 Filed 4-9-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission**

[Project No. 13135-000]

City of Watervliet; Notice of Application Accepted for Filing and Soliciting Comments, Protests, and Motions To Intervene

April 3, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

- a. *Type of Application:* Preliminary Permit.
- b. *Project No.:* 13135-000.
- c. *Date filed:* March 3, 2008.
- d. *Applicant:* City of Watervliet.
- e. *Name and Location of Project:* The proposed Delta Dam Hydroelectric Project would be located at Delta Dam on the Mohawk River in Oneida County, New York.
- f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).
- g. *Applicant contact:* Mr. Mark Gleason, General Manager, City of Watervliet, City Hall, Watervliet, NY 12189, (518) 270-3800 x122.
- h. *FERC Contact:* Tom Papsidero, (202) 502-6002.
- i. *Deadline for filing comments, protests, and motions to intervene:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy

Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings. Please include the project number (P-13135-000) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

j. *Description of Existing Facilities and Proposed Project:* The proposed Delta Dam Project would consist of: (1) The existing 1,016-foot-long, 76-foot-high Delta dam, owned by the New York State Canal Corporation, (2) an existing impoundment having a surface area of 2,700 acres and a storage capacity of 63,200 acre-feet and normal water surface elevation of 550 feet mean sea level, (3) a proposed powerhouse containing two generating units with a total installed capacity of 5.0 megawatts, (4) a proposed 1,000-foot-long, 13.2-kilovolt underground generator lead, and (5) appurtenant facilities. The project would have an annual generation of 16.1 GWh.

k. *Location of Applications:* A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room or may be viewed on the Commission's website at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1-866-208-3676 or e-mail FERCOnlineSupport@ferc.gov. For TTY, call (202) 502-8659. A copy is also available for inspection and reproduction at the address in item g above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. *Competing Preliminary Permit—* Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to

the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30 and 4.36.

n. Competing Development Application—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30 and 4.36.

o. Notice of Intent—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. Proposed Scope of Studies under Permit—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must

be received on or before the specified comment date for the particular application.

r. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. E8-7603 Filed 4-9-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13023-000]

Michael D. Mason; Notice of Application Accepted for Filing and Soliciting Comments, Protests, and Motions to Intervene

April 3, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. Type of Application: Preliminary Permit.

b. Project No.: 13023-000.

c. Date filed: September 17, 2007.

d. Applicant: Michael D. Mason.

e. Name and Location of Project: The proposed Upper Kiser Creek

Hydroelectric Project would be located on Kiser Creek in Delta County, Colorado and would be entirely located in the Grand Mesa National Forest.

f. Filed Pursuant to: Federal Power Act, 16 U.S.C. 791(a)-825(r).

g. Applicant contact: Mr. Michael D. Mason; 26380 Cedar Mesa Road, Cedaredge, CO 81413, (970) 856-7022.

h. FERC Contact: Tom Papsidero, (202) 502-6002.

i. Deadline for filing comments, protests, and motions to intervene: 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings. Please include the project number (P-13023-000) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

j. Description of Existing Facilities and Proposed Project: The proposed project would consist of: (1) A proposed diversion structure; (2) a proposed 5,755-foot-long, 16-inch-diameter plastic/steel penstock, (3) a proposed powerhouse containing one generator unit with a total installed capacity of 644 kilowatts, (4) a proposed 918-foot-long 12-kV transmission line interconnection, and (5) appurtenant facilities. The project would have an annual generation of 1.5 GWh which would be sold to a local utility.

k. Location of Applications: A copy of the application is available for inspection and reproduction at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, call toll-free 1-866-208-3676 or e-mail FERCOnlineSupport@ferc.gov. For TTY,

call (202) 502-8659. A copy is also available for inspection and reproduction at the address in item g above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. *Competing Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30 and 4.36.

n. *Competing Development Application*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30 and 4.36.

o. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

p. *Proposed Scope of Studies under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

q. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

r. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

s. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives

Kimberly D. Bose,

Secretary.

[FR Doc. E8-7602 Filed 4-9-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RR07-16-003]

North American Electric Reliability Corporation; Notice of Filing

April 3, 2008.

Take notice that on April 1, 2008, The North American Electric Reliability Corporation filed additional compliance filings in response to the Commission's October 18, 2007, Order, *North American Electric Reliability Corporation, Order Conditionally Accepting 2008 Business Plan and Budget if the North American Electric Reliability Corporation and Ordering Compliance Filings*, 121 FERC ¶ 61,057 (2007) (2008 ERO Budget Order).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5 p.m. Eastern Time on April 22, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8-7598 Filed 4-9-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of FERC Staff Attendance at Southwest Power Pool Board of Directors/Members Committee Meeting and Southwest Power Pool Regional State Committee Meeting

April 3, 2008.

The Federal Energy Regulatory Commission hereby gives notice that members of its staff may attend the meetings of the Southwest Power Pool (SPP) Regional State Committee Board of Directors, SPP Members Committee and SPP Board of Directors as noted below. Their attendance is part of the Commission's ongoing outreach efforts.

SPP Regional State Committee Meeting

April 21, 2008 (1 p.m.–5 p.m.), The Skirvin Hilton, 1 Park Ave., Oklahoma City, OK 73102, 405-272-3040.

SPP Board of Directors/Members Committee

April 22, 2008 (8:30 a.m.–3 p.m.), The Skirvin Hilton, 1 Park Ave., Oklahoma City, OK 73102, 405-272-3040.

The discussions may address matters at issue in the following proceedings:

Docket No. ER06-451, Southwest Power Pool, Inc.

Docket No. EL06-71, Associated Electric Cooperative, Inc. v. Southwest Power Pool.

Docket Nos. ER07-319 and EL07-73, Southwest Power Pool, Inc.

Docket No. ER07-371, Southwest Power Pool, Inc.

Docket No. EL07-27, East Texas Electric Cooperative, Inc., *et al.* and Docket No. ER07-396, Southwest Power Pool, Inc.

Docket No. ER07-1255, Southwest Power Pool, Inc.

Docket No. ER07-1311, Southwest Power Pool, Inc.

Docket No. ER08-340, Southwest Power Pool, Inc.

Docket No. ER08-477, Southwest Power Pool, Inc.

Docket No. ER08-684, Southwest Power Pool, Inc.

Docket No. OA08-5, Southwest Power Pool, Inc.

Docket No. OA08-60, Southwest Power Pool, Inc.

Docket No. OA08-61, Southwest Power Pool, Inc.

These meetings are open to the public.

For more information, contact Patrick Clarey, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (317) 249-5937 or patrick.clarey@ferc.gov.

Kimberly D. Bose,

Secretary.

[FR Doc. E8-7600 Filed 4-9-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM06-12-000]

Regulations for Filing Applications for Permits To Site Interstate Electric Transmission Facilities; Notice of New Docket Prefixes "PT" and "ET" for Permits To Site Interstate Electric Transmission Facilities

April 3, 2008.

Notice is hereby given that new docket prefixes "PT" and "ET" have been established for the pre-filing and application processes for permits to site interstate electric transmission facilities in accordance with Order No. 689,¹ issued November 16, 2006.

Order No. 689 requires potential applicants to complete a pre-filing process prior to filing an application for an electric transmission construction permit. The pre-filing request will be assigned a "PT" docket number prefix, and all related filings should be submitted under that docket. Applications for a permit to site facilities will be assigned an "ET" docket² and all related filings should refer to that docket number.

Pre-filing requests, applications, and all related filings may be submitted using the Commission's electronic filing system (<http://www.ferc.gov/docs-filing/efiling.asp>). Guidelines for the appropriate efilings menu choices and the required number of staff copies are listed in the Filing Guide and Qualified Documents List on the efilings Web page under the entries for 18 CFR Part 50 of the Commission's regulations.

Comments submitted in both PT and ET docket number prefixes will be

¹ Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, Order No. 689, 71 FR 69440 (November 16, 2006), FERC Stats. & Regs. 31,234 (2006).

² Application filings under a new ET docket should reference the applicable pre-filing PT docket number.

eligible to be electronically submitted using the Commission's Quick Comment option. Quick Comment is an easier alternative to the efilings system for submitting text comments and does not require advance eRegistration. Commenters may also use the efilings system to submit more extensive comments and/or exhibits, provided they have an eRegistration account.

If you need assistance with efilings, please contact FERC Online Support at 1-866-208-3676 or FERCOnlineSupport@ferc.gov.

Kimberly D. Bose,

Secretary.

[FR Doc. E8-7606 Filed 4-9-08; 8:45 am]

BILLING CODE 6717-01-P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested

April 2, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before May 12, 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 contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at Nicholas_A_Fraser@omb.eop.gov or via fax at (202) 395-5167 and to Cathy Williams, Federal Communications Commission, Room 1-C823, 445 12th Street, SW., Washington, DC or via Internet at Cathy.Williams@fcc.gov or PRA@fcc.gov. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page <http://www.reginfo.gov/public/do/PRAMain>, (2) look for the section of the web page called "Currently Under Review," (3) click on the downward-pointing arrow in the "Select Agency" box below the "Currently Under Review" heading, (4) select "Federal Communications Commission" from the list of agencies presented in the "Select Agency" box, (5) click the "Submit" button to the right of the "Select Agency" box, (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB control number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418-2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-0433.

Title: Basic Signal Leakage Performance Report.

Form Number: FCC Form 320.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 7,100.

Frequency of Response: Recordkeeping requirement; Annual reporting requirement.

Estimated Time per Hours: 17 hours.

Total Annual Burden: 120,700 hours.

Total Annual Cost: None.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in sections 4(i), 302 and 303 of the Communications Act of 1934, as amended.

Confidentiality: No need for confidentiality required.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: Cable television system operators and Multichannel Video Programming Distributors (MPVDs) who use frequencies in the bands 108-137 and 225-400 MHz (aeronautical frequencies) are required

to file a Cumulative Signal Leakage Index (CLI) derived under 47 CFR 76.611(a)(1) or the results of airspace measurements derived under 47 CFR 76.611(a)(2). This filing must include a description of the method by which compliance with basic signal leakage criteria is achieved and the method of calibrating the measurement equipment. This yearly filing of FCC Form 320 is done in accordance with 47 CFR 76.1803.

OMB Control Number: 3060-0980.

Title: SHVERA Procedural Rules; Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (Broadcast Signal Carriage Issues, Retransmission Consent Issues).

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business and other for-profit entities.

Number of Respondents: 7,179.

Estimated Hours per Response: 1 to 5 hours.

Frequency of Response: On occasion reporting requirement; Every three year reporting requirement; Third party disclosure requirement.

Total Annual Burden: 10,196 hours.

Total Annual Cost: \$30,000.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in the Satellite Home Viewer Extension and Reauthorization Act of 2004, Public Law No. 108-447, Section 202, 205, 210, 118 Stat 2809 (2004); 47 CFR 325, 338, 339 and 340.

Confidentiality: No need for confidentiality required.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: 47 CFR 76.66(c)(3) requires that a commercial television station notify a satellite carrier in writing whether it elects to be carried pursuant to retransmission consent or mandatory consent in accordance with the established election cycle.

47 CFR 76.66(c)(5) requires that a noncommercial television station must request carriage by notifying a satellite carrier in writing in accordance with the established election cycle.

47 CFR 76.66(c)(6) required a commercial television broadcast station located in a local market in a noncontiguous state to make its retransmission consent-mandatory carriage election by October 1, 2005, for carriage of its signals that originate as analog signals for carriage commencing on December 8, 2005 and ending on December 31, 2008, and by April 1, 2007 for its signals that originate as digital signals for carriage commencing

on June 8, 2007 and ending on December 31, 2008. For analog and digital signal carriage cycles commencing after December 31, 2008, such stations shall follow the election cycle in 47 CFR 76.66(c)(2) and 47 CFR 76.66(c)(4). A noncommercial television broadcast station located in a local market in Alaska or Hawaii must request carriage by October 1, 2005, for carriage of its signals that originate as an analog signal for carriage commencing on December 8, 2005 and ending on December 31, 2008, and by April 1, 2007 for its signals that originate as digital signals for carriage commencing on June 8, 2007 and ending on December 31, 2008. Moreover, section 76.66(c) requires a commercial television station located in a local market in a noncontiguous state to provide notification to a satellite carrier whether it elects to be carried pursuant to retransmission consent or mandatory consent.

47 CFR 76.66(d) states a television station's written notification must include its call sign, the name of a station contact, the station's community of license, the station's designated market area (DMA) assignment, and, for commercial stations, its election of mandatory carriage or retransmission consent. Within 30 days of receiving a request for carriage, a satellite carrier must notify in writing any station whether it will carry the station requested. If the satellite carrier will not carry the station, it must include its reasons for denying carriage.

47 CFR 76.66(d)(2) requires satellite carriers to issue notices to station licensees when the carrier is going to initiate new local service. These notifications are required to be sent by certified mail to the television station licensees.

47 CFR 76.66(d)(2)(iii) requires a satellite carrier with more than five million subscribers to provide a notice as required by 47 CFR 76.66(d)(2)(i) and 47 CFR 76.66(d)(2)(ii) to each television broadcast station located in a local market in a noncontiguous state, not later than September 1, 2005 with respect to analog signals and a notice not later than April 1, 2007 with respect to digital signals; provided, however, that the notice shall also describe the carriage requirements pursuant to section 338(a)(4) of title 47, United States Code, and 47 CFR 76.66(b)(2).

47 CFR 76.66(d)(5) applies to satellite carriers that carry or intend to carry significantly viewed signals and provide television stations with different carriage election options in counties and markets in which the satellite carrier is offering significantly viewed signals.

Therefore, if satellite carriers elect to carry significantly viewed signals, they are required to provide notifications to local broadcast stations informing them of their rights to elect mandatory carriage or retransmit consent on a county basis.

47 CFR 76.66(m) states whenever a local broadcast station believes that a satellite carrier has failed to meet its obligations under this section, such station shall notify the carrier, in writing, of the alleged failure and identify its reason for believing that the satellite carrier failed to comply with its obligations.

The satellite carrier shall, within 30 days of such written notification, respond in writing to such notification and comply with such obligations or state its reasons for believing that it is in compliance. A local station that disputes a satellite carrier's response may obtain review of such response by filing a complaint with the Commission in accordance with 47 CFR 76.7 of the rules.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8-7384 Filed 4-9-08; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, for Extension Under Delegated Authority, Comments Requested

April 2, 2008.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3520), the Federal Communications Commission invites the general public and other Federal agencies to comment on the following information collection(s). 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. An agency may not conduct or sponsor a collection of information unless it

displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before June 9, 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: You may submit all PRA comments by e-mail or U.S. post mail. To submit your comments by e-mail, send them to PRA@fcc.gov. To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1-C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s), contact Cathy Williams at (202) 418-2918 or send an e-mail to PRA@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060-0075.

Title: Application for Consent to Assign Construction Permit or License for TV or FM Translator Station or Low Power Television Station or to Transfer Control of Entity Holding TV or FM Translator or Low Power Television Station.

Form Number: FCC Form 345.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 550 respondents; 870 responses.

Estimated Time per Response: 0.5-1.0 hour.

Frequency of Response: Recordkeeping requirement; Third party disclosure requirement; On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in Sections 154(i) and 310 of the Communications Act of 1934, as amended.

Total Annual Burden: 723 hours.

Total Annual Cost: \$1,284,700.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: Filing of the FCC Form 345 is required when applying for authority for assignment of license or permit, or for consent to transfer of control of corporate licensee or

permittee for an FM or TV translator station, or low power TV station.

This collection also includes the third party disclosure requirement of 47 CFR Section 73.3580 (OMB approval was received for Section 73.3580 under OMB Control Number 3060-0031). 47 CFR 73.3580 requires local public notice in a newspaper of general circulation or providing notice over the air of the filing of all applications for assignment of license/permit. This notice must be completed within 30 days of the tendering of the application. A copy of the newspaper notice or a record of the broadcast notice must be placed in the public inspection file along with the application.

OMB Control Number: 3060-0707.

Title: Over-the-Air Reception Devices (OTARD).

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: State or Local, or Tribal Government.

Number of Respondents and Responses: 77 respondents; 77 responses.

Estimated Time per Response: 0.5-1.0 hour.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in Section 207 of the Communications Act of 1994, as amended.

Total Annual Burden: 289 hours.

Total Annual Cost: \$10,410.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: Section 207 of the Telecommunications Act of 1996 ("1996 Act") directs the Commission to promulgate rules prohibiting restrictions on viewers' ability to receive over-the-air signals by television broadcast, multichannel multipoint distribution, or direct broadcast satellite services.

In a Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CS Docket No. 96-83, FCC 96-328, released August 6, 1996, the Commission fully implemented Section 207 of the 1996 Act by adopting final rules for a preemption of state, local and non-governmental regulations that impair viewers' ability to receive over-the-air signals. In doing so, the FCC acknowledged the necessity of allowing state, local and non-governmental entities to continue to enforce certain regulations and restrictions, such as

those serving safety purposes, and therefore exempted them from its prohibition. Also, state, local and non-governmental entities were permitted to file petitions for waivers.

On September 25, 1998, the Commission released an Order on Reconsideration, FCC 98–214, in this proceeding that further modified and clarified Section 207 rules. Among other things, the Order on Reconsideration clarified how declaratory rulings and waivers in this matter are to be served on all interested parties. If a local government seeks a declaratory ruling or a waiver, it must take steps to afford reasonable, constructive notice to residents in its jurisdiction (e.g., by placing notices in a local newspaper of general circulation). Certificates of service and proof of constructive notice also must be provided to the Commission with the petition. In this regard, the petitioner should provide the Commission with a copy of the notice and an explanation of where the notice was placed and how many people the notice might reasonably have reached.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

[FR Doc. E8–7386 Filed 4–9–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

April 4, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. sections 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a current valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid control number. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c)

ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written PRA comments should be submitted on or before June 9, 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: You may submit all PRA comments by e-mail or U.S. mail. To submit your comments by e-mail, send them to PRA@fcc.gov. To submit your comments by U.S. mail, send them to Leslie F. Smith, Federal Communications Commission, Room 1–C216, 445 12th Street, SW., Washington, DC 20554, or via the Internet to PRA@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s), contact Leslie F. Smith via the Internet at PRA@fcc.gov or call (202) 418–0217.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0862.

Title: Handling Confidential Information.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; Federal Government; and State, Local, or Tribal Government.

Number of Respondents and Responses: 2,400 respondents; 2,400 responses.

Estimated Time per Response: 1 to 2 hours.

Obligation to Respond: Required to obtain or retain benefits.

Frequency of Response: Recordkeeping; On occasion reporting requirement; Third party disclosure.

Total Annual Burden: 4,200 hours.

Total Annual Cost: \$0.00.

Privacy Impact Assessment: N/A.

Nature of Extent of Confidentiality: The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 C.F.R. Section 0.459 of the Commission's rules.

Needs and Uses: On August 4, 1998, the FCC released a *Report and Order* (R&O), Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, CG Docket No. 96–55.

The R&O included a Model Protective Order (MPO) that is used, when appropriate, to grant limited access to information that the Commission determines should not be routinely available for public inspection. The party granted access to the confidential information materials must keep a written record of all copies made and provide this record to the submitted of the confidential materials upon request. This approach was adopted to facilitate the use of confidential materials under an MPO, instead of restricting access to materials. In addition, the FCC amended 47 CFR 0.459(b) to set forth the type of information that should be included when a party submits information to the Commission for which it seeks confidential treatment. This listing of types of information to be submitted was adopted to provide guidance to the public for confidentiality requests.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

[FR Doc. E8–7633 Filed 4–9–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Revision Under Delegated Authority, Comments Requested

April 4, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a current valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid control number. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the

respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written PRA comments should be submitted on or before June 9, 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: You may submit all PRA comments by e-mail or U.S. mail. To submit your comments by e-mail, send them to PRA@fcc.gov. To submit your comments by U.S. mail, send them to Leslie F. Smith, Federal Communications Commission, Room 1–C216, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s), contact Leslie F. Smith via the Internet at PRA@fcc.gov or call (202) 418–0217.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0298.

Title: Part 61, Tariffs (Other than Tariff Review Plan).

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for profit.

Number of Respondents and Responses: 580 respondents; 1,160 responses.

Estimated Time per Response: 57 hours.

Obligation to Respond: Required to obtain or retain benefits.

Frequency of Response: On occasion and annual reporting requirements.

Total Annual Burden: 66,120 hours.

Annual Cost Burden: \$899,000.

Privacy Act Impact Assessment: No impacts.

Nature of Extent of Confidentiality: The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: Sections 201, 202, 203, 204 and 205 of the Communications Act of 1934, ("Act") as amended, 47 U.S.C. 201, 202, 203, 204 and 205, require that common carriers establish just and reasonable charges, practices and regulations must be filed with the Commission which is required to determine whether such schedules are just, reasonable and not unduly discriminatory. Part 61 of the Commission's Rules, 47 CFR part 61, establishes the procedures for filing

tariffs which contain the charges, practices and regulations of the common carriers, supporting economic data and other related documents. The supporting data must also conform to other parts of the Commission Rules such as Parts 36 and 69, 47 CFR parts 36 and 69. Part 61 also prescribes the framework for the initial establishment of and subsequent revisions to tariffs. Tariffs that do not conform to part 61 may be required to post their schedules or rates and regulations, as required by 47 CFR 61.72. The information collected through a carrier's tariff is used by the Commission to determine whether services offered are just and reasonable as the Act requires. Tariffs and any other supporting documentation are examined in order to determine if the services are offered in a just and reasonable manner.

On August 31, 2007, the Commission released the section 272(f)(1) *Sunset Order*, which found the BOCs to be nondominant in the provision of in-region, interstate and international, long distances services, whether they provide these services directly or through affiliates that are neither section 272 nor rule 64.1903 affiliates. *Sunset Order*, 22 FCC Rcd 16440 (2007). Accordingly, AT&T, Verizon and Qwest are now barred from filing tariffs for in-region, interstate and international, long distance services pursuant to section 203 of the Act and sections 61.31–61.38 and 61.43 of the Commission's Rules, 47 CFR 61.31–61.38 and 61.43.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–7636 Filed 4–9–08; 8:45 am]

BILLING CODE 6712–01–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 applications 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 May 2, 2008.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105–1521:

1. *ENB Financial Corporation*, Ephrata, Pennsylvania; to become a bank holding company in connection with the reorganization of Ephrata National Bank, merging with and into The Ephrata Interim National Bank, both of Ephrata Pennsylvania.

B. Federal Reserve Bank of Chicago (Burl Thornton, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *MainSource Financial Group, Inc.*, Greensburg, Indiana; to acquire 100 percent of the voting shares of 1st Independence Financial Group, Inc., and thereby indirectly acquire 1st Independence Bank, both of Louisville, Kentucky.

C. Federal Reserve Bank of Kansas City (Todd Offenbacher, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Las Vegas Bancorporation, Inc.*, Las Vegas, New Mexico; to retain shares and increase its ownership to 53 percent of the voting shares of Bethlehem Financial Corporation, and thereby indirectly acquire voting shares of My Bank, both of Belen, New Mexico.

Board of Governors of the Federal Reserve System, April 3, 2008.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E8–7534 Filed 4–9–08; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS-0990-New; 30-day Notice]

Agency Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to

minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to Sherette.funncoleman@hhs.gov, or call the Reports Clearance Office on (202) 690-5683. Written comments and recommendations for the proposed information collections must be received within 30 days of this notice directly to the OS OMB Desk Officer all comments must be faxed to OMB at 202-395-6974.

Proposed Project—Annual Appellant Climate Survey—0990-NEW—Office of Medicare Hearings and Appeals (OMHA).

Abstract: The first annual OMHA Appellant Climate Survey is a survey of Medicare beneficiaries, providers, and suppliers who had a hearing before an Administrative Law Judge (ALJ) at the Office of Medicare Hearings and Appeals (OMHA). Appellants dissatisfied with the outcome of their Level 2 appeal may request a hearing before an OMHA ALJ. The Appellant

Climate Survey will be used to measure appellant satisfaction with their OMHA appeals experience, as opposed to their satisfaction with a specific ruling.

OMHA was established by the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 (Pub. L. 108-173) and became operational on July 1, 2005. The MMA legislation and implementing regulations issued on March 8, 2007 instituted a number of changes in the appeals process. The MMA legislation also directed the U.S. Department of Health and Human Services to consider the feasibility of "conducting hearings using telephone- or video-conference technologies." In carrying out this mandate, OMHA makes extensive use of video-teleconferencing to provide appellants with a vast nationwide network of access points for hearings close to their homes. The survey will gauge appellants' satisfaction with this new service along with the overall appeals experience. The OMHA survey will be conducted annually over a three-year period, beginning in FY08. Results from the surveys will be used to gauge progress made in increasing satisfaction amongst appellants.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Form name	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Healthcare Practitioners and Technical Occupations	Form A	60	1	11/60	11
Bill and Account Collectors	Form A	340	1	11/60	62
Total		400	1	11/60	73

Seleda Perryman,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. E8-7611 Filed 4-9-08; 8:45 am]

BILLING CODE 4150-46-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-08-0260]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and

Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404-639-4766 and send comments to Maryam Daneshvar, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS-D74, Atlanta, GA 30333 or send an e-mail to omb@cdc.gov.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the

use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Health Hazard Evaluation and Technical Assistance—Requests and Emerging Problems—Reinstatement (OMB No. 0920-0260)—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

In accordance with its mandates under the Occupational Safety and Health Act of 1970 and the Federal Mine Safety and Health Act of 1977, the National Institute for Occupational Safety and Health (NIOSH) responds to requests for health hazard evaluations (HHE) to identify chemical, biological or

physical hazards in workplaces throughout the United States. Each year, NIOSH receives approximately 400 such requests. Most HHE requests come from the following types of companies: Service, manufacturing companies, health and social services, transportation, construction, agriculture/mining, skilled trade and construction. A printed Health Hazard Evaluation request form is available in English and in Spanish. The form is also available on the Internet and differs from the printed version only in format and in the fact that it uses an Internet address to submit the form to NIOSH. Both the printed and Internet versions of the form provide the mechanism for employees, employers, and other authorized representatives to supply the information required by the regulations governing the NIOSH Health Hazard Evaluation program (42 CFR 85.3–1). In general, if employees are submitting the form it must contain the signatures of three or more current employees. However, regulations allow a single signature if the requestor: Is one of three (3) or fewer employees in the process, operation, or job of concern; or is any officer of a labor union representing the employees for collective bargaining purposes. An individual management official may request an evaluation on behalf of the employer. The information provided is used by NIOSH to determine whether there is reasonable cause to justify conducting an

investigation and provides a mechanism to respond to the requestor.

In the case of 25% to 50% of the health hazard evaluation requests received, NIOSH determines an on-site evaluation is needed. The primary purpose of an on-site evaluation is to help employers and employees identify and eliminate occupational health hazards. In most on-site evaluations employees are interviewed to help further define concerns, and in approximately 50% of these evaluations (presently estimated to be about 100 facilities), questionnaires are distributed to the employees (averaging about 40 employees per site for this last subgroup). The interview and survey questions are specific to each workplace and its suspected diseases and hazards, however, items are derived from standard medical and epidemiologic techniques. The request forms take an estimated 12 minutes to complete. The interview forms take 30 minutes to complete.

NIOSH distributes interim and final reports of health hazard evaluations, excluding personal identifiers, to: Requesters, employers, employee representatives; the Department of Labor (Occupational Safety and Health Administration or Mine Safety and Health Administration, as appropriate); and, as needed, other state and federal agencies.

NIOSH administers a follow-back program to assess the effectiveness of its health hazard evaluation program in reducing workplace hazards. This

program entails the mailing of follow-back questionnaires to employer and employee representatives at all the workplaces where NIOSH conducted site visits. In a small number of instances, a follow-back on-site evaluation may be conducted. The initial follow-back questionnaire is administered immediately following the site visits and takes about 15 minutes. Another follow-back questionnaire is sent a year later and requires about 15 minutes to complete. At 24 months, a final follow-back questionnaire regarding the completed evaluation is sent which takes about 15 minutes to complete.

For requests where NIOSH does not conduct an onsite evaluation, the requester receives a follow-back questionnaire 12 months after our response and a second one 24 months after our response. The first questionnaire takes about 10 minutes to complete and the second questionnaire takes about 15 minutes to complete.

Because of the large number of investigations conducted each year, the need to respond quickly to requests for assistance, the diverse and unpredictable nature of these investigations, and its follow-back program to assess evaluation effectiveness; NIOSH requests an umbrella clearance for data collections performed within the domain of its health hazard evaluation program.

There is no cost to respondents other than their time.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Type of respondent	Form	Number of respondents	Number of responses per respondent	Average burden per response in hours	Total burden hours
Employees and Representatives	Health Hazard Evaluation Request Form.	302	1	12/60	60
Employers	Health Hazard Evaluation Request Form.	118	1	12/60	24
Employees	Health Hazard Evaluation specific interview example.	4200	1	15/60	1050
Employees	Health Hazard Evaluation specific questionnaire example.	4440	1	30/60	2220
Followback for onsite evaluations for Management, Labor and Requester.	Initial Site Visit survey form	840	1	15/60	210
Followback for onsite evaluations for Management, Labor and Requester.	Closeout for HHE with an OnSite Evaluation.	840	1	15/60	210
Followback for onsite evaluations for Management, Labor and Requester.	1 year later HHE with an OnSite Evaluation.	840	1	15/60	210
Followback for evaluations for Management, Labor and Requester without onsite evaluation.	Followback I Survey cover letter and Forms.	55	1	10/60	9
Followback for evaluations for Management, Labor and Requester without onsite evaluation.	Followback II Survey Cover Letter and Forms.	55	1	15/60	14

ESTIMATE OF ANNUALIZED BURDEN HOURS—Continued

Type of respondent	Form	Number of respondents	Number of responses per respondent	Average burden per response in hours	Total burden hours
Total Burden Hours					4007

Dated: March 28, 2008.

Maryam I. Daneshvar,
Acting Reports and Clearance Officer, Centers
for Disease Control and Prevention.

[FR Doc. E8-7560 Filed 4-9-08; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day-08-08AC]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 371-5960 or send an e-mail to omb@cdc.gov. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395-6974. Written comments should be received within 30 days of this notice.

Proposed Project

Racial and Ethnic Approaches to Community Health across the U.S. (REACH US) Evaluation—NEW—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Minority populations in the U.S. experience health disparities and excess deaths due to the burden of disease. Analysis has shown that more than eighty percent of excess deaths in minority populations are accounted for by six disease areas: Cardiovascular disease, diabetes, asthma, infant mortality, breast and cervical cancer, and diseases that can be prevented through immunization. In response, CDC has funded a national, multi-level community intervention program to eliminate health disparities in specific priority areas, entitled “Racial and Ethnic Approaches to Community Health across the U.S. (REACH US).” The REACH US program will serve communities with African American, American Indian, Hispanic American, Asian American, and Pacific Islander citizens. The REACH US program extends previous CDC-funded efforts

funded through the related REACH 2010 program, and is part of the Department of Health and Human Services’ response to the President’s Race Initiative and to the Healthy People 2010 goal of eliminating health disparities in the health status of racial and ethnic minorities.

REACH US will help to continue assessing the prevalence of self-reported risk behaviors associated with cardiovascular disease, diabetes, health disparities in infant mortality, deficits in breast and cervical cancer screening and management, and deficits in adult immunizations. Annual surveys will be conducted in 29 REACH US communities using Computer-Assisted Telephone Interview (CATI) methodology. Information will be collected from 900 respondents in each participating community. The REACH US questionnaire is modeled on the questionnaire previously fielded through the REACH 2010 evaluation, and contains questions that are standard public health performance measures for each health priority area.

There are no costs to respondents except their time to participate in the survey. The total estimated annualized burden hours are 9,875.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	No. of respondents	No. of responses per respondent	Average burden per response (in hours)
Adults ages 18 and older who live in communities participating in the REACH US Program.	Introductory Screening Interview	100,500	1	2/60
	Household Member Interview	26,100	1	15/60

Dated: March 28, 2008.

Maryam I. Daneshvar,
Acting Reports Clearance Officer, Centers for
Disease Control and Prevention.

[FR Doc. E8-7566 Filed 4-9-08; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day-08-05CL]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under

review by the Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Acting Reports Clearance Officer at 404-639-5960 or send an e-mail to omb@cdc.gov. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395-6974. Written comments should be received within 30 days of this notice.

Proposed Project

Formative Evaluation of Adults' and Children's Views Related to Promotion of Healthy Food Choices—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

In FY 2004, Congress directed the Centers for Disease Control and Prevention (CDC) to conduct formative research on the attitudes of children and parents regarding nutrition behavior and the characteristics of effective marketing of foods to children to promote healthy food choices. In response, CDC will work with a contractor to conduct focus groups to explore barriers and

motivations to the adoption and maintenance of healthy food choices among children at different developmental stages. Current literature and opinion-leaders both strongly suggest that “tweens” (ages 9–12) greatly influence their parents' and younger siblings' nutritional decisions. The focus groups will also explore the topic of family interactions around decision-making about food choices. The information gathered will be used to develop, refine, and modify messages and strategies to increase healthy food choices by children and parents.

A total of 90 focus groups will be conducted in three phases: Phase 1 will address tweens and parents of tweens; Phase 2 will focus on children 5–8 years old and their parents; and Phase 3 focus

groups will be conducted with parents of children ages 1–4 years old. Thirty-six focus groups will be conducted in Phase 1; 36 focus groups will be conducted in Phase 2; and 18 focus groups will be conducted in Phase 3.

All focus groups will incorporate appropriate representation of diverse ethnic groups, and the groups will be held in several cities to ensure broad geographic representation. Participants will be recruited by focus group facilities utilizing their database to solicit and screen interested parties. Each focus group discussion will be limited to no more than two hours.

There is no cost to respondents other than their time. The total estimated annualized burden hours are 1,556.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	No. of respondents	No. of responses per respondent	Average burden (in hours)
Children	Screener D1 for Parent & Child Groups	384	1	3/60
	Screener D2 for Child Only Groups	384	1	3/60
	Focus Group Moderator's Guide for Children/Youth.	384	1	2
Parents	Screener D1 for Parent & Child Groups	192	1	7/60
	Screener D2 for Child Only Groups	192	1	7/60
	Screener D3 for Parent Only Groups	288	1	7/60
	Focus Group Moderator's Guide for Parents	336	1	2

Dated: April 1, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8-7571 Filed 4-9-08; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Disease Control and Prevention**

[60Day-08-08AX]

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 or send comments to Maryam Daneshvar, Acting CDC 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

Nationally Notifiable Sexually Transmitted Disease (STD) Morbidity Surveillance—New—Division of STD Prevention (DSTDP), National Center for HIV, Viral Hepatitis, STD and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Because the STD epidemiology in the United States is changing rapidly, CDC must monitor disease indicators that are not currently included in the STD surveillance currently being implemented. CDC is proposing a new electronic information collection which will include information elements that will be integrated into the existing nationally notifiable STDs. These new information elements are beyond the scope of the OMB-approved collection called Weekly and Annual Morbidity and Mortality Reports (MMWR, OMB #0920-0007). The new collection will be epidemiologically superior to the existing system and will provide evidence to better define STD distribution and epidemiology in the United States. The proposed surveillance system will modify several data elements currently included in the MMWR collection and add others to produce a new set of sensitive indicators. This new surveillance will provide the evidence to enhance our understanding of STDs, develop intervention strategies, and evaluate the impact of ongoing control efforts.

CDC works closely with state and local STD control programs to monitor

and respond to STD outbreaks and trends in STD-associated risk behavior. Users of data include, but are not limited to, congressional offices, state and local health agencies, health care providers, and other health-related groups.

CDC disseminates all STD surveillance information through the MMWR series of publications, including

the MMWR, the CDC Surveillance Summaries, the Recommendations and Reports, and the annual Summary of Notifiable Diseases, United States. Additionally, DSTDP publishes an annual STD-specific surveillance summary and supplements in hard copy on CD-ROM and on the Internet http://www.cdc.gov/nchstp/dstd/Stats_Trends/Stats_and_Trends.htm.

CDC will use the findings from this and other STD surveillance to develop guidelines, control strategies, and impact measures that monitor trends in STDs in the United States.

We expect a total of 57 sites in state, city, and territory health departments will be submitting STD morbidity information to CDC each week.

ESTIMATE OF ANNUALIZED BURDEN TABLE

Types of data collection	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden in hours
States	50	52	20/60	867
Territories	5	52	20/60	87
Cities	2	52	20/60	35
Totals	57			989

Dated: April 3, 2008.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E8-7575 Filed 4-9-08; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2008-N-0027] (formerly Docket No. 2007N-0495)

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Medical Device User Fee Amendments of 2007; Foreign Small Business Qualification Certification, Form FDA 3602A

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by May 12, 2008.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202-395-6974, or e-mailed to baguilar@omb.eop.gov. All comments

should be identified with the OMB control number 0910-0613. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT:

Denver Presley, Jr., Office of the Chief Information Officer (HFA-250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-1472.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Medical Device User Fee Amendments of 2007; Foreign Small Business Qualification Certification, Form FDA 3602A—(OMB Control Number 0910-0613)—Extension

The FDA Amendments Act of 2007 includes the "Medical Device User Fee Amendments of 2007" (the 2007 Amendments), which reauthorizes medical device user fees for fiscal years (FY) 2008 through 2012 and which makes significant changes to the medical device user fee provisions of the act. The 2007 Amendments provide a new way for a foreign business to qualify as a small business eligible to pay a significantly lower fee when a medical device user fee must be paid.

Before passage of the 2007 Amendments, the only way a business could qualify as a small business was to submit a Federal (U.S.) income tax return showing its gross receipts or sales that did not exceed a statutory threshold, (currently \$100 million). If a business could not provide a Federal income tax return, it did not qualify as

a small business and had to pay the standard (full) fee. Because many foreign businesses have not, and cannot, file a Federal (U.S.) income tax return, this requirement has effectively prevented those businesses from qualifying for the small business fee rates. Thus, foreign governments, including the European Union, have objected.

In lieu of a Federal income tax return, the 2007 Amendments will allow a foreign business to qualify as a small business by submitting a certification from its national taxing authority, the foreign equivalent of our Internal Revenue Service. This certification, referred to as a "National Taxing Authority Certification," must:

- Be in English;
- Be from the national taxing authority of the country in which the business is headquartered;
- Provide the business' gross receipts or sales for the most recent year, in both the local currency and in U.S. dollars, and the exchange rate used in converting local currency to U.S. dollars;
- Provide the dates during which the reported receipts or sales were collected; and
- Bear the official seal of the national taxing authority.

The new FDA Form 3602A, "FY 2008 MDUFMA Foreign Small Business Qualification Certification," will collect the information required by the statute and allows a foreign business to qualify for the same small business benefits as a domestic U.S. business.

In the **Federal Register** of January 15, 2008 (73 FR 2503), FDA published a 60-day notice requesting public comment on the information collection

provisions. In response to this notice, FDA received two general comments on the information collection requirements which are described in this document along with FDA's responses.

(Comment 1) The commenter recommended that once a firm has qualified for small business status, this should be good enough for 3 to 5 years. Further, that it would be quite unlikely that a small business firm would move from a small business to a huge business in 3 years, particularly for the starting business or very small business. The commenter concluded that the extra paperwork will cost time and money for the industry and FDA as well.

(Response) FDA cannot accept this recommendation, because current provisions of the 2007 Amendments do not permit the recommended approach. Section 738(d)(2)(B) and (e)(2)(B) of the act (21 U.S.C. 379j(d)(2)(B) and (e)(2)(B)) defines the "Evidence of Qualification" that must be provided to qualify as a small business. The provisions

specifically require the applicant to support its claim that it qualifies as a small business by submitting, among other things, the following:

- "a copy of the most recent Federal income tax return for a taxable year" and
- A signed certification of gross receipts or sales for the most recent year.

Because both requirements specify that the information must be for the "most recent" year, FDA cannot determine whether an applicant's status as a small business will persist for a period of more than 1 year.

(Comment 2) The commenter expressed concern there could be some problems in collecting the tax certification information required of Form FDA 3602A, Section III, from the national taxing authority of each country where an applicant has business entities. The commenter cited that in some countries, the national taxing authority may not agree to fill out

this form for various reasons including: (1) The fact that it may not be its own official form, (2) the form is in English, and (3) authorities do not agree to determine the exchange rate for the U.S. dollar.

As an alternative to Form FDA 3602A, Section III, the commenter recommends the following information be provided:

- A tax report or an income statement from each country of business entities,
- Translation to English could be organized by the applicant, and a
- Determination of exchange rate could be done by the applicant.

(Response) FDA cannot accept this recommendation because the agency does not have authority to modify the statutory requirement for a signed certification form, and bearing the seal of the national taxing authority of the country in which the applicant, or if applicable, affiliate, is headquartered (see section 738(d)(2)(B)(iii) and 738(e)(2)(B)(iii)).

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN¹

Form FDA 3602A	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Sections I and II (completed by the business seeking small business status)	229	1	229	1	229
Section III (completed by the foreign national taxing authority)	33	7	231	1	231
Total					460

¹There are no capital costs or operating and maintenance costs associated with this collection of information.

This burden estimate is based on an examination of 510(k) premarket notifications received during FY 2006 and FDA's estimation of the time to collect the required information to complete Form FDA 3602A. The evidence supporting each Form FDA 3602A must be reviewed by a foreign national taxing authority to complete Section III, the National Taxing Authority Certification, of each Form FDA 3602A. Because this is a new activity, and neither FDA nor any foreign national taxing authority has any data that would provide an objective measure of the effort required to complete Section III, FDA is estimating that the burden will be the same as FDA experiences in reviewing Form FDA 3602, "FY 2008 MDUFMA Small Business Qualification Certification For a Business Headquartered in the United States," approved under OMB control number 0910-0508.

FDA believes most entities that submit Form FDA 3602A will not have any affiliates, and very few will have

more than three or four affiliates. Based on our experience with FDA Form 3602, FDA believes each business will require 1 hour to complete Sections I and II. Because this is a new requirement, FDA does not have any data on the time that will be required to complete Section III, the National Taxing Authority Certification.

Dated: April 7, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8-7637 Filed 4-9-08; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2008-N-0213] (formerly Docket No. 2007N-0460)

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Reports of Corrections and Removals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by May 12, 2008.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202-395-6974, or e-mailed to baguilar@omb.eop.gov. All comments should be identified with the OMB control number 0910-0359. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of the Chief Information Officer (HFA-250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-1472.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed

collection of information to OMB for review and clearance.

Reports of Corrections and Removals—21 CFR Part 806; (OMB Control Number 0910-0359)—Extension

The collection of information required under the reports of corrections and removals, part 806 (21 CFR part 806), implements section 519(f) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360i(f)), as amended by the Food and Drug Modernization Act of 1997 (FDAMA) (21 U.S.C. 301) (Public Law 105-115). Each device manufacturer or importer under § 806.10 shall submit a written report to FDA of any action initiated to correct or remove a device to reduce a risk to health posed by the device, or to remedy a violation of the act caused by the device which may present a risk to health, within 10 working days of

initiating such correction or removal. Each device manufacturer or importer of a device who initiates a correction or removal of a device that is not required to be reported to FDA under § 806.20 shall keep a record of such correction or removal.

The information collected in the reports of corrections and removals will be used by FDA to identify marketed devices that have serious problems and to ensure that defective devices are removed from the market. This will assure that FDA has current and complete information regarding these corrections and removals and to determine whether recall action is adequate.

In the **Federal Register** of December 11, 2007 (72 FR 70327), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN¹

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
806.10	488	1	488	10	4,880
Total					4,880

¹There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN¹

21 CFR Section	No. of Recordkeepers	Annual Frequency per Recordkeeping	Total Annual Records	Hours per Record	Total Hours
806.20	132	1	132	10	1,320
Total					1,320

¹There are no capital costs or operating and maintenance costs associated with this collection of information.

In preparing the previous clearances for approval of the information collection requirements under §§ 806.10 and 806.20, FDA reviewed the reports of corrections and removals submitted for the previous 3 years under part 7 (21 CFR part 7), the agency's recall provisions. FDA has determined that estimates of the reporting burden in § 806.10 should be revised to reflect a 1.2 percent increase for reports and records submitted under part 7 due to a decrease in class I and class II recall actions. FDA also estimates the reporting burden in § 806.20 should be revised to reflect a reduction of 8 percent for reports and records submitted under part 7 due to a decrease in class III recall actions. The time needed to collect information has not been changed.

Dated: April 4, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8-7638 Filed 4-9-08; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2008-N-0202] (formerly Docket No. 2008N-0009)

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Customer/Partner Service Surveys

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by May 12, 2008.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202-395-6974, or e-mailed to baguilar@omb.eop.gov. All comments should be identified with the OMB control number 0910-0360. Also include the FDA docket number found

in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT:

Jonna Capezzuto, Office of the Chief Information Officer (HFA-250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-4659.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Customer/Partner Service Surveys—(OMB Control Number 0910-0360)—Extension

Under section 903 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 393), FDA is authorized to conduct research and public information programs about regulated products and responsibilities of the agency. Executive

Order 12862, entitled “Setting Customer Service Standard,” directs Federal agencies that “provide significant services directly to the public” to “survey customers to determine the kind and quality of services they want and their level of satisfaction with existing services.” FDA is seeking OMB clearance to conduct a series of surveys to implement Executive Order 12862. Participation in the surveys is voluntary. This request covers customer/partner service surveys of regulated entities, such as food processors; cosmetic drug, biologic and medical device manufacturers; consumers; and health professionals. The request also covers “partner” (State and local governments) customer service surveys.

FDA will use the information from these surveys to identify strengths and weaknesses in service to customers/

partners and to make improvements. The surveys will measure timeliness, appropriateness and accuracy of information, courtesy, and problem resolution in the context of individual programs.

FDA estimates conducting 15 customer/partner service surveys per year, each requiring an average of 18 minutes for review and completion. We estimate respondents to these surveys to be between 50 and 6,000 customers. Some of these surveys will be repeats of earlier surveys for purposes of monitoring customer/partner service and developing long-term data.

In the **Federal Register** of January 24, 2008 (73 FR 4234), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN¹

Type of Survey	No. of Respondents	Annual Frequency per Response	Hours per Response	Total Hours
Mail, telephone, fax, web-based	15,000	1	.30	4,500

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: April 4, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8-7640 Filed 4-9-08; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2008-D-0205] (formerly Docket No. 2004D-0465)

Guidance for Food and Drug Administration Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control Information for Human Gene Therapy Investigational New Drug Applications; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a document entitled “Guidance for FDA Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control (CMC) Information for Human Gene Therapy Investigational New Drug Applications (INDs),” dated April 2008.

The guidance document provides to sponsors recommendations on the CMC information to include in an original IND for human gene therapy. In addition, the guidance provides instructions to FDA reviewers about the information to record and assess as part of the IND review. The guidance document announced in this notice finalizes the draft guidance of the same title dated November 2004.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Office of Communication, Training, and Manufacturers Assistance (HFM-40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852-1448. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1-800-835-4709 or 301-827-1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit written comments on the guidance to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit

electronic comments to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Tami Belouin, Center for Biologics Evaluation and Research (HFM-17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852-1448, 301-827-6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a document entitled “Guidance for FDA Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control (CMC) Information for Human Gene Therapy Investigational New Drug Applications (INDs),” dated April 2008. The guidance document provides to sponsors of a human gene therapy IND recommendations on the CMC information to include in an original IND. In addition, the guidance provides instructions to FDA reviewers about the information to record and assess as part of the IND review. This guidance will help sponsors and FDA reviewers to assess, given the phase of the investigation, whether sufficient information is provided to assure the proper identification, quality, purity, and potency of the investigational product.

In the **Federal Register** of November 9, 2004 (69 FR 64958), FDA announced

the availability of the draft guidance of the same title. FDA received several comments on the draft guidance and FDA considered those comments when finalizing the guidance. In addition, we revised the guidance to clarify its applicability for sponsors. The guidance announced in this notice finalizes the draft guidance dated November 2004.

The guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents FDA's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR 211.100, 211.160, and 211.165(e) have been approved under OMB Control No. 0910–0139; 21 CFR 312.23(a) and (b), 312.32(c), and Form FDA 1571 have been approved under OMB Control No. 0910–0014; and 21 CFR part 1271 has been approved under OMB Control No. 0910–0559.

III. Comments

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IV. Electronic Access

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www.fda.gov/cber/guidelines.htm or <http://www.regulations.gov>.

Dated: April 2, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–7585 Filed 4–9–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0206] (formerly Docket No. 2003D–0349)

Guidance for Food and Drug Administration Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control Information for Human Somatic Cell Therapy Investigational New Drug Applications; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a document entitled “Guidance for FDA Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control (CMC) Information for Human Somatic Cell Therapy Investigational New Drug Applications (INDs)” dated April 2008. The guidance document provides to sponsors recommendations on the CMC information to include in an original IND for human somatic cell therapy. In addition, the guidance provides instructions to FDA reviewers about information to record and assess as part of the IND review. The guidance announced in this notice finalizes the draft guidance entitled “Guidance for Reviewers: Instructions and Template for Chemistry, Manufacturing, and Control Reviewers of Human Somatic Cell Therapy Investigational New Drug Applications” dated August 2003.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–

800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Tami Belouin, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a document entitled “Guidance for FDA Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control (CMC) Information for Human Somatic Cell Therapy Investigational New Drug Applications (INDs),” dated April 2008. The guidance document provides to sponsors of a human somatic cell therapy IND recommendations on the CMC information to include in an original IND. In addition, the guidance provides instructions to FDA reviewers about information to record and assess as part of the IND review. This guidance will help sponsors and FDA reviewers to assess, given the phase of the investigation, whether sufficient information is provided to assure the proper identification, quality, purity, and potency of the investigational product.

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used if such approach satisfies the requirements of the applicable statutes and regulations.

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This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR 211.100, 211.160, and 211.165(e) have been approved under OMB Control No. 0910–0139; 21 CFR 312.23(a) and (b), 312.32(c), and Form FDA 1571 have been approved under OMB Control No. 0910–0014; and 21 CFR part 1271 has been approved under OMB Control No. 0910–0559.

III. Comments

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

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IV. Electronic Access

Persons with access to the Internet may obtain the guidance at either <http://www.fda.gov/cber/guidelines.htm> or <http://www.regulations.gov>.

Dated: April 2, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–7588 Filed 4–9–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0165] (formerly Docket No. 2006D–0413)

Guidance for Industry on Blue Bird Medicated Feed Labels; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry (#181) entitled “Blue Bird Medicated Feed Labels.” This guidance provides new animal drug application (NADA) sponsors with the Center for Veterinary Medicine’s current thinking on what constitutes recommended content and format of representative labels for new animal drugs intended for use in the manufacture of medicated feeds.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests.

Submit written comments on this guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to <http://www.regulations.gov>. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT:

Dragan Momcilovic, Center for Veterinary Medicine (HFV–220), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–453–6856, e-mail: dragan.momcilovic@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of October 30, 2006 (71 FR 63328), FDA published a notice of availability for a draft guidance entitled “Draft Guidance for Industry: Blue Bird Medicated Feed Labels” giving interested persons until January 16, 2007, to comment on the draft guidance. FDA received several comments on the draft guidance and those comments were considered as the guidance was finalized. The guidance

announced in this notice finalizes the draft guidance dated October 30, 2006.

This Level 1 guidance is being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). This guidance represents the agency’s current thinking on the topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

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III. Comments

Submit written requests for single copies of the guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests.

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IV. Electronic Access

Persons with access to the Internet may obtain the guidance at either <http://www.fda.gov/cvm> or <http://www.regulations.gov>.

Dated: April 2, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8-7500 Filed 4-9-08; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on the draft guidance and those comments were considered as the guidance was finalized. The guidance announced in this notice finalizes the draft guidance dated October 30, 2006.

This Level 1 guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). This guidance represents the agency's current thinking on the topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

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III. Comments

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comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

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Dated: April 2, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8-7500 Filed 4-9-08; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on the draft guidance for Food and Drug Administration Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control (CMC) Information for Human Gene Therapy Investigational New Drug Applications; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a document entitled "Guidance for FDA Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control (CMC) Information for Human Gene Therapy Investigational New Drug Applications (INDs)," dated April 2008. The guidance document provides to sponsors recommendations on the CMC information to include in an original IND for human gene therapy. In addition, the guidance provides instructions to FDA reviewers about the information to record and assess as part of the IND review. The guidance document announced in this notice finalizes the draft guidance of the same title dated November 2004.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Office of Communication, Training, and Manufacturers Assistance (HFM-40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852-1448. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1-800-835-4709 or 301-827-1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

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FOR FURTHER INFORMATION CONTACT:

Tami Belouin, Center for Biologics Evaluation and Research (HFM-17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852-1448, 301-827-6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a document entitled "Guidance for FDA Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control (CMC) Information for Human Gene Therapy Investigational New Drug Applications (INDs)," dated April 2008. The guidance document provides to sponsors of a human gene therapy IND recommendations on the CMC information to include in an original IND. In addition, the guidance provides instructions to FDA reviewers about the information to record and assess as part of the IND review. This guidance will help sponsors and FDA reviewers to assess, given the phase of the investigation, whether sufficient information is provided to assure the proper identification, quality, purity, and potency of the investigational product.

In the **Federal Register** of November 9, 2004 (69 FR 64958), FDA announced the availability of the draft guidance of the same title. FDA received several comments on the draft guidance and FDA considered those comments when finalizing the guidance. In addition, we revised the guidance to clarify its applicability for sponsors. The guidance announced in this notice finalizes the draft guidance dated November 2004.

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Dated: April 2, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–7585 Filed 4–9–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0206] (formerly Docket No. 2003D–0349)

Guidance for Food and Drug Administration Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control (CMC) Information for Human Somatic Cell Therapy Investigational New Drug Applications; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a document entitled “Guidance for FDA Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control (CMC) Information for Human Somatic Cell Therapy Investigational New Drug Applications (INDs)” dated April 2008. The guidance document provides to sponsors recommendations on the CMC information to include in an original IND for human somatic cell therapy. In addition, the guidance provides instructions to FDA reviewers about information to record and assess as part of the IND review. The guidance announced in this notice finalizes the draft guidance entitled “Guidance for Reviewers: Instructions and Template for Chemistry, Manufacturing, and Control Reviewers of Human Somatic Cell Therapy Investigational New Drug Applications” dated August 2003. **DATES:** Submit written or electronic comments on agency guidances at any time.

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FOR FURTHER INFORMATION CONTACT:

Tami Belouin, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

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Dated: April 2, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8-7588 Filed 4-9-08; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2008-D-0165] (formerly Docket No. 2006D-0413)

Guidance for Industry on Blue Bird Medicated Feed Labels; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry (#181) entitled "Blue Bird Medicated Feed Labels." This guidance provides

new animal drug application (NADA) sponsors with the Center for Veterinary Medicine's current thinking on what constitutes recommended content and format of representative labels for new animal drugs intended for use in the manufacture of medicated feeds.

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ADDRESSES: Submit written requests for single copies of the guidance to the Communications Staff (HFV-12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests.

Submit written comments on this guidance to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to <http://www.regulations.gov>. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT:

Dragan Momcilovic, Center for Veterinary Medicine (HFV-220), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240-453-6856, e-mail: dragan.momcilovic@fda.hhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of October 30, 2006 (71 FR 63328), FDA published a notice of availability for a draft guidance entitled "Draft Guidance for Industry: Blue Bird Medicated Feed Labels" giving interested persons until January 16, 2007, to comment on the draft guidance. FDA received several comments on the draft guidance and those comments were considered as the guidance was finalized. The guidance announced in this notice finalizes the draft guidance dated October 30, 2006.

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collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The collections of information in 21 CFR 514.1(b)(3) have been approved under OMB control number 0910-0032.

III. Comments

Submit written requests for single copies of the guidance to the Communications Staff (HFV-12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests.

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individual proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104-13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer on (301) 443-1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information shall have practical utility; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Proposed Project: Health Education Assistance Loan (HEAL) Program: Lender's Application for Insurance Claim Form and Request for Collection Assistance Form (OMB No. 0915-0036)—Extension

The HEAL program provided federally insured loans to students in certain health professions to pay for their educational costs. HEAL Lenders use the Lender's Application for Insurance Claim to request payment from the Federal Government for

federally insured loans lost due to borrower's death, disability, bankruptcy, or default. The Request for Collection

Assistance form is used by HEAL lenders to request Federal assistance

with the collection of delinquent payments from HEAL borrowers. The burden estimates are as follows:

Form	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Lender's Application for Insurance Claim Form 510	17	25	425	.5	213
Request for Collection Assistance Form 513	17	550	9,350	.167	1,561
Total	17		9,775		1,774

Send comments to Susan G. Queen, PhD, HRSA Reports Clearance Officer, Room 10-33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: April 7, 2008.

Alexandra Huttinger,
Director, Division of Policy Review and Coordination.

[FR Doc. E8-7634 Filed 4-9-08; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

"Low Income Levels" Used for Various Health Professions and Nursing Programs Included in Titles III, VII, and VIII of the Public Health Service Act

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Health Resources and Services Administration (HRSA) is updating income levels used to identify a "low income family" for the purpose of determining eligibility for programs that provide health professions and nursing training for individuals from disadvantaged backgrounds. These various programs are included in Titles III, VII, and VIII of the Public Health Service Act.

The Department periodically publishes in the **Federal Register** low income levels used to determine eligibility for grants and cooperative agreements to institutions providing training for (1) Disadvantaged individuals, (2) individuals from disadvantaged backgrounds, or (3) individuals from "low income" families.

SUPPLEMENTARY INFORMATION: The various health professions and nursing grant and cooperative agreement programs that use the low-income levels to determine whether an individual is from an economically disadvantaged

background in making eligibility and funding determinations generally make awards to: Accredited schools of medicine, osteopathic medicine, public health, dentistry, veterinary medicine, optometry, pharmacy, allied health podiatric medicine, nursing, chiropractic, public or private nonprofit schools which offer graduate programs in behavioral health and mental health practice, and other public or private nonprofit health or education entities to assist the disadvantaged to enter and graduate from health professions and nursing schools. Some programs provide for the repayment of health professions or nursing education loans for disadvantaged students.

Low Income Levels

The Secretary defines a "low income family" for programs included in Titles III, VII, and VIII of the Public Health Service Act as having an annual income that does not exceed 200 percent of the Department's poverty guidelines. A "family" is a group of two or more individuals related by birth, marriage, or adoption who live together or an individual who is not living with any relatives. Most HRSA programs use the income of the student's parents to compute low income status, while a few programs, depending upon the legislative intent of the program, programmatic purpose of the low income level, as well as the age and circumstances of the average participant, will use the student's family as long as he or she is not listed as a dependent upon the parents' tax form. Each program will announce the rationale and choice of methodology for determining low income levels in their program guidance. The Department's poverty guidelines are based on poverty thresholds published by the U.S. Bureau of the Census, adjusted annually for changes in the Consumer Price Index.

The Secretary annually adjusts the low income levels based on the Department's poverty guidelines and makes them available to persons responsible for administering the applicable programs. The income

figures below have been updated to reflect increases in the Consumer Price Index through December 31, 2007.

Size of parents' family *	Income level **
1	\$20,800
2	28,000
3	35,200
4	42,400
5	49,600
6	56,800
7	64,000
8	71,200

* Includes only dependents listed on Federal income tax forms. Some programs will use the student's family rather than his or her parents' family.

** Adjusted gross income for calendar year 2007.

Dated: April 2, 2008.

Elizabeth M. Duke,

Administrator.

[FR Doc. E8-7579 Filed 4-9-08; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Committee on Interdisciplinary, Community-Based Linkages; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given of the following meeting:

Name: Advisory Committee on Interdisciplinary, Community-Based Linkages (ACICBL).

Dates and Times: May 7, 2008, 8:30 a.m. to 5 p.m.; May 9, 2008, 8:30 a.m. to 3 p.m.

Place: Hilton Washington DC/Rockville Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852, Telephone: 301-468-1100.

Status: The meeting will be open to the public.

Purpose: The Committee will focus on rural issues and how the Title VII Interdisciplinary, Community-Based Training Grant Programs identified under sections 751-756, Part D of the Public Health Service

Act can respond to the current rural healthcare workforce needs. The Committee has invited speakers to highlight various topics related to rural healthcare workforce issues including, but not limited to, discipline specific shortages; recruitment and retention; health professions training; faculty development; telemedicine; and other specific rural health care issues. The meeting will afford committee members with the opportunity to identify and discuss the current status of the healthcare workforce in rural America and formulate appropriate recommendations to the Secretary and to the Congress regarding a variety of training strategies to address the health workforce shortage issues.

Agenda: The ACICBL agenda includes an overview of the Committee's general business activities, presentations by experts on rural healthcare workforce related issues, and discussion sessions specific for the development of recommendations to be addressed in the Eighth Annual ACICBL Report.

Agenda items are subject to change as dictated by the priorities of the Committee.

Supplementary Information: The ACICBL will join the Council on Graduate medical Education (COGME), the National Advisory Council on Nurse Education and Practice (NACNEP), and the Advisory Committee on Training in Primary Care Medicine and Dentistry (ACTPCMD) on May 8, 2008, for the first Bureau of Health Professions (BHPr) All Advisory Committee Meeting. Please refer to the **Federal Register** notice for the BHPr All Advisory Committee Meeting for additional details.

For Further Information Contact: Anyone requesting information regarding the ACICBL should contact Louis D. Coccodrilli, Designated Federal Official for the ACICBL, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Rm 9-05, 5600 Fishers Lane, Rockville, Maryland 20857, (301) 443-6950 or lcoccodrilli@hrsa.gov. Additionally, Adriana Guerra, Public Health Fellow, can be contacted at (301) 443-6194 or aguerra@hrsa.gov.

Dated: April 3, 2008.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E8-7586 Filed 4-9-08; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Committee on Training in Primary Care Medicine and Dentistry; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given of the following meeting:

Name: Advisory Committee on Training in Primary Care, Medicine and Dentistry (ACTPCMD).

Date and Time: May 7, 2008, 8:30 a.m.-4:30 p.m.

Place: Hilton Washington, DC/Rockville Executive Meeting Center, 1750 Rockville Pike, Rockville, Maryland 20852.

Status: The meeting will be open to the public.

Purpose: The Advisory Committee provides advice and recommendations on a broad range of issues dealing with programs and activities authorized under section 747 of the Public Health Service Act as amended by The Health Professions Education Partnership Act of 1998, Public Law 105-392. At this meeting, the Advisory Committee will finish work on its seventh report on the topic of primary care providing a medical/dental home within the health care system and choose a topic for its eighth report. Reports are submitted to Congress and to the Secretary of the Department of Health and Human Services.

Agenda: The meeting on Wednesday, May 7, will begin with opening comments from the Chair of the Advisory Committee and introductory remarks from senior management of the Health Resources and Services Administration. In the plenary session, the Advisory Committee will review and revise various parts of the seventh report on primary care serving as a medical/dental home for individuals and communities. It will give final approval to the report recommendations. On Wednesday afternoon, the Committee will discuss various topics and select a topic for its eighth report. It will determine next steps in the report preparation process. An opportunity will be provided for public comment.

Supplementary Information: The ACTPCMD will join the Council on Graduate Medical Education (COGME), the National Advisory Council on Nurse Education and Practice (NACNEP), and the Advisory Committee on Interdisciplinary, Community-Based Linkages (ACICBL) on May 8, 2008, for the first Bureau of Health Professions (BHPr) All Advisory Committee Meeting. Please refer to the **Federal Register** notice for the BHPr All Advisory Committee Meeting for additional details.

For Further Information Contact: Anyone interested in obtaining a roster of members or other relevant information should write or contact Jerilyn K. Glass, M.D., PhD, Division of Medicine and Dentistry, Bureau of Health Professions, Health Resources and Services Administration, Room 9A-27, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443-6785. The Web address for information on the Advisory Committee is <http://bhpr.hrsa.gov/medicine-dentistry/actpcmd>.

Dated: April 3, 2008.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E8-7590 Filed 4-9-08; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Bureau of Health Professions; All Advisory Committee Meeting; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given of the following meeting:

Name: Bureau of Health Professions All Advisory Committee Meeting (AACM).

Dates and Times: May 8, 2008, 8:30 a.m.-4 p.m.

Place: Hilton Washington DC/Rockville Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852, Telephone: 301-468-1100.

Status: The meeting will be open to the public.

Purpose: The purpose of the meeting is to provide a venue for the Bureau of Health Professions' (BHPr) four advisory committees [the Council on Graduate Medical Education (COGME), the Advisory Committee on Training in Primary Care Medicine and Dentistry (ACTPCMD), the Advisory Committee on Interdisciplinary, Community-Based Linkages (ACICBL), and the National Advisory Council on Nurse Education and Practice (NACNEP)] to discuss common issues, including health professions workforce supply and demand, training and diversity, and the impact on access to primary care. The product of this meeting will be a report highlighting activities, recommendations and presentations.

Agenda: The AACM agenda will include Agency and Bureau administrative updates, cross-sharing of recommendations and committee activities, presentations from experts in interdisciplinary collaboration and the advisory committee recommendation process, and proposals for future advisory committee collaboration.

Agenda items are subject to change as priorities dictate.

For Further Information Contact: Anyone interested in obtaining a roster of members, minutes of the meeting, or other relevant information can contact Erica Pearson, MPH, Bureau of Health Professions, Office of the Associate Administrator, Health Resources and Services Administration, 5600 Fishers Lane, Room 8-15, Rockville, Maryland 20857, telephone (301) 443-8419. Information can also be found at the following Web site: <http://bhpr.hrsa.gov/>.

Dated: April 3, 2008.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E8-7576 Filed 4-9-08; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Health Resources and Services Administration****Council on Graduate Medical Education; Notice of Meeting**

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given of the following meeting:

Name: Council on Graduate Medical Education (COGME).

Dates and Times: May 9, 2008, 8:15 a.m.–3:15 p.m.

Place: Hilton Washington DC/Rockville Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852, Telephone: 301-468-1100.

Status: The meeting will be open to the public.

Agenda: On the morning of May 9, following the welcoming remarks from the COGME Chair and the Executive Secretary of COGME, there will be presentations and discussion of studies and models that link income and reimbursement to medical career choice. A presentation will also be given from staff of the Medicare Payment Advisory Commission (MEDPAC) on issues of interest to COGME.

Agenda items are subject to change as priorities dictate.

Supplementary Information: COGME will join the Advisory Committee on Training in Primary Care Medicine and Dentistry (ACTPCMD), the National Advisory Council on Nurse Education and Practice (NACNEP) and the Advisory Committee on Interdisciplinary, Community-Based Linkages (ACICBL) on May 8, 2008, for the first Bureau of Health Professions (BHP) All Advisory Committee Meeting. Please refer to the **Federal Register** notice for the BHP All Advisory Committee Meeting for additional details.

For Further Information Contact: Jerald M. Katzoff, Executive Secretary, COGME, Division of Medicine and Dentistry, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 9A-21, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443-4443.

Dated: April 3, 2008.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E8-7573 Filed 4-9-08; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Health Resources and Services Administration****National Advisory Council on Nurse Education and Practice; Notice of Meeting**

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given of the following meeting:

Name: National Advisory Council on Nurse Education and Practice (NACNEP).

Dates and Times: May 6, 2008, 8:30 a.m.–4:30 p.m. May 7, 2008, 8:30 a.m.–4 p.m.

Place: Hilton Washington DC/Rockville Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852, Telephone: 301-468-1100.

Status: The meeting will be open to the public.

Purpose: The purpose of the meeting is to examine the nursing curricula of the different levels of basic registered nursing education (associate degree, diploma and baccalaureate degree). The objectives of the meeting are to understand similarities and differences in the nursing curricula and the effectiveness of the curricula in preparing the 21st century nursing student for professional practice. This meeting is a continuation of the meeting that was held November 2007 in which the NACNEP examined issues regarding nursing education in relation to teaching and learning strategies and the needs of employers.

Agenda: Agency and Bureau administrative updates will be provided. During this meeting, the NACNEP council members will deliberate as workgroups on the content presented and formulate recommendations to the Secretary of Health and Human Services and the Congress on the nursing curricula for the different levels of basic registered nursing education. Members from the professional nursing accreditation bodies, the state board of nursing and experts in the field of quality and safety education for nurses will provide information to assist the NACNEP in formulating and making their recommendations. This meeting and the meeting held November 2007 will form the basis for NACNEP's mandated Eighth Annual Report.

Agenda items are subject to change as dictated by the priorities of the Committee.

Supplementary Information: The NACNEP will join the Council on Graduate Medical Education (COGME), the Advisory Committee on Training in Primary Care Medicine and Dentistry (ACTPCMD), and the Advisory Committee on Interdisciplinary, Community-Based Linkages (ACICBL) on May 8, 2008, for the first Bureau of Health Professions (BHP) All Advisory Committee Meeting. Please refer to the **Federal Register** notice for the BHP All Advisory Committee Meeting for additional details.

For Further Information Contact: Anyone interested in obtaining a roster of members, minutes of the meeting, or other relevant information can contact Nancy Douglas-Kersellius, Acting Executive Secretary,

National Advisory Council on Nurse Education and Practice, Health Resources and Services Administration, Parklawn Building, Room 9-36, 5600 Fishers Lane, Rockville, Maryland 20857, telephone (301) 443-5688. Information can also be found at the following Web site: <http://bhpr.hrsa.gov/nursing/nacnep.htm>.

Dated: April 3, 2008.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E8-7591 Filed 4-9-08; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Health Resources and Services Administration****Privacy Act of 1974; System of Records**

AGENCY: Health Resources and Services Administration (HRSA), HHS.

ACTION: Notification of an Altered System of Records.

SUMMARY: In accordance with the requirements of the Privacy Act, the Health Resources and Services Administration (HRSA) is publishing notice of a proposal to alter the system of records for Organ Procurement and Transplantation Network (OPTN)/Scientific Registry of Transplant Recipients (SRTR) Data System. This system of records is required to comply with the implementation directives of Public Law 109-129.

HRSA published in the **Federal Register** of September 8, 2003, a document concerning notice of a new system of records, 09-15-0055, Organ Procurement and Transplantation Network (OPTN)/Scientific Registry of Transplant Recipients (SRTR) Data System, 68 FR 52950. This document more fully explains the routine uses of records maintained in the system and amends the records' purpose and routine uses of records maintained in the system. Accordingly, the notice is published below in its entirety, as amended.

DATES: Persons wishing to comment on this revised system of records notice may do so until May 12, 2008. Unless there is a further notice in the **Federal Register**, this revised system of records will become effective on May 20, 2008.

ADDRESSES: Please address comments to: HRSA Privacy Act Officer, Alexandra Huttinger (Acting), 5600 Fishers Lane, Room 14A-11, Rockville, Maryland 20857; telephone (301) 443-1785; or e-mail ahuttinger@hrsa.gov. This is not

a toll-free number. Comments received will be available for inspection at this same address from 9 a.m. to 3 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT:

James F. Burdick, M.D., Director, Division of Transplantation, HSB, HRSA, 5600 Fishers Lane, Room 12C-06, Rockville, Maryland 20857; telephone (301) 443-7577; fax (301) 594-6095; or e-mail: jburdick@hrsa.gov. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: The system of records, 09-15-0055, Organ Procurement and Transplantation Network (OPTN)/Scientific Registry of Transplant Recipients (SRTR) Data System. Accordingly, is published below in its entirety, as amended.

09-15-0055

SYSTEM NAME:

Organ Procurement and Transplantation Network (OPTN)/Scientific Registry of Transplant Recipients (SRTR) Data System, HHS/HRSA/HSB/DoT (system of records, 09-15-0055).

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Data collected by the OPTN are maintained by the OPTN contractor and shared on a monthly basis with the contractor for the SRTR and the DoT, within HRSA, the Federal entity that oversees the OPTN and SRTR contracts.

OPTN Contractor: United Network for Organ Sharing (UNOS), P.O. Box 2484, 700 North Fourth Street, Richmond, Virginia 23218.

SRTR Contractor: Arbor Research Collaborative for Health (ARCH), 315 West Huron, Suite 360, Washtenaw County, Ann Arbor, Michigan, 48103.

Division of Transplantation: Healthcare Systems Bureau, HRSA, Parklawn Building, Room 12C-06, 5600 Fishers Lane, Rockville, Maryland 20857.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

1. Living and deceased persons from whom organs have been obtained for transplantation.
2. Persons who are candidates for organ transplantation.
3. Persons who have been recipients of transplanted organs.

CATEGORIES OF RECORDS IN THE SYSTEM:

Donor registration, transplant candidate registration, transplant recipient registration, histocompatibility, transplant recipient follow-up and living donor follow-up,

forms and other non-registry operational information. Data items include: Name, Social Security number, identifiers assigned by OPTN and SRTR contractors, hospital and hospital provider number, State and zip code of residence, citizenship, race/ethnicity, gender, date and time of organ recovery and transplantation, name of transplant center, histocompatibility status, donor medical information and, if donor is deceased, cause of death, patient medical information before and after transplantation, immunosuppressive medication, cause of death (if recipient is deceased), health care coverage, employment and education level.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 274 requires that the Secretary, by contract, provide for the establishment and operation of an OPTN, and 42 U.S.C. 274a requires that the Secretary, by grant or contract, develop and maintain a Scientific Registry of the recipients of organ transplants. 42 CFR part 121 authorizes collection of the information included in this system by the OPTN.

PURPOSE(S):

To (1) facilitate organ placement and match donor organs with recipients; (2) monitor compliance of member organizations with Federal laws and regulations and with OPTN requirements; (3) review and report periodically to the public on the status of organ donation and transplantation in the United States; (4) provide data to researchers and government agencies to study the scientific and clinical status of organ transplantation; (5) perform transplantation-related public health surveillance including possible transmission of donor disease.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

1. Departmental contractors and/or their subcontractors who have been engaged by the Department to assist in accomplishment of a departmental function relating to the purposes for this system of records and who require access to the records in order to assist the Department.
2. HRSA, independently and through its contractor(s), may disclose records regarding organ donors, organ transplant candidates, and organ transplant recipients to other HHS entities, transplant centers, histocompatibility laboratories, organ procurement organizations, the Transplant Transmission Sentinel Network and other public health agencies such as SEER registries, NCI contractors, State

cancer registries and other State health agencies, provided that such disclosure is compatible with the purpose for which the records were collected, including: Matching donor organs with recipients, monitoring compliance of member organizations with Federal laws and regulations and OPTN requirements, reviewing and reporting periodically to the public on the status of organ donation and transplantation in the United States, and transplantation-related public health surveillance. These records consist of Social Security numbers, other patient identification information and pertinent medical information.

3. In the event of litigation where the defendant is (a) the Department, any component of the Department, or any employee of the Department in his or her official capacity; (b) the United States where the Department determines that the claim, if successful, is likely to affect directly the operation of the Department or any of its components; or (c) any Department employee in his or her individual capacity where the Department of Justice has agreed to represent such employee, for example, in defending a claim against the Public Health Service in connection with such individual, disclosure may be made to the Department of Justice to enable the Department to present an effective defense.

4. Disclosure may be made to a congressional office from the record of an individual in response to a verified inquiry from the congressional office made at the written request of that individual.

5. A record may be disclosed for a research purpose, when the Department, independently or through its contractor(s):

- a. Has determined that the use or disclosure does not violate legal or policy limitations under which the record was provided, collected, or obtained;
- b. Has determined that a bona fide research/analysis purpose exists;
- c. Has required the data recipient to:
 - (1) Establish strict limitations concerning the receipt and use of patient-identified or center-identified data;
 - (2) establish reasonable administrative, technical, and physical safeguards to protect the confidentiality of the data and to prevent the unauthorized use or disclosure of the record;
 - (3) remove, destroy, or return the information that identifies the individual or center at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the research project, unless the data recipient has presented

adequate justification of a research or health nature for retaining such information; and (4) make no further use or disclosure of the record except as authorized by HRSA or its contractor(s) or when required by law;

d. has determined that other applicable safeguards or protocols will be followed; and

e. has secured a written statement attesting to the data recipient's understanding of, and willingness to abide by these provisions.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in file folders, magnetic tapes, and disc packs.

SAFEGUARDS:

1. Authorized users: Access is limited to authorized HRSA and contract personnel responsible for administering the program. Authorized personnel include the System Manager and Project Officer, and the HRSA Automated Information System (AIS) Systems Security Officer; and the program managers/program specialists who have responsibilities for implementing the program. Both HRSA and its contractor(s) shall maintain current lists of authorized users.

2. Physical safeguards: Magnetic tapes, disc packs, computer equipment, and hard-copy files are stored in areas where fire and life safety codes are strictly enforced. All automated and nonautomated documents are protected on a 24-hour basis in locked storage areas. Security guards perform random checks on the physical security of the records storage area. The OPTN and SRTR contractors are required to maintain off site a complete copy of the system and all necessary files to run the computer organ donor-recipient match and update software.

3. Procedural safeguards: A password is required to access the terminal and a data set name controls the release of data to only authorized users. All users of personal information in connection with the performance of their jobs protect information from public view and from unauthorized personnel entering an unsupervised office. All authorized users must sign a nondisclosure statement. Access to records is limited to those staff members trained in accordance with the Privacy Act and Automated Data Processing (ADP) security procedures. The contractor(s) is required to assure that the confidentiality safeguards of these records will be employed and that it complies with all provisions of the

Privacy Act. All individuals who have access to these records must have the appropriate ADP security clearances. Privacy Act and ADP system security requirements are included in the contracts. The HRSA Project Officer(s) and the System Manager(s) oversee compliance with these requirements. The HRSA authorized users will make visits to the contractors' facilities to assure security and Privacy Act compliance. The contractor(s) is/are required to adhere to a HRSA approved system security plan.

RETENTION AND DISPOSAL:

Each donor, candidate, and recipient record stored within the OPTN/SRTR Data System shall be retained for no more than 25 years beyond the known death of the candidate or the organ recipient.

SYSTEM MANAGER AND ADDRESS:

Chief, Operations and Analysis Branch, Division of Transplantation, HSB/HRSA, Parklawn Building, Room 12C-06, 5600 Fishers Lane, Rockville, MD 20857.

NOTIFICATION PROCEDURE:

Requests by mail: To determine if a record about you exists, write to the OPTN contractor (see System Location). The request should contain the name and address of the individual; the Social Security number if the individual chooses to provide it; the name of his/her transplant center, a notarized written statement that the requester is the person he/she claims to be and that he/she understands that the request or acquisition of records pertaining to another individual under false pretenses is a criminal offense subject to a \$5,000 fine. These procedures are in accordance with the Department's regulations (45 CFR part 5b).

Requests in person: The individual must meet all the requirements stated above for a request by mail, providing the information in written form, or provide at least one piece of tangible identification. The individual should recognize that in order to maintain confidentiality, and thus the accuracy of data released through repeated internal verification, securing the information by request in person will be time consuming. These procedures are in accordance with the Department's regulations (45 CFR part 5b).

Requests by Telephone: Since positive identification of the caller cannot be established, telephone requests are not honored.

RECORD ACCESS PROCEDURES:

These are the same as notification procedures. Requestors should also

provide a reasonable description of the record being sought. Requestors also may request an accounting of disclosures that have been made of their records, if any. A parent or guardian who requests notification of, or access to, a minor's/incompetent person's medical record shall designate a family physician or other health professional (other than a family member) to whom the record, if any, will be sent. The parent or guardian must verify relationship to the minor/incompetent person as well as his/her own identity. These procedures are in accordance with the Department's regulations (45 CFR part 5b).

CONTESTING RECORDS PROCEDURES:

To contest a record in the system, contact the official at the address specified under notification procedure above and reasonably identify the record, specify the information being contested, and the corrective action sought, and your reasons for requesting the correction, along with supporting information to show how the record is inaccurate, incomplete, untimely, or irrelevant.

RECORD SOURCE CATEGORIES:

Organ procurement organizations, histocompatibility laboratories, and organ transplant centers.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

Dated: April 2, 2008.

Elizabeth M. Duke,
Administrator.

[FR Doc. E8-7632 Filed 4-9-08; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Statement of Organization, Functions and Delegations of Authority

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Correction of Chapter RP title.

SUMMARY: The Health Resources and Services Administration published a Statement of Organization, Functions and Delegations of Authority document in the **Federal Register** of March 10, 2008 (73 FR 12742), regarding the Bureau of Health Professions. In section heading RP, Office of the Administrator, the title was incorrect.

Correction

In the **Federal Register** issue of March 10, 2008 (73 FR 12742), correct the section heading Chapter RP, Office of the Administrator as follows:

Chapter RP, Office of the Associate Administrator

Dated: April 3, 2008.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E8-7581 Filed 4-9-08; 8:45 am]

BILLING CODE 4165-15-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Institute of Neurological Disorders and Stroke; Notice of Meeting**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Neurological Disorders and Stroke Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set 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 Advisory Neurological Disorders and Stroke Council.
Date: May 29-30, 2008.

Open: May 29, 2008, 10:30 a.m. to 5 p.m.

Agenda: Report by the Director, NINDS; Report by the Director, Division of Extramural Research, and other administrative and program developments.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Closed: May 30, 2008, 8 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Contact Person: Robert Finkelstein, PhD, Associate Director for Extramural Research, National Institute of Neurological Disorders and Stroke, NIH, 6001 Executive Blvd., Suite 3309, MSC 9531, Bethesda, MD 20892, (301) 496-9248.

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://www.ninds.nih.gov>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: April 3, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8-7556 Filed 4-9-08; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Human Genome Research Institute; 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: Center for Inherited Disease Research Access Committee.

Date: May 1-2, 2008.

Time: 7 p.m. to 4 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: Camilla E. Day, PhD, Scientific Review Officer, CIDR, National Human Genome Research Institute, National Institutes of Health, 5635 Fishers Lane, Suite 4075, Bethesda, MD 20892, (301) 402-0838, cd19s@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: April 3, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8-7554 Filed 4-9-08; 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 Mechanisms, Diagnosis and Treatment of Radiation Injury from a Nuclear Accident or Terrorist Attack.

Date: May 5-7, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza Washington DC—Silver Spring, 8777 Georgia Avenue, Lincoln Room, Silver Spring, MD 20910.

Contact Person: Thames E. Pickett, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892-7616, 301-496-2550, pickettte@niaid.nih.gov.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel Loan Repayment Program, (Meeting 2).

Date: May 8–9, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications, and/or proposals.

Place: National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Bethesda, MD 20817. (Virtual Meeting)

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 20892–7616, 301–496–2550, qvoss@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: April 3, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–7527 Filed 4–9–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; 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 Biomedical Imaging and Bioengineering, Special Emphasis Panel Training.

Date: July 16, 2008.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, 242, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Ruth Grossman, DDS, Scientific Review Administrator, National Institutes of Biomedical Imaging and Bioengineering, 6707 Democracy Boulevard, Room 960, Bethesda, MD 20892, (301) 496–8775, grossmanrs@mail.nih.gov.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering, Special Emphasis Panel, Tissue Engineering.

Date: July 17, 2008

Time: 11 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, 223, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: John K. Hayes, PhD, Scientific Review Officer, 6707 Democracy Blvd., Suite 959, Democracy Two, Bethesda, MD 20892, (301) 451–3398, hayesj@mail.nih.gov.

Dated: April 3, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–7528 Filed 4–9–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Deafness and Other Communication Disorders Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set 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 Deafness and Other Communication Disorders, Advisory Council.

Date: May 30, 2008.

Closed: 8:30 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Bethesda, MD 20892.

Open: 11 a.m. to 2:30 p.m.

Agenda: Staff reports on divisional, programmatic, and special Activities.

Place: National Institutes of Health, Building 31, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Craig A. Jordan, PhD, Director, Division of Extramural Activities, NIDCD, NIH, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892–7180, 301–496–8693, jordanc@nidcd.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 Institutes/Center's home page: <http://www.nidcd.nih.gov/about/groups/ndcdac/>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: April 3, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–7532 Filed 4–9–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 Neurological Disorders and Stroke, Special Emphasis Panel Review of NINDS PPGs on Neurodegeneration.

Date: April 24, 2008.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: W. Ernest Lyons, PhD, Scientific Review Administrator, Scientific Review Branch NINDS/NIH/DHHS Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529 Bethesda, MD 20892–9529, 301–496–4056.

Name of Committee: National Institute of Neurological Disorders and Stroke, Special Emphasis Panel, Loan Repayment Program.

Date: April 30, 2008.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Joann McConnell, PhD, Scientific Review Administrator, Scientific Review Branch NIH/NINDS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529 Bethesda, MD 20892–9529, (301) 496–5324, mcconnel@ninds.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: April 3, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–7533 Filed 4–9–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1731–DR]

California; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of California (FEMA–1731–DR), dated October 24, 2007, and related determinations.

DATES: *Effective Date:* March 31, 2008.

FOR FURTHER INFORMATION CONTACT:

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective March 31, 2008.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–7593 Filed 4–9–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1746–DR]

Kentucky; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Kentucky (FEMA–1746–DR), dated February 21, 2008, and related determinations.

DATES: *Effective Date:* April 1, 2008.

FOR FURTHER INFORMATION CONTACT:

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the Commonwealth of Kentucky is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of February 21, 2008.

The counties of Harrison and Nicholas for Public Assistance (already designated for Individual Assistance.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8–7595 Filed 4–9–08; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1749–DR]

Missouri; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Missouri (FEMA–1749–DR), dated March 19, 2008, and related determinations.

EFFECTIVE DATE: April 1, 2008.

FOR FURTHER INFORMATION CONTACT:

Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Missouri is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of March 19, 2008.

The counties of Butler, Callaway, Cape Girardeau, Gasconade, Howard, Laclede, Madison, McDonald, Osage, Ripley, Scott, Shannon, St. Louis, Stoddard, Taney, and Webster for Individual Assistance (already designated for emergency protective measures [Category B], limited to direct Federal assistance, under the Public Assistance program.)

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidential Declared Disaster Areas; 97.049, Presidential Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidential Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

R. David Paulson,

Administrator, Federal Emergency Management Agency.

[FR Doc. E8-7594 Filed 4-9-08; 8:45 am]

BILLING CODE 9110-10-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of an Application for an Incidental Take Permit for Residential Construction in Charlotte County, FL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of an incidental take permit (ITP) and Habitat Conservation Plan (HCP). Peter Mosel (applicant) requests an ITP pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The applicant anticipates taking about 0.23 acre of Florida scrub-jay (*Aphelocoma coerulescens*) (scrub-jay) foraging and sheltering habitat incidental to lot preparation for the construction of a single-family residence and supporting infrastructure in Charlotte County, Florida (project). The applicant's HCP describes the mitigation and minimization measures proposed to address the effects of the project on the scrub-jay.

DATES: We must receive your written comments on the ITP application and HCP on or before May 12, 2008.

ADDRESSES: See the **SUPPLEMENTARY INFORMATION** section below for information on how to submit your comments on the ITP application and HCP. You may obtain a copy of the ITP application and HCP by writing the South Florida Ecological Services Office, Attn: Permit number TE172415-0, U.S. Fish and Wildlife Service, 1339

20th Street, Vero Beach, FL 32960-3559. In addition, we will make the ITP application and HCP available for public inspection by appointment during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Ms. Trish Adams, Fish and Wildlife Biologist, South Florida Ecological Services Office (see **ADDRESSES**); telephone: (772) 562-3909, ext. 232.

SUPPLEMENTARY INFORMATION: If you wish to comment on the ITP application and HCP, you may submit comments by any one of the following methods. Please reference permit number TE172415-0 in such comments.

1. Mail or hand-deliver comments to our South Florida Ecological Services Office address (see **ADDRESSES**).

2. E-mail comments to *trish_adams@fws.gov*. If you do not receive a confirmation that we have received your e-mail message, contact us directly at the telephone number listed under **FOR FURTHER INFORMATION CONTACT**.

Before including your address, phone number, e-mail address, or other personal identifying information in your comments, 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.

Single-family residential construction for the applicant's HCP will take place within Section 15, Township 40, Range 23, Punta Gorda, Charlotte County, Florida, at 27422 San Marco Drive. This lot is within scrub-jay-occupied habitat.

The lot encompasses about 0.23 acre, and the footprint of the single-family residence, infrastructure, and landscaping preclude retention of scrub-jay habitat on this lot. In order to minimize take on site, the applicant proposes to mitigate for the loss of 0.23 acre of scrub-jay habitat by purchasing 0.46 acre of Service approved mitigation land, purchasing 0.46 acre of credit at a Service approved scrub-jay conservation bank, or contributing \$12,190 to the Florida Scrub-jay Conservation Fund administered by The Nature Conservancy. Funds in this account are earmarked for use in the conservation and recovery of scrub-jays and may include habitat acquisition, restoration, and/or management.

We have determined that the applicant's proposal, including the proposed mitigation and minimization measures, will have a minor or

negligible effect on the species covered in the HCP. Therefore, the ITP is a "low-effect" project and qualifies as a categorical exclusion under the National Environmental Policy Act (NEPA), as provided by the Department of the Interior Manual (516 DM 2 Appendix 1 and 516 DM 6 Appendix 1). Low-effect HCPs are those involving (1) minor or negligible effects on federally listed or candidate species and their habitats and (2) minor or negligible effects on other environmental values or resources. Based on our review of public comments that we receive in response to this notice, we may revise this preliminary determination.

We will evaluate the HCP and comments submitted thereon to determine whether the application meets the requirements of section 10(a) of the Act (16 U.S.C. 1531 et seq.). If we determine that the application meets the requirements, we will issue the ITP for incidental take of the scrub-jay. We will also evaluate whether issuance of the section 10(a)(1)(B) ITP complies with section 7 of the Act by conducting an intra-Service section 7 consultation. We will use the results of this consultation, in combination with the above findings, in the final analysis to determine whether or not to issue the ITP.

Authority: We provide this notice pursuant to Section 10 of the Endangered Species Act (16 U.S.C. 1531 et seq.) and NEPA regulations (40 CFR 1506.6).

Dated: March 7, 2008.

Paul Souza,

Field Supervisor, South Florida Ecological Services Office.

[FR Doc. E8-7564 Filed 4-9-08; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R3-ES-2008-N0046; 30120-1113-0000 D3]

Post-Delisting Monitoring Plan for the Western Great Lakes Distinct Population Segment of the Gray Wolf (*Canis lupus*)

AGENCY: 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 Post-delisting Monitoring Plan for the Western Great Lakes Distinct Population Segment of the Gray Wolf (*Canis lupus*) (Monitoring Plan). The status of the Distinct Population Segment (DPS) will be monitored over a 5-year period from

2007 through 2012, through annual evaluation of information collected by three states, other partners, and the Service.

ADDRESSES: Copies of the Monitoring Plan are available by request from the Field Supervisor, U.S. Fish and Wildlife Service, 4101 E. 80th St., Bloomington, MN (telephone 612-725-3548; fax; 612-725-3609). This Monitoring Plan is also available on the World Wide Web at <http://www.fws.gov/midwest/wolf/pdm/>.

FOR FURTHER INFORMATION CONTACT: Phil Delphey, at the above Bloomington, MN address, or at phil_delphey@fws.gov, or at 612-725-3548, extension 206.

SUPPLEMENTARY INFORMATION:

Background

Section 4(g) of the Endangered Species Act (Act) instructs the Secretary to implement a system in cooperation with the states to monitor effectively for not less than five years the status of any species that is delisted due to recovery. The intent of this monitoring is to determine whether the species should be proposed for relisting under the normal listing procedures, relisted under the emergency listing authority of the Act, or kept off of the list because it remains neither threatened nor endangered. For the Western Great Lakes Distinct Population Segment of the Gray Wolf [71 FR15266; (March 27, 2006)], the Monitoring Plan focuses on reviewing and evaluating (1) Population characteristics of the DPS, (2) threats to the DPS, and (3) implementation of legal and management commitments that are important in reducing threats to the DPS or maintaining threats at sufficiently low levels.

For the delisted DPS, focusing the Monitoring Plan on these three aspects is necessary and sufficient to ensure that the DPS does not decrease to the point of again meeting the definition of threatened or endangered without an appropriate and timely response from the Service. Winter and late-winter estimates of wolf populations in Minnesota, Wisconsin, and Michigan have demonstrated that wolves in the DPS have surpassed their numerical recovery criteria for a sufficient period due to a reduction in threats over the last 25 years. The protection and management of wolves by states, tribes, and federal land management agencies will be critical in conserving the DPS. Since delisting, state and tribal laws and regulations have become the primary mechanism to protect wolves from their primary former threat—excessive human-caused mortality.

The Monitoring Plan for the DPS will be focused within the borders of

Minnesota, Wisconsin, and the Upper Peninsula (UP) of Michigan, where wolf populations have attained the numerical recovery criteria specified in the Recovery Plan for the Eastern Timber Wolf. The delisting of the DPS was based on wolf recovery in those states. Therefore, it is not necessary to conduct intensive monitoring in other parts of the DPS. The Service is interested, however, in reviewing any data regarding the existence of individual wolves or wolf populations outside of the core recovery areas, especially in the Northern Lower Peninsula of Michigan. Additionally, the Service is interested in obtaining disease and parasite data from wolves found in other portions of the DPS that may suggest a new or increasing threat that may impact wolves in the core recovery areas.

On June 4, 2007, the Service announced the availability of its draft plan to monitor the WGLDPS of the Gray Wolf for public review and comment (72 FR 30819). After the comment period closed on July 5, 2007, the Service reviewed each comment received and prepared responses to substantive comments. The Service posted those comments and its responses on the internet—see <http://www.fws.gov/midwest/wolf/pdm/>.

Author

The primary author of this notice of document availability is Phil Delphey (see **FOR FURTHER INFORMATION CONTACT** section).

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

Dated: February 26, 2008.

Charlie Wooley,

Deputy Regional Director, Midwest Region.

[FR Doc. E8-7570 Filed 4-9-08; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA-6709-B, AA-6709-E, AA-6709-G, AA-6709-A2, AA-6709-B2; AK-964-1410-KC-P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Ounalashka Corporation. The

lands are in the vicinity of Unalaska, Alaska, and are located in:

U.S. Survey No. 8426, Alaska.

Containing 109.95 acres.

Seward Meridian, Alaska

T. 74 S., R. 116 W.,

Secs. 4, 5, and 8;

Secs. 9, 16, and 17;

Secs. 20, 28 and 29.

Containing approximately 2,470 acres.

T. 72 S., R. 118 W.,

Sec. 19.

Containing approximately 637 acres.

T. 72 S., R. 119 W.,

Secs. 3, 4, and 9;

Secs. 10, 15, and 16;

Secs. 22, 23, and 24.

Containing approximately 5,464 acres.

T. 73 S., R. 120 W.,

Secs. 4 to 7, inclusive;

Secs. 9, 16, 21, and 28;

Secs. 31, 32, and 33.

Containing approximately 6,955 acres.

T. 74 S., R. 120 W.,

Sec. 6, 7, and 18.

Containing approximately 1,855 acres.

Aggregating approximately 17,491 acres.

The subsurface estate in these lands will be conveyed to The Aleut Corporation when the surface estate is conveyed to Ounalashka Corporation. Notice of the decision will also be published four times in the Dutch Harbor Fisherman.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until May 12, 2008 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513-7504.

FOR FURTHER INFORMATION CONTACT: The Bureau of Land Management by phone at 907-271-5960, or by e-mail at ak.blm.conveyance@ak.blm.gov. Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8330, 24 hours a day, seven days a

week, to contact the Bureau of Land Management.

Hillary Woods,

Land Law Examiner, Land Transfer Adjudication I.

[FR Doc. E8-7584 Filed 4-9-08; 8:45 am]

BILLING CODE 4310--SS-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK-012-08-1220-DA-WSDL]

Notice of Intent To Prepare an Amendment to the East Alaska Resource Management Plan (EARMP) for the Delta River Special Recreation Management Area (SRMA)

AGENCY: Bureau of Land Management; Glennallen Field Office.

ACTION: Notice of Intent.

SUMMARY: The Bureau of Land Management (BLM), Glennallen Field Office, Alaska, intends to prepare a land use plan amendment for the East Alaska Resource Management Plan (EARMP). This amendment will address recreation management decisions in the Delta River Special Recreation Management Area (SRMA), as defined in the EARMP. The Delta River SRMA includes all portions of the Delta National Wild and Scenic River corridor managed by the BLM. This planning activity encompasses approximately 45,000 acres of unencumbered BLM-administered public lands. The plan amendment will fulfill the needs and obligations set forth by the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), the Wild and Scenic Rivers Act, and BLM management policies. The BLM will work collaboratively with interested parties to identify the management decisions best suited to local, regional, and national needs and concerns. The public scoping process will identify planning issues and develop planning criteria.

DATES: A 30-day public comment period will be announced through local news media outlets, mailings to interested individuals, and on the BLM-Alaska Web site at <http://www.blm.gov/ak/st/en/fo/gdo.html>. Comments may be submitted in writing to the address listed below. Associated planning documents can be viewed on the BLM-Alaska Web site, or they can be requested in a paper or electronic copy format by contacting the Glennallen Field Office at the address and phone number listed below.

ADDRESSES: Written comments should be sent to: Delta River Special Recreation Management Area Planning, Bureau of Land Management, Glennallen Field Office, P.O. Box 147, Glennallen, AK 99588; phone 907-822-3217, Fax 907-822-3120. Individual respondents may request confidentiality. If you wish to withhold your name and/or address from public review or disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. The BLM will honor such requests to the extent allowed by law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be available for public inspection in their entirety.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact Heath Emmons, phone 907-822-3217 or hemmons@blm.gov.

SUPPLEMENTARY INFORMATION: On September 7, 2007, the BLM published a Record of Decision (ROD) for the East Alaska Resource Management Plan/Environmental Impact Statement. Among other decisions, this document created the Delta River SRMA, which encompasses all BLM-managed portions of the Delta National Wild and Scenic River corridor. Subsequent to the development of the EARMP, the BLM developed new recreation planning requirements (see BLM Manual H-1601-1 Land Use Planning Handbook) that were not included in the EARMP. The new planning policy requires recreation-related land use allocations and development of recreation management zones (RMZ). Although the EARMP did identify RMZs within the Delta River SRMA, some boundaries require minor changes. For public lands within the Delta River SRMA, the proposed land use plan amendment will:

- Identify the corresponding recreation niche within each RMZ to be served,
- develop explicit recreation management objectives for the specific recreation opportunities to be produced and the outcomes to be attained (activities, experiences and benefits),
- prescribe recreation-setting character conditions required to produce recreation opportunities and facilitate the attainment of both recreation experiences and beneficial outcomes, as targeted above, and
- briefly describe an activity planning framework that addresses recreation

management, marketing, monitoring, and administrative support actions (e.g., visitor services, permits and fees, recreation concessions, and appropriate use restrictions) necessary to achieve explicitly stated recreation management objectives and setting prescriptions.

Preliminary issues and management concerns have been identified by BLM personnel, other agencies, and in focus group meetings with stakeholder groups. The major issue themes that will be addressed in the planning effort include: managing human uses and activities to preserve prescribed recreation-setting character conditions, protecting and conserving lands having special or unique features and resource values, and managing and conserving natural resources of the Delta River. The public is encouraged to help identify other questions, concerns, and issues during the scoping phase. An interdisciplinary team of specialists with expertise in outdoor recreation, minerals and geology, forestry, archaeology, paleontology, wildlife and fisheries, lands and realty, hydrology, soils, vegetation, sociology and economics will develop the plan with full consideration of the variety of resource issues and concerns identified. The BLM has identified the following preliminary planning criteria to guide the planning process:

1. The plan amendment will be consistent with the standards and guidance set forth in the FLPMA, the NEPA, the Council on Environmental Quality, the National Historic Preservation Act, the Wild and Scenic Rivers Act, the Migratory Bird Treaty Act, the Alaska National Interest Lands Conservation Act (ANILCA), and other Federal laws, regulations, and policies as required;
2. the plan amendment will conform to Section 810 of ANILCA, Subsistence and Land Use Decisions;
3. the plan amendment will recognize the existence of valid existing rights;
4. the lands covered in the plan amendment will be public lands managed by the BLM and decisions will be made only on lands managed by the BLM;
5. the BLM will work cooperatively with the State and Federal agencies, Native corporations, Tribes, and Municipal governments. Agencies (including federally recognized tribal governments) with jurisdiction by law or special expertise will be consulted during the planning process;
6. public participation by interested groups and individuals will be encouraged throughout the planning process;

7. wildlife habitat management will be consistent with Alaska Department of Fish and Game (ADF&G) objectives and/or the Federal Subsistence Board requirements and mandates;

8. off-highway vehicles designations for all public lands within the planning area will be completed according to the regulations found in 43 CFR part 8342;

9. the BLM will make all possible attempts to ensure that its management prescriptions and planning actions complement other planning jurisdictions, within the boundaries described by law and policy;

10. the BLM will, to the extent possible, use current scientific information, research, new technologies and the results of resource assessments, monitoring and coordination to determine appropriate management strategies that will enhance resource values;

11. implementation plans prepared by the BLM will conform to the Bureau's H-1601-1 Land Use Planning Handbook, Appendix C, Program-Specific and Resource-Specific Decision Guidance and supplemental program guidance manual for Recreation and Visitor Services; and

12. the plan amendment will supersede only sections of the existing EARMF that relate to the Delta River SRMA. Additional planning criteria may be identified during the comment period.

Dated: April 3, 2008.

Vincent Galterio,

Acting State Director.

[FR Doc. E8-7587 Filed 4-9-08; 8:45 am]

BILLING CODE 4310-JA-P

DEPARTMENT OF JUSTICE

[OMB Number 1122-0013]

Office on Violence Against Women; Agency Information Collection Activities: Revision of a Currently Approved Collection

ACTION: 60-Day Notice of Information Collection Under Review: Semi-Annual Progress Report for the Rural Domestic Violence, Dating Violence, Sexual Assault, Stalking, and Child Abuse Enforcement Assistance Grant Program.

The Department of Justice, Office on Violence Against Women (OVW) 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. Comments are encouraged and will be accepted for "sixty days" until June 9,

2008. This process is conducted 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 facsimile to (202) 395-5806.

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:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of the Form/Collection:* Semi-Annual Progress Report for the Rural Domestic Violence, Dating Violence, Sexual Assault, Stalking, and Child Abuse Enforcement Assistance Grant Program.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: 1122-0013. U.S. Department of Justice, Office on Violence Against Women.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The affected public includes the approximately 165 grantees of the Rural Program. The primary purpose of the Rural Program is to enhance the safety of victims of domestic violence, dating violence, sexual assault, stalking,

and child victimization by supporting projects uniquely designed to address and prevent these crimes in rural jurisdictions. Grantees include States, Indian tribes, local governments, and nonprofit, public or private entities, including tribal nonprofit organizations, to carry out programs serving rural areas or rural communities.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that it will take the approximately 165 respondents (Rural Program grantees) approximately one hour to complete a semi-annual progress report. The semi-annual progress report is divided into sections that pertain to the different types of activities in which grantees may engage. A Rural Program grantee will only be required to complete the sections of the form that pertain to its own specific activities.

(6) *An estimate of the total public burden (in hours) associated with the collection:*

The total annual hour burden to complete the data collection forms is 330 hours, that is 165 grantees completing a form twice a year with an estimated completion time for the form being one hour.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Suite 1600, Patrick Henry Building, 601 D Street, NW., Washington, DC 20530.

Dated: April 4, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E8-7550 Filed 4-9-08; 8:45 am]

BILLING CODE 4410-FX-P

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States v. MasTec, Inc. and Coos County, Oregon*, No. 06-6071-HO (D. Or.), was lodged with the United States District Court for the District of Oregon on April 4, 2008.

This proposed Consent Decree concerns a complaint filed by the United States against Coos County, Oregon pursuant to Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), to obtain, among other things, injunctive relief from and to impose civil penalties

against Coos County for violating the Clean Water Act by discharging pollutants in violation of a permit or without a permit into waters of the United States. The proposed Consent Decree resolves the allegations against Coos County by requiring Coos County to restore the impacted areas, to pay a civil penalty, and to perform supplemental environmental projects.

The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to Kent E. Hanson, Environmental Defense Section, P.O. Box 23986, Washington, DC 20026-3986, and refer to *United States v. Coos County, Oregon*, DJ #90-5-1-1-17191.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the District of Oregon, Wayne L. Morse US Courthouse, 405 East Eighth Avenue, Room 2100, Eugene, OR 97401. In addition, the proposed Consent Decree may be viewed at http://www.usdoj.gov/enrd/Consent_Decrees.html.

Russell Young,

Assistant Chief, Environmental Defense Section, Environment & Natural Resources Division.

[FR Doc. E8-7520 Filed 4-9-08; 8:45 am]

BILLING CODE 4410-15-M

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140-0057]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: A National Repository for the Collection and Inventory of Information Related to Arson and the Criminal Misuse of Explosives.

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 June 9, 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 Jose Vazquez, Chief, U.S. Bomb Data Center, 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:* A National Repository for the Collection and Inventory of Information Related to Arson and the Criminal Misuse of Explosives.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. 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:* State, Local or Tribal Government. *Other:* Federal Government. All Federal agencies are required to report information relating to arson and the criminal misuse of explosives in a national repository database maintained by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)—United States Bomb Data Center (USBDC). State, Local and Tribal law enforcement agencies report this information on a voluntary basis.

The ATF USBDC maintains all National Repository databases within the Department of Justice.

(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 2,000 respondents will report the information within approximately 10 minutes.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 333 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: April 4, 2008.

Lynn Bryant,

Department Clearance Officer, PRA, U.S. Department of Justice.

[FR Doc. E8-7518 Filed 4-9-08; 8:45 am]

BILLING CODE 4410-FY-P

DEPARTMENT OF LABOR

Bureau of International Labor Affairs; Proposed Collection: Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance 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 requirements on respondents can be properly assessed. Currently, the International Labor Affairs Bureau is soliciting comments concerning the proposed collection regarding the international child labor technical assistance program of the Office of Child Labor, Forced Labor, and Human Trafficking (OCFT). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the

address section below on or before June 9, 2008.

ADDRESSES: Ms. Maureen Jaffe, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-5317, Washington, DC 20210, telephone (202) 693-4848, fax (202) 693-4830, e-mail jaffe.maureen@dol.gov. Please use only one method of transmission for comments (mail, fax, or e-mail). The telephone and fax numbers listed here are not toll free.

SUPPLEMENTARY INFORMATION:

I. Background

Since 1995, Congress has provided \$660 million to the Department of Labor for efforts to combat exploitive child labor internationally. This funding has been used to support technical cooperation projects in more than 75 countries implemented by over 30 international, nonprofit, for-profit and faith-based organizations. Technical cooperation projects funded by DOL aim to remove and prevent children from exploitive child labor, increase the capacity of foreign governments and civil society organizations to combat exploitive child labor, and to increase public knowledge and understanding of the problem. This is a new data collection that will provide critical information for an evaluation of the impact and effectiveness of OCFT's technical cooperation program. The collection will gather information relating to the issues of program purpose, strategic planning, program management, and program results.

II. 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.

III. Current Actions

The Department of Labor seeks comments concerning the proposed new collection. A contractor has been hired to conduct the evaluation of OCFT's child labor technical assistance program and will collect qualitative and quantitative information. The data will be collected through on-site interviews, focus groups, and an e-mail survey.

Type of Review: New Collection.

Agency: International Labor Affairs Bureau.

Title of Collection: Data collection for OCFT program evaluation.

OMB Control Number: 1290-0NEW.

Affected Public: International organizations, for-profit and not-for-profit institutions, individual households.

Estimated Total Annual Respondents: 309.

Total Annual Responses: This is a one-time data collection effort.

Estimated Total Annual Burden Hours: 845 hours.

Estimated Time per Response: 30 minutes for e-mail survey; 90 minutes for interviews; 90 minutes for focus groups.

Frequency: One time only.

Total Burden Cost (capital/startup): \$0.

Total Burden Cost (operating/maintenance): \$0.

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.

Signed at Washington, DC, this 3rd day of April, 2008.

Lawrence W. Casey,

Associate Deputy Under Secretary for International Affairs, Bureau of International Labor Affairs.

[FR Doc. E8-7578 Filed 4-9-08; 8:45 am]

BILLING CODE 4510-23-P

SUMMARY: Pursuant to the Council on Environmental Quality Regulations (40 CFR part 1500-08) implementing procedural provisions of the National Environmental Policy Act (NEPA), the Department of Labor, Office of the Secretary (OSEC), in accordance with 29 CFR 11.11(d), gives final notice of the proposed construction of a new Job Corps Center located at 4000 Airport Road approximately two miles northwest of Riverton, Wyoming, and that this construction will not have a significant adverse impact on the environment. In accordance with 29 CFR 11.11(d) and 40 CFR 1501.4(e)(2), a preliminary FONSI for the new Job Corps Center was published in the December 12, 2007 **Federal Register** (72 FR Page 70615-70616). No comments were received that related to the environmental findings of the preliminary FONSI. The Job Corps has reviewed the conclusion of the environmental assessment (EA), and agrees with the finding of no significant impact. This notice serves as the Final Finding of No Significant Impact for the new Job Corps Center located at 4000 Airport Road approximately two miles northwest of Riverton, Wyoming. The preliminary FONSI and the EA are adopted in final with no change.

DATES: *Effective Date:* These findings are effective as of March 28, 2008.

FOR FURTHER INFORMATION CONTACT:

Edward C. Campbell, Realty Officer, Department of Labor, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-4460, Washington, DC 20210, (202) 693-6653 (this is not a toll-free number).

Dated: April 3, 2008.

Esther R. Johnson,

National Director of Job Corps.

[FR Doc. E8-7567 Filed 4-9-08; 8:45 am]

BILLING CODE 4510-23-P

DEPARTMENT OF LABOR

Office of the Secretary

Job Corps: Final Finding of No Significant Impact (FONSI) for the Proposed Job Corps Center To Be Located at 4000 Airport Road Approximately Two Miles Northwest of Riverton, WY

AGENCY: Office of the Secretary (OSEC), Department of Labor.

ACTION: Final Finding of No Significant Impact (FONSI) for the proposed Job Corps Center to be located at 4000 Airport Road approximately two miles northwest of Riverton, Wyoming.

DEPARTMENT OF LABOR

Office of the Secretary

Job Corps: Final Finding of No Significant Impact (FONSI) for the Proposed Job Corps Center To Be Located on Dunbarton Road, Manchester, NH

AGENCY: Office of the Secretary (OSEC), Department of Labor.

ACTION: Final Finding of No Significant Impact (FONSI) for the proposed Job Corps Center to be located on Dunbarton Road, Manchester, New Hampshire.

SUMMARY: Pursuant to the Council on Environmental Quality Regulations (40 CFR part 1500-08) implementing

procedural provisions of the National Environmental Policy Act (NEPA), the Department of Labor, Office of the Secretary (OSEC), in accordance with 29 CFR 11.11(d), gives final notice of the proposed construction of a new Job Corps Center located in Manchester, New Hampshire, and that this construction will not have a significant adverse impact on the environment. In accordance with 29 CFR 11.11(d) and 40 CFR 1501.4(e)(2), a preliminary FONSI for the new Job Corps Center was published in the February 1, 2008 **Federal Register** (73 FR Pages 6208–6209). No comments were received regarding the preliminary FONSI. OSEC has reviewed the conclusion of the environmental assessment (EA), and agrees with the finding of no significant impact. This notice serves as the Final Finding of No Significant Impact for the new Job Corps Center located on Dunbarton Road, Manchester, New Hampshire. The preliminary FONSI and the EA are adopted in final with no change.

DATES: *Effective Date:* These findings are effective as of April 1, 2008.

FOR FURTHER INFORMATION CONTACT: Edward C. Campbell, Realty Officer, Department of Labor, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–1508, Washington, DC 20210, (202) 693–6653 (this is not a toll-free number).

Dated: April 3, 2008.

Esther R. Johnson,

National Director of Job Corps.

[FR Doc. E8–7568 Filed 4–9–08; 8:45 am]

BILLING CODE 4510–23–P

DEPARTMENT OF LABOR

Office of the Secretary

Job Corps: Final Finding of No Significant Impact (FONSI) for the Proposed Job Corps Center To Be Located at College Avenue and 6th Street, Ottumwa, IA

AGENCY: Office of the Secretary (OSEC), Department of Labor.

ACTION: Final Finding of No Significant Impact (FONSI) for the proposed Job Corps Center to be located at College Avenue and 6th Street, Ottumwa, Iowa.

SUMMARY: Pursuant to the Council on Environmental Quality Regulations (40 CFR part 1500–08) implementing procedural provisions of the National Environmental Policy Act (NEPA), the Department of Labor, Office of the Secretary (OSEC), in accordance with 29 CFR 11.11(d), gives final notice of the

proposed construction of a new Job Corps Center located in Ottumwa, Iowa, and that this construction will not have a significant adverse impact on the environment. In accordance with 29 CFR 11.11(d) and 40 CFR 1501.4(e)(2), a preliminary FONSI for the new Job Corps Center was published in the February 1, 2008 **Federal Register** (73 FR Page 6209–6210). No comments were received regarding the preliminary FONSI. OSEC has reviewed the conclusion of the environmental assessment (EA), and agrees with the finding of no significant impact. This notice serves as the Final Finding of No Significant Impact for the new Job Corps Center located at College Avenue and 6th Street, Ottumwa, Iowa. The preliminary FONSI and the EA are adopted in final with no change.

DATES: *Effective Date:* These findings are effective as of April 1, 2008.

FOR FURTHER INFORMATION CONTACT:

Edward C. Campbell, Realty Officer, Department of Labor, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S–1508, Washington, DC 20210, (202) 693–6653 (this is not a toll-free number).

Dated: April 3, 2008.

Esther R. Johnson,

National Director of Job Corps.

[FR Doc. E8–7569 Filed 4–9–08; 8:45 am]

BILLING CODE 4510–23–P

DEPARTMENT OF LABOR

Office of the Secretary

Providing Job Training for People With Disabilities

AGENCY: Bureau of International Labor Affairs, Department of Labor.

Announcement Type: New. Notice of Availability of Funds and Solicitation for Cooperative Agreement Applications. The full announcement is posted on <http://www.Grants.Gov> as well as on the DOL Web-site at <http://www.dol.gov/ilab>.

Funding Opportunity Number: SGA 08–03

Key Dates: The closing date for receipt of applications is 30 Days After Publication via Grants.Gov.

Funding Opportunity Description: The U.S. Department of Labor (USDOL), Bureau of International Labor Affairs (ILAB), announces the availability of funds to be awarded by Cooperative Agreement (hereinafter referred to as “grant” or “Cooperative Agreement”) to one qualifying organization for the purpose of supporting job placement of People

With Disabilities (PWDs) in the Costa Rican labor market. Approximately \$ 470,000 dollars are available for award. Specific objectives of the grant includes: increasing employer awareness about the benefits of hiring PWDs, increasing the ability of a variety of organizations to provide access to job training and computer adaptive technology for PWDs, and increasing a variety of local organizations ability to provide case management of PWDs training and job placement. The duration of the project funded by this solicitation is 2–3 years. The start date of program activities will be negotiated upon award of the Cooperative Agreement, but will be no later than September 30, 2008.

ILAB is authorized to award and administer this program by the Department of Labor Appropriations Act, 2008, Public Law No. 110–161, 121 Stat. 1844 (2007).

The full Solicitation for Grant Application is posted on <http://www.Grants.Gov> under U.S. Department of Labor/ILAB. Only Applications submitted through <http://www.Grants.Gov> will be accepted. If you need to speak to a person concerning these grants, or if you have issues regarding access to the Grants.gov Web site, you may telephone Lisa Harvey at 202–693–4592 (not a toll-free number).

Signed at Washington, DC, this 4th day of April, 2008.

Lisa Harvey,

Grant Officer.

[FR Doc. E8–7597 Filed 4–9–08; 8:45 am]

BILLING CODE 4510–28–P

DEPARTMENT OF LABOR

Office of the Secretary

Strengthening Labor Law Compliance in the Agricultural Sector in Guatemala

AGENCY: Bureau of International Labor Affairs, Department of Labor.

Announcement Type: New. Notice of Availability of Funds and Solicitation for Cooperative Agreement Applications. The full announcement is posted on <http://www.Grants.Gov>.

Funding Opportunity Number: SGA 08–02.

Key Dates: The closing date for receipt of applications is 30 Days After Publication via Grants.Gov.

Funding Opportunity Description: The U.S. Department of Labor (USDOL), Bureau of International Labor Affairs (ILAB), announces the availability of funds to be awarded by Cooperative Agreement (hereinafter referred to as “grant” or “Cooperative Agreement”) to one qualifying organization for the

purpose of improving labor law compliance in the agricultural sector in Guatemala. Approximately \$940,000 million dollars are available for award.

Specific objectives of the grant include: Increased ability of workers in targeted agricultural communities to exercise their labor rights; increased awareness among workers and employers in targeted agricultural communities about national labor laws; and systems implemented in targeted communities/workplaces to improve labor law compliance and working conditions. The duration of the project funded by this solicitation is three to four years. The start date of program activities will be negotiated upon award of the Cooperative Agreement, but will be no later than September 30, 2008. ILAB is authorized to award and administer this program by the Department of Labor Appropriations Act, 2008, Public Law No. 110-161, 121 Stat. 1844 (2007).

The full Solicitation for Grant Application is posted on <http://www.Grants.Gov> under U.S. Department of Labor/ILAB. Only Applications submitted through <http://www.Grants.Gov> will be accepted. If you need to speak to a person concerning these grants, or if you have issues regarding access to the Grants.Gov Web site, you may telephone Lisa Harvey at 202-693-4592 (not a toll-free number).

Signed at Washington, DC this 4th day of April 2008.

Lisa Harvey,
Grant Officer.

[FR Doc. E8-7596 Filed 4-9-08; 8:45 am]

BILLING CODE 4510-28-P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting

TIME AND DATE: 9:30 a.m., April 15, 2008.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza, SW., Washington, DC 20594.

STATUS: The one item is open to the public.

MATTER TO BE CONSIDERED: 8002

Aircraft Accident Report—Runway Overrun During Landing, Shuttle America, Inc., doing business as Delta Connection Flight 6448, Embraer ERJ-170, N862RW, Cleveland, Ohio, February 18, 2007.

NEWS MEDIA CONTACT: Telephone: (202) 314-6100: Individuals requesting specific accommodations should contact Chris Bisett at (202) 314-6305 by Friday, April 11, 2008.

The public may view the meeting via a live or archived webcast by accessing a link under "News & Events" on the NTSB home page at <http://www.nts.gov>.

FOR MORE INFORMATION CONTACT: Vicky D'Onofrio, (202) 314-6410.

Dated: April 4, 2008.

Vicky D'Onofrio,
Federal Register Liaison Officer.

[FR Doc. E8-7479 Filed 4-9-08; 8:45 am]

BILLING CODE 7533-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57618; File No. SR-BSE-2008-21]

Self-Regulatory Organizations; Boston Stock Exchange, Inc., Notice of Filing and Immediate Effectiveness of Proposed Rule Change, as Modified by Amendment No. 2 Thereto, Relating to Exchange Fees and Charges

April 4, 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 March 27, 2008, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared substantially by the Exchange. On April 2, 2008, the BSE filed Amendment No. 1 to the proposed rule change.³ On April 3, 2008, the Exchange withdrew Amendment No. 1 and simultaneously filed Amendment No. 2 to the proposal.⁴ BSE has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A),⁵ and Rule 19b-4(f)(2) thereunder,⁶ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 eliminated from the original filing reference to Section 7.c. ("Intermarket Linkage Transactions") of the BSE Fee Schedule. Any proposed changes to Section 7.c. of the BSE Fee Schedule will be the subject of a separate filing.

⁴ Amendment No. 2 corrected two typographical errors in the rule text set forth in Amendment No. 1. Amendment No. 2 superseded and replaced the previously filed Amendment 1 in its entirety.

⁵ 15 U.S.C. 78s(b)(3)(A).

⁶ 17 CFR 240.19b-4(f)(2).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Fee Schedule of the Boston Options Exchange ("BOX"). The text of the proposed rule change is available on the Exchange's Web site (<http://www.bostonstock.com>), at Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the BSE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposal. The text of these statements may be examined at the places specified in Item IV below. The BSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend Section 7 of the BOX Fee Schedule. The proposed rule change will remove the "M or T Non-Penny Pilot Classes" from the BOX Fee Schedule, resulting in the Liquidity Make or Take Pricing Structure ("Make or Take") applying only to those classes of options included in the Penny Pilot Program on BOX ("Penny Pilot Classes").⁷

On November 30, 2007, the Exchange filed a rule proposal with the Commission which added to Make or Take the twenty five (25) most actively traded options classes on BOX that at that time were not included within the Penny Pilot Program ("M or T Non-Penny Pilot Classes").⁸ Recently, nineteen (19) of these M or T Non-Penny Pilot Classes were included in an expansion of the Penny Pilot Program.⁹ The Exchange does not consider it

⁷ The rules pertaining to the Penny Pilot Program on BOX can be found in Section 33 of Chapter V of the BOX Rules. The Exchange has notified Participants of the classes included within the Penny Pilot Program via Regulatory Circular. See BOXR Regulatory Circular 2008-06.

⁸ See Securities Exchange Act Release No. 56948 (December 12, 2007), 72 FR 72426 (December 20, 2007) (SR-BSE-2007-52).

⁹ See Securities Exchange Act Release No. 57566 (March 26, 2008), 73 FR 18013 (April 2, 2008) (SR-BSE-2008-20). This filing added twenty eight (28) of the most actively-traded, multiply-listed options classes, according to Options Clearing Corporation volume statistics, to the Penny Pilot Program.

beneficial to investors or the public in general to continue to apply the Make or Take pricing structure to the six (6) M or T Non-Penny Pilot Classes that were not included in the Penny Pilot Program expansion.

The Exchange proposes to apply Make or Take only to those classes of options that are included within the Penny Pilot Program on BOX. The fees and credits associated with the Make or Take pricing structure will no longer apply to transactions in any class of options other than those included in the Penny Pilot Program. The standard trading fees, as delineated in the remainder of the BOX Fee Schedule, shall apply to those options classes that this proposal seeks to remove from Make or Take.¹⁰

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Section 6(b)(4) of the Act,¹² in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing 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 Act¹³ and subparagraph (f)(2) of Rule 19b-4¹⁴ 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.¹⁵

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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-BSE-2008-21 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-BSE-2008-21. 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 BSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that

you wish to make available publicly. All submissions should refer to File No. SR-BSE-2008-21 and should be submitted on or before May 1, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8-7503 Filed 4-9-08; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57613]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Declaration of Effectiveness of the Boston Stock Exchange Fingerprinting Plan

April 3, 2008.

On March 27, 2008, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a Fingerprint Plan ("Plan") pursuant to Rule 17f-2(c)¹ under the Securities Exchange Act of 1934 ("Act").² A copy of the Plan is attached as Exhibit A.

The BSE believes that the Plan will facilitate compliance by Exchange members with section 17(f)(2) of the Act and Rule 17f-2 thereunder, by providing a facility for the fingerprints of directors, partners, officers and employees of Exchange members to be submitted to the Attorney General of the United States or his designee ("Attorney General") and processed electronically.

Under the Plan, all persons who are seeking registration with the BSE or are currently registered with the BSE submit fingerprints and identifying information, on paper or electronically, to the Financial Industry Regulation Authority, Inc. ("FINRA"), which then forwards the fingerprints to the Federal Bureau of Investigation ("FBI") (the fingerprint processing arm of the Attorney General). The FBI identifies submitted fingerprints, retrieves relevant criminal history information, and returns fingerprint reports to FINRA. BSE members will be able to view the status and results of fingerprints, including any relevant criminal history information, through FINRA's Web Central Registration Depository (Web CRD®) system after submission to the Attorney General.

FINRA notifies the Exchange if the fingerprint results received by FINRA contain information indicating that the

¹⁰ The BOX Fee Schedule can be found on the BOX Web site at <http://www.bostonoptions.com>.

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4).

¹³ 15 U.S.C. 78s(b)(3)(A).

¹⁴ 17 CFR 240.19b-4(f)(2).

¹⁵ For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on April 3, 2008, the date on which BSE filed Amendment No. 2. See 15 U.S.C. 78s(b)(3)(C).

¹⁶ 17 CFR 200.30-3(a)(12).

¹⁷ 17 CFR 240.17f-2(c).

² 15 U.S.C. 78a et seq.

person is subject to a statutory disqualification. In such an instance, the Exchange reviews the fingerprint results to determine the possible existence of a statutory disqualification as defined in section 3(a)(39) of the Act, and takes appropriate action, if necessary, concerning eligibility or continued eligibility of the individual for employment or association with an Exchange member.

The Commission has reviewed the procedures detailed in the Plan and believes that the Plan is consistent with the public interest and the protection of investors. Thus, the Commission declares the Plan effective.

The Commission notes that the securities industry fingerprinting procedures are in a state of flux due to rapidly advancing technology. In the event that an industry-wide standard is adopted or becomes prevalent and in the event that this Plan substantially differs therefrom, the Commission would expect the BSE to revise its fingerprint plan to incorporate the industry-wide standard.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³

Florence E. Harmon,
Deputy Secretary.

Exhibit A

Boston Stock Exchange Fingerprinting Plan

The Boston Stock Exchange, Inc. ("BSE" or "Exchange") submits this Fingerprint Plan ("Plan") pursuant to section 17(f)(2) of the Securities Exchange Act of 1934 ("Act") and Rule 17f-2(c) thereunder.

The purpose of this Plan is to facilitate compliance by Exchange Members with section 17(f)(2) of the Act and Rule 17f-2(c) thereunder, by providing a facility for the fingerprints of directors, partners, officers and employees of Exchange members to be submitted to the Attorney General of the United States or his designee ("Attorney General") and processed electronically.

The Exchange has established an arrangement with the Financial Industry Regulation Authority, Inc. ("FINRA"), to permit all individuals that must be registered with, or approved by, the Exchange ("registered persons") to be electronically registered with the Exchange through FINRA's Web Central Registration Depository ("Web CRD"). The Web CRD is a Web-based system that provides broker-dealers and their associated person with "one-stop filing" with the Commission, FINRA and other

self-regulatory organizations and regulators. The Web CRD is operated by FINRA and is used by participating regulators in connection with registering and licensing broker-dealers and their associated persons.

In connection with the arrangement with FINRA, all persons who are seeking registration with the Exchange or are currently registered with the Exchange, submit fingerprint cards or fingerprint results to FINRA for processing and/or submission to the Attorney General. The Attorney General provides FINRA with fingerprint processing results for persons seeking registration, and results are provided to the members. FINRA notifies the Exchange if the fingerprint results received by FINRA contain information indicating that the person is subject to a statutory disqualification. In such an instance, the Exchange reviews the fingerprint results to determine the possible existence of a statutory disqualification as defined in section 3(a)(39) of the Act, and takes appropriate action, if necessary, concerning eligibility or continued eligibility of the individual for employment or association with an Exchange member.

The Exchange advises its members and member applicants of any fees charged in connection with processing of fingerprints pursuant to this Plan. The Exchange will file any such Exchange member fees with the Commission pursuant to section 19(b) of the Act.

Copies of fingerprint reports received from the Attorney General with respect to fingerprints submitted by the Exchange pursuant to this Plan will be maintained by the Exchange in accordance with the Exchange's record retention obligations under the Act. Any maintenance of fingerprint records by the Exchange shall be for the Exchange's own administrative purposes, and the Exchange is not undertaking to maintain fingerprint records on behalf of Exchange members pursuant to Rule 17f-2(d)(2).

The Exchange shall not be liable for losses or damages of any kind in connection with the fingerprint services, as a result of a failure to properly follow the procedures described above, or as a result of lost or delayed fingerprint cards, fingerprint records, or fingerprint processing results, or as a result of any action by the Exchange or the Exchange's failure to take action in connection with this Plan.

[FR Doc. E8-7506 Filed 4-9-08; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57623; File No. SR-BSE-2008-05]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 5, To Amend the Rules of the Boston Options Exchange Related To Obvious Error Procedures

April 4, 2008.

I. Introduction

On January 29, 2008, the Boston Stock Exchange, Inc. ("BSE" 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 the Boston Options Exchange ("BOX") Rules related to Obvious Error procedures. On February 21, 2008, the Exchange filed Amendment No. 1 to the proposal. On February 22, 2008, the Exchange submitted Amendment Nos. 2, 3, and 4, and withdrew Amendment Nos. 1, 2, and 3 to the proposal. On February 26, 2008, the exchange withdrew Amendment No. 4 and submitted Amendment No. 5 to the proposal.³ The proposed rule change, as modified by Amendment No. 5, was published for comment in the **Federal Register** on March 3, 2008.⁴ The Commission received no comment letters on the proposal. This order approves the proposed rule change, as modified by Amendment No. 5.

II. Description of the Proposed Rule Change

BOX has an established process whereby, in the event that a suspected Obvious Error has occurred during trading on the BOX market, a request for review may be made by one or both of the parties involved. To request a review of a suspected Obvious Error under current BOX rules, one or both of the parties involved must notify the Market Regulation Center ("MRC") of the existence of a suspected erroneous transaction. The MRC would then initiate a review process. If the MRC determines that the transaction does in fact represent an Obvious Error, the transaction would either be adjusted or

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 5 replaced and superseded the original filing and all previous amendments in their entirety.

⁴ Securities Exchange Act Release No. 57383 (February 26, 2008), 73 FR 11452.

³ 17 CFR 200.30-3(a)(17)(iii).

busted. Depending on the parties involved in the transaction, the adjustments would either be set according to pre-determined increments or by mutual agreement between the parties.

The proposed rule change would require that one or both parties contact the BOX Market Operations Center ("MOC"),⁵ instead of the MRC, to request a review of a suspected erroneous transaction. The MOC would then be required to promptly notify the MRC, since the MRC would continue to be the body that makes adjust or bust decisions.

The proposed change also would provide an additional avenue of relief for non-BOX market makers, resulting in the Obvious Error Rules applying not only to BOX Market Makers, but also to market makers on other exchanges whose orders are designated with a market maker account type in the BOX Trading Host. Under current BOX Rules, only BOX Market Makers and non market maker Options Participants may request a review of a suspected erroneous transaction. Under the proposed rule change, non-BOX market makers also may request a review of a suspected erroneous transaction. Moreover, only BOX Market Makers involved in an erroneous transaction with another BOX Market Maker currently may avail themselves to the pre-determined obvious error Theoretical Price plus or minus adjustment levels. The proposed rule change would maintain and expand the choices available to a non-BOX market maker involved in an erroneous transaction. Specifically, a non-BOX market maker, like BOX Market Makers today, would have the choice of agreeing with the counter party to bust the transaction, agreeing to adjust to an agreed upon price for the transaction, or now having the transaction adjusted to the pre-determined levels.

Finally, the proposed rule change would establish an additional course of action if it is determined that an Obvious Error has occurred. The current BOX Rules allow for an adjustment in the transaction price to the pre-determined levels where both parties to the transaction are BOX Market Makers. If *at least* one party to the transaction is a market maker on BOX, the BOX rules

call for the transaction to be busted, unless both parties agree to an adjustment price and notify the MRC. The proposed rule change would: (1) provide that the transaction would be busted absent an agreement to an adjusted price only when neither party is a market maker; and (2) allow the non market maker party to elect to have the transaction busted or the price adjusted to a pre-determined level, when one party to the transaction is *not* a market maker and the other party *is* a market maker.

III. Discussion

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 exchange⁶ and, in particular, the requirements of Section 6(b) of the Act⁷ and the rules and regulations thereunder. Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,⁸ in that the proposal is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, 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 should be based on specific and objective criteria and subject to specific and objective procedures.

The Commission believes that the proposed rule change is based on specific and objective criteria and subject to specific and objective procedures. Specifically, expanding the application of BOX's Obvious Error rule to non-BOX market makers would extend the specific and objective criteria and procedures applicable to BOX Market Makers to non-BOX market makers. In addition, under the proposed rule change, an obviously erroneous transaction that is not busted would be adjusted to objective, pre-established

numerical Obvious Error adjustment increments.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁹ that the proposed rule change (SR-BSE-2008-05), as modified by Amendment No. 5, is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8-7511 Filed 4-9-08; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57610; File No. SR-CBOE-2008-14]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving Proposed Rule Change To Establish a Solicitation Auction Mechanism and To Amend Its Automated Improvement Mechanism

April 3, 2008.

I. Introduction

On February 7, 2008, 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 proposal to establish a new automated mechanism for auctioning larger-sized orders and to modify its existing automated improvement mechanism ("AIM") to permit its use for the execution of complex orders. The proposed rule change was published for comment in the **Federal Register** on February 28, 2008.³ The Commission received no comments regarding the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

Under CBOE Rules 6.45A, *Priority and Allocation of Equity Option Trades on the CBOE Hybrid System*, and 6.45B, *Priority and Allocation of Trades in Index Options and Options on ETFs on the CBOE Hybrid System*, order entry

⁵ This proposed rule change would also add the MOC to the definitions section of the BOX Rules. See Section 1 of Chapter I of the BOX Rules. The remainder of the changes to the definition section fall into two categories. The first is switching the current Sections 31 and 32 so that they are in alphabetical order. The second is, after inserting the MOC as a definition, renumbering the remaining definitions.

⁶ 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).

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

⁹ 15 U.S.C. 78s(b)(2).

¹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 57357 (February 20, 2008), 73 FR 10837.

firms that electronically enter orders are required to expose an unsolicited agency order ("Agency Order") for at least 3 seconds before crossing it against an order that it has solicited from other broker-dealers.⁴ Currently, an order entry firm can comply with this requirement by entering the Agency Order on the Exchange, waiting 3 seconds, and then entering the solicited order. According to the Exchange, because of the 3-second exposure requirement, order entry firms have no level of assurance that they will be able to electronically pair solicited orders against Agency Orders for executions. As an alternative, CBOE has developed AIM, which permits an Agency Order to be electronically executed against principal or solicited interest.⁵

CBOE has also developed an enhanced auction mechanism for larger-sized simple and complex Agency Orders that are to be executed against solicited orders (the "Auction"). The proposal would implement this functionality in options classes designated by the Exchange. Such orders would be required to be for at least 500 contracts, must be entered as all-or-none limit ("AON") orders,⁶ and would be executed only if the price is at or better than the CBOE best bid or offer ("BBO").

When a proposed solicited cross is entered into the Auction, the Exchange would send a Request for Responses ("RFR") message to all members that have elected to receive such messages. Members would then have 3 seconds to respond with a price that would improve the proposed execution price for the Agency Order, except that responses would not be entered for the account of an options market maker from another options exchange. Responses may be entered and executed at prices that are in a multiple of the applicable minimum price increment that has been designated by the Exchange for the series, which increment may not be less than \$0.01. The Exchange believes this would allow for greater flexibility in pricing large-

sized orders and provide for a greater opportunity for price improvement.

The Auction will conclude at the sooner of various conditions.⁷ At the conclusion of the Auction, the Agency Order would be executed against the solicited order unless there is sufficient size to execute the entire Agency Order at a price (or prices) that improves the proposed crossing price. In the case where there is one or more public customer orders resting in the book at the proposed execution price on the opposite side of the Agency Order, the solicited order would be cancelled and the Agency Order would be executed against other bids (offers) if there is sufficient size at the bid (offer) to execute the entire size of the Agency Order (size would be measured considering resting orders and quotes and responses).⁸ If there is not sufficient size to execute the entire Agency Order, the proposed cross would not be executed and both the Agency Order and solicited order would be cancelled. Additionally, the proposed cross would not be executed and both the Agency Order and solicited order would be cancelled if the execution price would be inferior to the BBO.

The proposed rule would also require members to deliver to customers a written document, in a form approved by the Exchange, describing the terms and conditions of the Auction mechanism prior to executing Agency Orders using the Auction mechanism.

The proposed rule would also specify that members may not use the Auction mechanism to circumvent the Exchange's rules limiting principal

order transactions.⁹ Additionally, the Exchange notes that for purposes of paragraph (e) to CBOE Rule 6.9, *Solicited Transactions*, which paragraph prohibits anticipatory hedging activities prior to the entry of an order on the Exchange, the terms of an order would be considered "disclosed" to the trading crowd on the Exchange when the order is entered into the Auction mechanism.

Finally, the Exchange is proposing to expand its existing AIM auction, which currently only applies to simple orders, to cover complex orders. Accordingly, complex orders would be eligible for execution through AIM at a net debit or net credit price provided the Auction eligibility requirements of the AIM rule are satisfied and the Agency Order is eligible for AIM considering its complex order type, order origin code (*i.e.*, non-broker-dealer public customer, broker-dealers that are not Market-Makers or specialists on an options exchange, and/or Market-Makers or specialists on an options exchange), class, and marketability as determined by the Exchange. Allocation of complex orders that are subject to AIM will be the same as the existing allocation procedures, provided that the complex order priority rules applicable to bids and offers in the individual series legs of a complex order contained in CBOE Rule 6.53C(d) or 6.53C.06, as applicable, will continue to apply. In addition, the Exchange is proposing to provide in its rules that it may determine on a class-by-class basis that orders of 500 or more contracts may be executed through AIM without considering prices that might be available on other options exchanges. All other aspects of the AIM auction will continue to apply unchanged.

III. Discussion

After careful review, 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.¹⁰ In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,¹¹ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market

⁴ See CBOE Rule 6.45A.02 and 6.45B.02.

⁵ See CBOE Rule 6.74A, *Automated Improvement Mechanism* ("AIM").

⁶ The Exchange's existing rules provide that an AON order may be crossed with another AON order if all bids or offers at the same price at which the cross is to be effected have been filled. See, *e.g.*, Interpretation and Policy .01 to CBOE Rule 6.44, *Bids and Offers in Relation to Units of Trading*. The proposed Auction system is modeled after this principle, except that it would allow the crossing of large-sized AON orders to take place so long as there are no public customer orders at the proposed price and there is insufficient size at an improved price to accommodate the Agency Order.

⁷ The Auction shall conclude at the sooner of: (i) The end of the response period, (ii) upon receipt by the Hybrid Trading System ("Hybrid") of an unrelated order (in the same series as the Agency Order) that is marketable against either the Exchange's disseminated quote (when such quote is the NBBO) or the responses, (iii) upon receipt by Hybrid of an unrelated limit order (in the same series as the Agency Order and on the opposite side of the market as the Agency Order) that improves any response, (iv) any time a response matches the Exchange's disseminated quote on the opposite side of the market from the responses, or (v) any time there is a quote lock on the Exchange pursuant to CBOE Rule 6.45A(d) or 6.45B(d). See paragraph (b)(2) of proposed CBOE Rule 6.74B, *Solicitation Auction Mechanism*.

⁸ When the Agency Order is executed at an improved price(s) or at the proposed execution price against electronic orders, quotes and responses, priority would be pursuant to the allocation algorithm in effect pursuant to CBOE Rule 6.45A or 6.45B, as applicable. The allocation for simple and complex orders would be the same, except that complex orders would also be subject to the complex order priority rules applicable to bids and offers in the individual series legs of a complex order contained in paragraphs (d) or .06 of CBOE Rule 6.53C, *Complex Orders on the Hybrid System*, as applicable.

⁹ See CBOE Rules 6.45A.01, 6.45B.01, 6.74, *Crossing Orders*, and 6.74A.

¹⁰ In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹¹ 15 U.S.C. 78f(b)(5).

and a national market system, and, in general, to protect investors and the public interest. The Commission believes that the proposal should allow for greater flexibility in pricing large-sized orders and may provide a greater opportunity for price improvement. The Commission also notes that the proposal is substantially similar to requirements set forth in the rules of another exchange.¹²

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-CBOE-2008-14), be, and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Florence E. Harmon,
Deputy Secretary.

[FR Doc. E8-7505 Filed 4-9-08; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57615; File No. SR-CBOE-2007-120]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving Proposed Rule Change and Amendments No. 1 and No. 2 Thereto Relating to Market-Makers and Remote Maker-Makers

April 3, 2008.

On October 11, 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 relating to Market-Makers and Remote Market-Makers ("RMMs"). On February 13, 2008, the Exchange submitted Amendment No. 1 to the proposed rule change.³ The proposed rule change was published for comment in the **Federal Register** on February 29, 2008.⁴ On April 2, 2008, the Exchange submitted Amendment No. 2 to the proposed rule change.⁵ The Commission received no

comments regarding the proposal. This order approves the proposed rule change, as amended.

CBOE proposes to amend its rules relating to Market-Makers and RMMs. The Exchange notes that, since the time the RMM rules were adopted, the ability of Market-Makers to quote from a location outside of the trading crowd or trading floor has expanded. CBOE also states that the existing obligations of Market-Makers and RMMs are generally the same. CBOE therefore does not see a reason to maintain the RMM category of market participant and proposes to delete all references to RMMs in its rules. In connection with this change, CBOE's proposal also: (i) Amends the definition of Market-Maker to include member organizations; (ii) amends CBOE Rule 3.3 to clarify that the member organization membership statuses that are approved by the Membership Committee include Market-Maker; and (iii) deletes Interpretation and Policy .02 to CBOE Rule 3.8, and amends CBOE Rule 3.8(a)(ii), to allow any member organization that is the owner or lessee of more than one membership to designate one individual to be the nominee for all memberships utilized by the organization (except that, for each membership utilized for trading in open outcry on the trading floor, the organization must designate a different individual to be the nominee for each of the memberships).

CBOE also proposes to reorganize the text of two of the Exchange's pilot programs relating to the ability of e-DPMs, Off-Floor DPMs, and RMMs to have affiliated Market-Makers in the same class and clarify that they would no longer apply to RMMs.⁶ The Exchange also is adding a new provision to CBOE Rule 8.3 that provides that there is no restriction on affiliated Market-Makers holding an appointment and submitting electronic quotations in the same class, provided CBOE uses an allocation algorithm in the class that does not allocate electronic trades, in whole or in part, in an equal percentage based on the number of market participants quoting at the best bid or offer.⁷

made in a subsequent rule filing that extended two of the Exchange's pilot programs. See Securities Exchange Act Release No. 57519 (March 18, 2008) 73 FR 15805 (March 25, 2008) ("Pilot Extension"). These changes are technical and are not subject to public comment.

⁶ In the Notice, the Exchange indicated that it proposed extending these pilot programs for an additional year. This extension was subsequently made in a separate filing. See Pilot Extension in note 5, *supra*.

⁷ CBOE's proposal also: (i) Amends CBOE Rule 8.3 to provide that the appointment of a Market-Maker to a certain option class can be made by the

The Commission finds that the proposal, as amended, is consistent with section 6(b)(5) of the Act,⁸ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.⁹ Specifically, the Commission finds that it is consistent with the Act for CBOE to clarify, update, and consolidate the Exchange's rules related to Market-Makers and their obligations on the Exchange.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-CBOE-2007-120), as amended, is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Florence E. Harmon,
Deputy Secretary.

[FR Doc. E8-7512 Filed 4-9-08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57586; File No. SR-FICC-2007-10]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, To Replace the Mortgage-Backed Securities Division Clearing Fund Calculation Methodology With a Yield-Driven Value-at-Risk Methodology

March 31, 2008.

I. Introduction

On August 31, 2007, the Fixed Income Clearing Corporation ("FICC") filed with the Securities and Exchange Commission ("Commission") and on September 27, 2007, amended proposed rule change SR-FICC-2007-10 pursuant

Market-Maker's selection or by CBOE, consistent with certain criteria set forth in CBOE Rule 8.3; (ii) amends CBOE Rule 8.3 to delete the requirement that a Market-Maker may hold an appointment in an appropriate number of Hybrid option classes that are located at one trading station; (iii) amends CBOE Rule 8.7 to delete references to RMMs and other outdated references, and (iv) updates or deletes outdated provisions in other CBOE Rules, including CBOE Rule 8.3A relating to Class Quoting Limits.

⁸ 15 U.S.C. 78f(b)(5).

⁹ 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).

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).

¹² See paragraphs (d) and (e) of ISE Rule 716.

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).

¹⁵ 15 U.S.C. 78s(b)(1).

¹⁷ 17 CFR 240.19b-4.

³ Amendment 1 replaced the original filing in its entirety.

⁴ See Securities Exchange Act Release No. 57367 (February 21, 2008), 73 FR 11168 ("Notice").

⁵ In Amendment No. 2, CBOE made minor revisions to the proposed rule text to reflect changes

to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").¹ Notice of the proposal was published in the **Federal Register** on November 30, 2007.² The Commission received no comment letters in response to the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change, as amended.

II. Description

FICC is replacing the Mortgage-Backed Securities Division ("MBSD") margin calculation methodology with a value-at-risk ("VaR") methodology.

Clearing participants of MBSD are required to maintain participants' fund

deposits. Each participant's required deposit is calculated daily to ensure enough funds are available to cover the risks associated with that participant's activities.

The purpose served by the participants fund is to have on deposit from each participant assets sufficient to satisfy any losses that may otherwise be incurred by MBSD participants as the result of the default by another participant and the resultant close out of the defaulting participant's settlement positions.

FICC is replacing the current participants' fund methodology, which uses haircuts and offsets, with a VaR model. FICC expects the VaR model to

better reflect market volatility and to more thoroughly distinguish levels of risk presented by individual securities.

Specifically, FICC will replace the existing MBSD margin calculation with a yield-driven VaR model. VaR is defined to be the maximum amount of money that may be lost on a portfolio over a given period of time within a given level of confidence. With respect to MBSD, FICC will use a 99 percent three-day VaR.

The changes to the components that comprise the current participants fund calculation as compared to the VaR calculation in relation to the risks addressed by the components are summarized below:

Existing methodology	Risk addressed	VaR methodology
Market Margin Differential, which is the greater of: (i) The P&L Requirement or (ii) The Market Volatility Requirement. Final margin requirement generated for second processing cycle ⁴ .	Adjusting contract price to market price and post mark-to-market fluctuations in security prices. Additional exposure due to portfolio variation.	The sum of: (i) Mark-to-market and (ii) Interest rate or index-driven model, as appropriate. ³ Margin Requirement Differential ("MRD") to include intraday portfolio variations and protection regarding late margin deficit satisfaction.
Prefunding of certain debit cash obligation items through the participants fund (no offset for credits). N/A	Uncertainty of whether a member will satisfy its cash settlement obligation. Potential loss in unlikely situations beyond the model's effective range.	Prefunding of certain debit cash obligation items through the participants fund (offset for credits) ⁵ Coverage Component (if necessary, applies additional charge to bring coverage to the applicable confidence level).
Minimum Market Margin Differential (currently \$250,000).	Maintenance of a minimum amount of collateral to support potential counterparty liquidation losses.	A minimum charge of the greater of: (i) \$100,000 or (ii) a defined percentage of gross portfolio.

In addition, FICC may include in a participant's participant fund calculation a "special charge" as determined by FICC from time to time in view of market conditions and the financial and operational capabilities of the participant. FICC will make any such determination based on such factors as it determines to be appropriate.

Because it will become obsolete upon the implementation of a VaR based participants fund calculation, FICC is also eliminating the provision in MBSD rules requiring participants to maintain a Basic Deposit and Minimum Market Margin Differential Deposit with MBSD pursuant to Article IV, Rule 1 (Participants Fund), Section 1(a) and (b).

III. Discussion

Section 19(b) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds in FICC's custody or control or for which it is responsible.⁶ Because FICC's proposed rule change implements a VaR methodology that should better reflect market volatility and should more thoroughly distinguish the levels of risk presented by individual securities, FICC should be able to more accurately

calculate the risk presented by each of its member's activity and to make participants fund collections to protect against that risk. As a result, FICC should be in a better position to assure the safeguarding of securities and funds in its custody or control or for which it is responsible.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder. In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation.⁷

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 56837 (November 26, 2007), 72 FR 67770 (SR-FICC-2007-10).

³ FICC shall have the discretion to not apply the interest rate model to classes of securities whose volatility is less amenable to statistical analysis (e.g., a security that has a lack of pricing history). In lieu of such a calculation, the required charge

with respect to such positions will be determined based on an historic index volatility model.

⁴ MBSD generates a preliminary margin report as part of a first processing cycle at the close of the business day and calculates a final margin requirement as part of a second processing cycle completed at approximately 11:30 am each business day. Upon the implementation of the new VaR methodology, the MBSD will no longer generate a margin requirement as part of the second cycle.

Instead, a final margin requirement will be established after the running of the first cycle at approximately 9:00 pm.

⁵ Cash obligation item credits are retained by MBSD and are not passed through to the participant. As a result, MBSD has correspondingly less risk vis-à-vis a firm with cash obligation credits and therefore requires less collateral.

⁶ 15 U.S.C. 78q-1(b)(3)(F).

⁷ 15 U.S.C. 78c(f).

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-FICC-2007-10), as amended, be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.⁸

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8-7504 Filed 4-9-08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57614; File No. SR-NASDAQ-2008-029]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify a Pricing Incentive Program for Market Makers in Exchange-Traded Funds and Index-Linked Securities Listed on NASDAQ

April 3, 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 March 31, 2008, The NASDAQ Stock Market LLC ("NASDAQ") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. Pursuant to Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ NASDAQ has designated this proposal as establishing or changing a due, fee, or other charge, which renders the proposed rule change effective immediately upon filing. 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

NASDAQ proposes to modify a pricing incentive program for market makers in exchange-traded funds ("ETFs") and index-linked securities ("ILSs") listed on NASDAQ. NASDAQ will implement the proposed rule change on April 1, 2008. The text of the proposed rule change is available at the Exchange, the Commission's Public

Reference Room, and <http://www.nasdaq.com/about/LegalCompliance.stm>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Last year, NASDAQ introduced a pricing incentive program for market makers in ETFs and ILSs listed on NASDAQ. The program was designed both to enhance NASDAQ's competitiveness as a listing venue for ETFs and ILSs and to further strengthen its market quality as a transaction venue for ETFs and ILSs.

Under NASDAQ's program, a market maker in an ETF or ILS may become a "Designated Liquidity Provider" in a "Qualified Security" and receive favorable incentive pricing. A "Designated Liquidity Provider" is a registered NASDAQ market maker in a Qualified Security that has committed to maintain minimum performance standards. The minimum performance standards applicable to a Designated Liquidity Provider may be determined from time to time by NASDAQ and may vary depending on the price, liquidity, and volatility of a particular Qualified Security. The performance measurements include: (A) Percent of time at the national best bid/best offer ("NBBO"); (B) percent of executions better than the NBBO; (C) average displayed size; and (D) average quoted spread. NASDAQ may remove Designated Liquidity Providers that do not meet performance standards or that decide to change their status at any time.

A Qualified Security is an ETF or ILS that is listed on NASDAQ, has at least one Designated Liquidity Provider, and trades at volumes below a NASDAQ-designated maximum trading volume. Since the inception of the program, the maximum trading volume has been set

such that a security is no longer eligible to be a Qualified Security once there have been two calendar months in any three calendar-month period during which its average daily volume on NASDAQ exceeded 250,000 shares. Although the program has had some success in encouraging additional listings of ETFs on NASDAQ since its inception, NASDAQ has concluded, based on feedback from sponsors of ETFs and ILSs and market makers, that the attractiveness of NASDAQ as a listing venue for these products would be further enhanced by increasing the maximum volume threshold such that a security would no longer be a Qualified Security once there have been two calendar months in any three calendar-month period during which its average daily volume on NASDAQ exceeded 10,000,000 shares. NASDAQ believes that this increase reflects a commitment to make NASDAQ the most attractive venue for listing and trading ETFs and ILSs. The change will encourage market maker support for ETFs and ILSs beyond their initial introductory period and thereby further enhance liquidity for the products as their trading volumes increase.

Designated Liquidity Providers will continue to pay \$0.003 per share executed when accessing liquidity in Qualified Securities; when providing liquidity, the Designated Liquidity Provider will continue to receive a credit of \$0.004 per share executed. Consistent with the requirements of Regulation NMS, in the unlikely event that a security is trading at less than \$1 per share, the normal execution fee and credit schedule in Rule 7018(a) regarding securities trading at less than \$1 would apply. Once the 10,000,000 share volume threshold is reached, the pricing for the ETF or ILS becomes consistent with pricing for other securities traded on NASDAQ.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁵ in general, and with Section 6(b)(4) and (5) of the Act,⁶ in particular, in that the provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in

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)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ 15 U.S.C. 78f.

⁶ 15 U.S.C. 78f(b)(4) and (5).

general, to protect investors and the public interest. NASDAQ believes that by allocating pricing benefits to market makers that make tangible commitments to enhancing market quality for ETFs and ILSs listed on NASDAQ, the proposal will encourage the development of new financial products, provide a better trading environment for investors in ETFs and ILSs, and encourage greater competition between listing venues for ETFs and ILSs.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ believes that the proposed rule change will encourage greater competition among venues that list ETFs and ILSs, and will further strengthen the quality of the NASDAQ market as a venue for transactions in ETFs and ILSs. Accordingly, NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

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 Act⁷ and Rule 19b-4(f)(2)⁸ thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2008-029 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-NASDAQ-2008-029. 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 the NASDAQ. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2008-029 and should be submitted on or before May 1, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8-7507 Filed 4-9-08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57616; File No. SR-NASDAQ-2008-017]

Self-Regulatory Organizations; the NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Clarify the Listing of Additional Shares Notification Process

April 3, 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 March 6, 2008, The NASDAQ Stock Market LLC ("Nasdaq") 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 Nasdaq. 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

Nasdaq proposes to clarify the process concerning notifications of the listing of additional shares.³ The text of the proposed rule change is below. Proposed new language is in italics; proposed deletions are in brackets.⁴

* * * * *

4310. Listing Requirements for Domestic and Canadian Securities

To qualify for listing in Nasdaq, a security of a domestic or Canadian issuer shall satisfy all applicable requirements contained in paragraphs (a), (b), and (c) hereof. Issuers that meet these requirements, but that are not listed on the Nasdaq Global Market, are listed on the Nasdaq Capital Market.

(a)-(b) No change.

(c) In addition to the requirements contained in paragraph (a) and (b) above, and unless otherwise indicated, a security shall satisfy the following criteria for listing on Nasdaq:

(1)-(16) No change.

(17) [The issuer shall be] *A listed company* is required to notify Nasdaq [on the appropriate form no later than] *at least 15 calendar days prior to:*

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Commission notes that as part of the proposed rule filing, the Exchange submitted a revised Listing of Additional Shares Notification Form conforming the instructions on the Form to the proposed rule changes herein.

⁴ Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at <http://www.complinet.com/nasdaq>.

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(f)(2).

⁹ 17 CFR 200.30-3(a)(12).

(A)(i) establishing or materially amending a stock option plan, purchase plan or other equity compensation arrangement pursuant to which stock may be acquired by officers, directors, employees, or consultants without shareholder approval.

(ii) *Nasdaq recognizes that when an issuer makes an equity grant to induce an individual to accept employment, as permitted by the exception contained in Rule 4350(i)(1)(A)(iv), it may not be practical to provide the advance notice otherwise required by this Rule. Therefore, when an issuer relies on that exception to make such an inducement grant without shareholder approval, it is sufficient to notify Nasdaq about the grant and the use of the exception no later than five calendar days after entering into the agreement to issue the securities; or*

(B)–(C) No change.

(D) [entering into] *issuing any common stock, or any security convertible into common stock in a transaction that may result in the potential issuance of common stock, [(or securities convertible into common stock)] greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis.*

The notifications required by this paragraph must be made on the Notification Form: Listing of Additional Shares and Nasdaq encourages companies to file this form as soon as practicable, even if all of the relevant terms are not yet known. Nasdaq reviews these forms to determine compliance with applicable Nasdaq rules, including the shareholder approval requirements. Therefore, if a company fails to file timely the form required by this paragraph, Nasdaq may issue a Staff Determination (pursuant to the Rule 4800 Series) that is either a public reprimand letter or a delisting determination.

(18)–(30) No change.

(d) No change.

4320. Listing Requirements for Non-Canadian Foreign Securities and American Depositary Receipts

To qualify for listing on Nasdaq, a security of a non-Canadian foreign issuer, an American Depositary Receipt (ADR) or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b), and (e) of this Rule. Issuers that meet these requirements, but that are not listed on the Nasdaq Global Market, are listed on the Nasdaq Capital Market.

(a)–(d) No change.

(e) In addition to the requirements contained in paragraphs (a) and (b), the security shall satisfy the criteria set out in this subsection for listing on Nasdaq. In the case of ADRs, the underlying security will be considered when determining the ADR's qualification for initial or continued listing on Nasdaq.

(1)–(14) No change.

(15) The issuer of any class of securities listed on Nasdaq, except for American Depositary Receipts, [shall be] is required to notify Nasdaq [on the appropriate form no later than] *at least 15 calendar days prior to:*

(A)(i) establishing or materially amending a stock option plan, purchase plan or other equity compensation arrangement pursuant to which stock may be acquired by officers, directors, employees, or consultants without shareholder approval.

(ii) *Nasdaq recognizes that when an issuer makes an equity grant to induce an individual to accept employment, as permitted by the exception contained in Rule 4350(i)(1)(A)(iv), it may not be practical to provide the advance notice otherwise required by this Rule. Therefore, when an issuer relies on that exception to make such an inducement grant without shareholder approval, it is sufficient to notify Nasdaq about the grant and the use of the exception no later than five calendar days after entering into the agreement to issue the securities; or*

(B)–(C) No change.

(D) [entering into] *issuing any common stock, or any security convertible into common stock in a transaction that may result in the potential issuance of common stock, [(or securities convertible into common stock)] greater than 10% of either the total shares outstanding or the voting power outstanding on a pre-transaction basis.*

The notifications required by this paragraph must be made on the Notification Form: Listing of Additional Shares and Nasdaq encourages companies to file this form as soon as practicable, even if all of the relevant terms are not yet known. Nasdaq reviews these forms to determine compliance with applicable Nasdaq rules, including the shareholder approval requirements. Therefore, if a company fails to file timely the form required by this paragraph, Nasdaq may issue a Staff Determination (pursuant to the Rule 4800 Series) that is either a public reprimand letter or a delisting determination.

(16)–(26) No change.

(f) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq Rules 4310(c)(17) and 4320(e)(15) require a company to provide 15 days notice prior to issuing securities in certain specified situations. These notifications allow Nasdaq to make compliance determinations regarding stock issuances that are potentially subject to the shareholder approval rules.

Nasdaq proposes to clarify the timing requirement contained in Rules 4310(c)(17)(D) and 4320(e)(15)(D).⁵ At present, the rules provide that notifications under these subparagraphs are required prior to "entering into" a described transaction. However, while Nasdaq has treated this requirement as being satisfied if the company files the required notification 15 days before issuing the securities, that interpretation is not transparent from the rule. As such, Nasdaq proposes to revise these provisions such that notice will instead be required prior to "issuing" the securities, consistent with the requirements in paragraphs (B) and (C) of those rules.⁶

In addition, Nasdaq proposes to modify the timing requirement contained in Rules 4310(c)(17)(A) and 4320(e)(15)(A) as it relates to companies relying on the exception to shareholder approval for inducement grants to new employees contained in Rule

⁵ See *supra* note 3.

⁶ Nasdaq believes that this is also consistent with the requirements of other marketplaces. See, e.g., New York Stock Exchange LLC ("NYSE") Listed Company Manual Section 703.01(B) (requiring subsequent listing applications to be filed at least two weeks before the company wishes the NYSE to take action upon the application) and American Stock Exchange LLC ("Amex") Company Guide Sections 303(b) and 331 (requiring a company to submit an additional listing application at least one to two weeks in advance of the date on which Amex's approval is needed).

4350(i)(1)(A)(iv).⁷ Because these grants can be made at the time the employment offer is accepted, companies may not be able to provide 15 days advance notice. Instead, the proposed rule would require notification no later than five calendar days after entering into the agreement to issue the securities.

Nasdaq also proposes to amend Rules 4310(c)(17) and 4320(e)(15) to clarify that the notifications required by these rules must be made on a Listing of Additional Shares ("LAS") Notification Form and to provide transparency to the consequences of failing to timely file LAS notifications. Specifically, depending on the circumstances, Nasdaq may issue a Staff Determination (pursuant to the Rule 4800 Series) that is a public reprimand letter or a delisting determination. In determining whether to issue a Staff Determination, and whether such a Staff Determination would be a delisting determination or a public reprimand letter, Nasdaq would consider whether the issuer has demonstrated a pattern of late filings, the length of such filing delays, the reason for the delays, whether the issuer has been contacted concerning previous violations, whether the underlying transactions were themselves non-compliant, and whether the issuer has taken steps to assure that future violations will not occur.

Finally, in connection with this change, Nasdaq notes that it also intends to adopt a process whereby it will notify companies when the LAS review process has been completed. At present, Nasdaq does not routinely inform a company when it has completed its review.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁸ in general, and with Section 6(b)(5) of the Act,⁹ in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the

mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change is designed to simplify and provide transparency to the operation of Nasdaq's notification requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2008-017 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-NASDAQ-2008-017. 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 Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2008-017 and should be submitted on or before May 1, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8-7508 Filed 4-9-08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57617; File No. SR-NYSE-2008-25]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Program for Providing Liquidity on the NYSE BondsSM System

April 4, 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 March 31, 2008, the New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items

⁷ Rule 4350(i)(1)(A)(iv) allows an exception to the requirement to obtain shareholder approval for equity compensation for certain "issuances to a person not previously an employee or director of the company, or following a bona fide period of non-employment, as an inducement material to the individual's entering into employment with the company."

⁸ 15 U.S.C. 78f.

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

have been substantially prepared by NYSE. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposal effective upon filing with the Commission. 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 extend the pilot program pursuant to which liquidity providers receive a \$20 credit for bond trades executed on the NYSE BondsSM system ("NYSE Bonds") with an execution size of less than 20 bonds. The text of the proposed rule change is available at the Exchange's principal office, in the Commission's Public Reference Room, and at <http://www.nyse.com>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE 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. NYSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend for nine months the pilot program pursuant to which liquidity providers receive a \$20 credit for bond trades executed on NYSE Bonds with an execution size of less than 20 bonds. The pilot program would thus end on December 31, 2008.

A liquidity provider is one who posts liquidity to NYSE Bonds. During the course of clearing their bond trades, liquidity providers absorb clearing costs. In order to offset these clearing costs, liquidity providers may increase the offer price or decrease the bid price of the bond. In doing so, the best execution of a bond order may be

compromised, as clearing costs increase with smaller orders.

Accordingly, the Exchange proposes that liquidity providers continue to be issued a \$20 credit for executions of bond orders with an execution size of less than 20 bonds through December 31, 2008. For a liquidity provider to be eligible to receive this \$20 credit, the original order posted by the liquidity provider must be for 20 bonds or more. For example, if a liquidity provider posts an order for 100 bonds and a contra side order comes in for 50 bonds, the liquidity provider will not receive a \$20 credit. However, if a contra side order comes in for 10 bonds against the liquidity provider's original posted order of 100 bonds, the liquidity provider will receive a credit of \$20 from the Exchange for that execution.

NYSE Bonds, which was implemented in March 2007, will continue to update its functionality to provide competitive bond trading for customers. The Exchange believes that this \$20 credit will continue to incentivize liquidity providers to display the best price available on NYSE Bonds.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act⁵ in general and furthers the objectives of Section 6(b)(4) of the Act⁶ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on 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 Act⁷ and subparagraph (f)(2) of Rule 19b-4 thereunder.⁸ At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2008-25 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-NYSE-2008-25. 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 NYSE. All comments received will be posted

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ 15 U.S.C. 78f.

⁶ 15 U.S.C. 78f(b)(4).

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(f)(2).

without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2008-25 and should be submitted on or before May 1, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8-7513 Filed 4-9-08; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57619; File No. SR-NYSEArca-2008-25]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 to Proposed Rule Change and Order Granting Accelerated Approval of Such Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Rules Permitting the Listing and Trading of Managed Fund Shares, Trading Hours and Halts, Listing Fees Applicable To Managed Fund Shares, and the Listing and Trading of Shares of the PowerShares Active AlphaQ Fund, PowerShares Active Alpha Multi-Cap Fund, PowerShares Active Mega-Cap Portfolio, and the PowerShares Active Low Duration Portfolio

April 4, 2008.

I. Introduction

On February 27, 2008, NYSE Arca, Inc. ("NYSE Arca" or "Exchange"), through its wholly owned subsidiary, NYSE Arca Equities, Inc. ("NYSE Arca Equities" or "Corporation"), 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 seeking to: (1) Add new NYSE Arca Equities Rule 8.600 to permit the listing and trading, or trading pursuant to unlisted trading privileges ("UTP"), of securities issued by an actively managed, open-end investment management company ("Managed Fund Shares"); (2) list and trade the shares ("Shares"), offered by PowerShares Actively Managed Exchange-Traded Fund Trust ("Trust"), of the PowerShares Active AlphaQ Fund,

PowerShares Active Alpha Multi-Cap Fund, PowerShares Active Mega-Cap Portfolio, and the PowerShares Active Low Duration Portfolio (collectively, the "Funds"); (3) amend NYSE Arca Equities Rule 7.34 (Trading Sessions) to reference Managed Fund Shares; and (4) amend its listing fees to include Managed Fund Shares under the term "Derivative Securities Products." The proposed rule change was published for comment in the **Federal Register** on March 5, 2008.³ The Commission received no comments regarding the proposal. On March 31, 2008, the Exchange filed Amendment No. 1 to the proposed rule change.⁴ This order provides notice of, and solicits comments from interested persons regarding, Amendment No. 1 to the proposed rule change and approves the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposal

The Exchange proposes to add new NYSE Arca Equities Rule 8.600 to permit the listing and trading, or trading pursuant to UTP, of Managed Fund Shares, which are securities issued by an actively managed, open-end investment management company. The Exchange also proposes to amend NYSE Arca Equities Rule 7.34 (Trading Sessions) to reference Managed Fund Shares in paragraph (a)(3)(A), relating to hours of the Exchange's Core Trading Session, and paragraph (a)(4)(A), relating to trading halts when trading pursuant to UTP during the Exchange's Opening Session.⁵ In addition, the

Exchange proposes to amend its listing fees by incorporating Managed Fund Shares in the term "Derivative Securities Products." Finally, pursuant to new NYSE Arca Equities Rule 8.600, the Exchange proposes to list and trade the Shares of the Funds.

Proposed Listing Rules for Managed Fund Shares

Under proposed NYSE Arca Equities Rule 8.600(c)(1), a "Managed Fund Share" is a security that: (1) Represents an interest in a registered investment company ("Investment Company") organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (2) is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value ("NAV"); and (3) when aggregated in the same specified minimum number, may be redeemed at a holder's request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV.

Proposed NYSE Arca Equities Rule 8.600(c)(2) defines "Disclosed Portfolio" as the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company's calculation of the NAV at the end of the business day. Proposed NYSE Arca Equities Rule 8.600(c)(3) defines "Portfolio Indicative Value" as the estimated indicative value of a Managed Fund Share based on current information regarding the value of the securities and other assets in the Disclosed Portfolio. Finally, proposed NYSE Arca Equities Rule 8.600(c)(4) defines "Reporting Authority" as, in respect of a particular series of Managed Fund Shares, the Corporation,⁶ an institution, or a reporting service designated by the Corporation or by the Exchange that lists a particular series of Managed Fund Shares (if the Corporation is trading such series pursuant to UTP) as the official source for calculating and reporting information relating to such series, including, but not limited to, the (i) Portfolio Indicative Value, (ii) the

³ See Securities Exchange Act Release No. 57395 (February 28, 2008), 73 FR 11974 ("Notice").

⁴ In Amendment No. 1, the Exchange added Commentary .07 to proposed NYSE Arca Equities Rule 8.600 which would require the following: (1) If the investment adviser to the Investment Company (as defined herein) issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser must erect a "firewall" between such investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to the Investment Company portfolio; and (2) personnel who make decisions on the Investment Company's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the applicable Investment Company portfolio. In addition, the Exchange provided a representation that PowerShares Capital Management LLC, the investment adviser of the Funds, is affiliated with a broker-dealer and has therefore implemented a firewall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the Fund's portfolio. Lastly, the Exchange provided a description of the ethical and fiduciary requirements under the Investment Advisers Act of 1940 ("Advisers Act") and rules thereunder, as they apply to PowerShares Capital Management LLC.

⁵ See NYSE Arca Equities Rule 7.34(a) (setting forth, generally, the three trading sessions on the

Exchange: (1) Opening Session, from 4 a.m. to 9:30 a.m. Eastern Time or "ET"; (2) Core Trading Session, from 9:30 a.m. to 4 p.m. ET; and (3) Late Trading Session, from 4 p.m. to 8 p.m. ET).

⁶ The "Corporation" means NYSE Arca Equities. See NYSE Arca Equities Rule 1.1(k) (defining Corporation).

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Disclosed Portfolio, (iii) the amount of any cash distribution to holders of Managed Fund Shares, (iv) NAV, or (v) other information relating to the issuance, redemption, or trading of Managed Fund Shares. A series of Managed Fund Shares may have more than one Reporting Authority, each having different functions.

Proposed NYSE Arca Equities Rule 8.600(d) sets forth the initial and continued listing criteria applicable to Managed Fund Shares. Proposed NYSE Arca Equities Rule 8.600(d)(1) provides that, for each series of Managed Fund Shares, the Corporation will establish a minimum number of Managed Fund Shares required to be outstanding at the time of commencement of trading. In addition, the Corporation will obtain a representation from the issuer of each series of Managed Fund Shares that the NAV per share for the series will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

Proposed NYSE Arca Equities Rule 8.600(d)(2) provides that each series of Managed Fund Shares will be listed and traded subject to application of the following continued listing criteria: (1) The Portfolio Indicative Value for Managed Fund Shares will be widely disseminated by one or more major market data vendors at least every 15 seconds during the time when the Managed Fund Shares trade on the Corporation; (2) the Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time; and (3) the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.

Proposed NYSE Arca Equities Rule 8.600(d)(2)(C) provides that the Corporation will consider the suspension of trading in, or removal from listing of, a series of Managed Fund Shares under any of the following circumstances: (1) If, following the initial twelve-month period after commencement of trading on the Exchange of a series of Managed Fund Shares, there are fewer than 50 beneficial holders of the series of Management Fund Shares for 30 or more consecutive trading days; (2) if the value of the Portfolio Indicative Value is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time; (3) if the Investment Company issuing the Managed Fund

Shares has failed to file any filings required by the Commission or if the Corporation is aware that the Investment Company is not in compliance with the conditions of any exemptive order or no-action relief granted by the Commission to the Investment Company with respect to the series of Managed Fund Shares; or (4) if such other event shall occur or condition exists which, in the opinion of the Corporation, makes further dealings on the Corporation inadvisable.

Proposed NYSE Arca Equities Rule 8.600(d)(2)(D) provides that, if the Portfolio Indicative Value of a series of Managed Fund Shares is not being disseminated as required, the Corporation may halt trading during the day in which the interruption to the dissemination of the Portfolio Indicative Value occurs. If the interruption to the dissemination of the Portfolio Indicative Value persists past the trading day in which it occurred, the Corporation will halt trading no later than the beginning of the trading day following the interruption. If a series of Managed Fund Shares is trading on the Corporation pursuant to UTP, the Corporation will halt trading in that series as specified in NYSE Arca Equities Rule 7.34(a), as proposed to be amended. In addition, if the Exchange becomes aware that the NAV or the Disclosed Portfolio with respect to a series of Managed Fund Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV or the Disclosed Portfolio is available to all market participants.

Proposed NYSE Arca Equities Rule 8.600(d)(2)(E) provides that, upon termination of an Investment Company, the Corporation requires that Managed Fund Shares issued in connection with such entity be removed from Corporation listing. Proposed NYSE Arca Equities Rule 8.600(d)(2)(F) provides that voting rights shall be as set forth in the applicable Investment Company prospectus. Proposed NYSE Arca Equities Rule 8.600(e) relates to the limitation of Corporation liability.

Proposed Commentary .01 to new NYSE Arca Equities Rule 8.600 provides that the Corporation will file separate proposals under Section 19(b) of the Act before the listing and/or trading of Managed Fund Shares. Proposed Commentary .02 provides that transactions in Managed Fund Shares will occur during the trading hours specified in NYSE Arca Equities Rule 7.34(a), as proposed to be amended. Proposed Commentary .03 provides that the minimum price variation for quoting and entry of orders in Managed Fund

Shares is \$0.01. Proposed Commentary .04 provides that the Exchange will implement written surveillance procedures for Managed Fund Shares.

Proposed Commentary .05 to new NYSE Arca Equities Rule 8.600, which is substantially similar to existing Commentary .01(i) to NYSE Arca Equities Rule 5.2(j)(3), provides that, for Managed Fund Shares based on an international or global portfolio, the statutory prospectus or the application for exemption from provisions of the Investment Company Act of 1940 ("1940 Act") for the series of Managed Fund Shares must state that such series must comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933. Proposed Commentary .06 to new NYSE Arca Equities Rule 8.600, which is substantially similar to existing Commentary .01(h) to NYSE Arca Equities Rule 5.2(j)(3), sets forth certain obligations of ETP Holders⁷ with respect to Managed Fund Shares that receive an exemption from certain prospectus delivery requirements under Section 24(d) of the 1940 Act. Lastly, Commentary .07 to new NYSE Arca Equities Rule 8.600 provides that, if the investment adviser of the Investment Company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser must erect a "firewall" between such investment adviser and broker-dealer with respect to access to information regarding the composition and/or changes to the Investment Company's portfolio. In addition, proposed Commentary .07 further requires that personnel who make decisions on the Investment Company's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Investment Company's portfolio. The Exchange states that Commentary .07 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Equities Rule 5.2(j)(3); however, the proposed Commentary in connection with the establishment of a "firewall" between the investment

⁷ An "ETP Holder" is a sole proprietorship, partnership, corporation, limited liability company, or other organization in good standing that has been issued an Equity Trading Permit or "ETP." An ETP Holder must be a registered broker or dealer pursuant to Section 15 of the Act (15 U.S.C. 78o). See NYSE Arca Equities Rule 1.1(m) and (n) (defining ETP and ETP Holder).

adviser and the broker-dealer reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with current exchange-traded funds.

Amendments to NYSE Arca Equities Rule 7.34

The Exchange proposes to amend NYSE Arca Equities Rule 7.34(a)(3)(A) to add Managed Fund Shares to the list of securities for which the Core Trading Session on the Exchange concludes at 4:15 p.m. ET. In addition, the Exchange proposes to amend NYSE Arca Equities Rule 7.34(a)(4)(A) to include Managed Fund Shares under "Derivative Securities Products" in connection with trading halts for trading pursuant to UTP on the Exchange.

Amendments to Listing Fees

The Exchange proposes to add Managed Fund Shares to the securities included under the term "Derivative Securities Products," as defined in the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services.⁸

Description of the Funds and the Trust

The Shares will be offered by the Trust, a business trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.⁹ The Trust currently consists of the four Funds, each a separate, actively managed exchange-traded fund. The Exchange represents that: (1) The Funds will not purchase or sell securities in markets outside the United States; and (2) the Shares will conform to the initial and continued listing criteria under proposed NYSE Arca Equities Rule 8.600 and Commentary thereto.¹⁰

⁸ Further descriptions regarding key features of Managed Fund Shares, including information about interests in a registered investment company, exemptive relief under the 1940 Act, intraday trading of Managed Fund Shares, creation and redemption of Managed Fund Shares, Portfolio Disclosure, and Portfolio Indicative Value, among other things, can be found in the Notice. See Notice, *supra* note 3.

⁹ The Exchange states that the Trust is registered under the 1940 Act. On November 26, 2007 the Trust filed with the Commission a Registration Statement for the Funds on Form N-1A under the Securities Act and under the 1940 Act (File Nos. 333-147622 and 811-22148) ("Registration Statement"). On November 16, 2007 the Trust filed with the Commission on Form 40-6C/A an Amended and Restated Application ("Application") for an Amended Order under Sections 6(c) and 17(b) of the 1940 Act (File No. 812-13386-04). See Investment Company Act Release No. 28140 (February 1, 2008), 73 FR 7328 (February 7, 2008) (File No. 812-13386) (providing notice of application for an exemptive order under Section 6 of the 1940 Act).

¹⁰ The Exchange further represents that, for initial and/or continued listing, Managed Fund Shares

Detailed descriptions of the investment objectives, strategies, and methodologies of the four Funds, management and structure of the Funds, and other relevant information relating to the Shares and Funds can be found in the Notice, the Registration Statement, and/or the Application, as applicable.

Availability of Information

The Funds' Web site (<http://www.powershares.com>), which will be publicly available prior to the public offering of the Shares, will include a form of the prospectus for each Fund that may be downloaded. The Web site will include for each Fund additional quantitative information updated on a daily basis, including: (1) Daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (the "Bid/Ask Price"),¹¹ and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency

must also be in compliance with Rule 10A-3 under the Act, as provided by NYSE Arca Equities Rule 5.3. See 17 CFR 240.10A-3. In addition, the Exchange represents that PowerShares Capital Management LLC, the investment adviser for the Funds, is affiliated with a broker-dealer, AIM Distributors, Inc., and has implemented a firewall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the Fund's portfolio. Further, the Exchange represents that the investment adviser and its related personnel are subject to Rule 204A-1 under the Advisers Act, which relates to codes of ethics for investment advisers. Rule 204A-1 requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, the Exchange notes that "firewall" procedures, as well as procedures designed to prevent the misuse of non-public information by an investment adviser, must be consistent with Rule 204A-1 under the Advisers Act. In addition, Rule 206(4)-7 under the Advisers Act (17 CFR 275.206(4)-7) makes it unlawful for an investment adviser to provide investment advice to clients, unless such investment adviser has (i) Adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the rules thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of such policies and procedures and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering such policies and procedures. See also Section 204A of the Advisers Act (15 U.S.C. 80b-4a) (requiring investment advisers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, non-public information by such investment adviser or any person associated with such investment adviser).

¹¹ The Bid/Ask Price of a Fund is determined using the highest bid and the lowest offer on the Exchange as of the time of calculation of such Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Funds and their service providers.

distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of the Core Trading Session, each Fund will disclose on its Web site the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day.¹²

Investors interested in a particular Fund can also obtain the Trust's Statement of Additional Information ("SAI"), each Fund's Shareholder Reports, and its Form N-CSR and Form N-SAR, filed twice a year. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N-CSR and Form N-SAR may be viewed on-screen or downloaded from the Commission's Web site (<http://www.sec.gov>).

Information regarding market price and volume is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the facilities of the Consolidated Tape Association ("CTA"). In addition, the Portfolio Indicative Value will be disseminated by the Exchange at least every 15 seconds during the Core Trading Session through the facilities of CTA. The NAV of each Fund will normally be determined as of the close of the regular trading session on the New York Stock Exchange LLC (ordinarily 4 p.m. ET) on each business day.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of a Fund.¹³ Trading in the Shares of the Funds will be halted if the circuit breaker parameters under NYSE Arca Equities Rule 7.12 are reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may

¹² Under accounting procedures followed by the Funds, trades made on the prior business day ("T") will be booked and reflected in the NAV on the current business day ("T+1"). Accordingly, the Funds will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

¹³ See Commentary .04 to NYSE Arca Equities Rule 7.12.

include: (1) The extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of a Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to proposed NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which trading in the Shares of a Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. The Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. ET, in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions).¹⁴ The Exchange states that it has appropriate rules to facilitate transactions in the Shares during all trading sessions.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which will include Managed Fund Shares) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules. The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and, where appropriate, investigations are opened to review the behavior of all relevant parties for all relevant trading violations. The Exchange may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members or affiliate members of ISG. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit

aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares;¹⁵ (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement and will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4 p.m. ET each trading day.

III. Discussion

After careful consideration, 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.¹⁶ In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,¹⁷ which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest.

¹⁵ NYSE Arca Equities Rule 9.2(a) provides that an ETP Holder, before recommending a transaction, must have reasonable grounds to believe that the recommendation is suitable for the customer based on any facts disclosed by the customer as to his other security holdings and as to his financial situation and needs. Further, the rule provides, with a limited exception, that prior to the execution of a transaction recommended to a non-institutional customer, the ETP Holder shall make reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives, and any other information that the ETP Holder believes would be useful to make a recommendation.

¹⁶ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78f(b)(5).

Proposed Listing Rules for Managed Fund Shares

The Commission finds that NYSE Arca's proposal contains adequate rules and procedures to govern the listing and trading of Managed Fund Shares on the Exchange.¹⁸ Prior to listing and/or trading on the Exchange, NYSE Arca must file a separate proposed rule change pursuant to Section 19(b) of the Act for each series of Managed Fund Shares. All such securities listed and/or traded under proposed NYSE Arca Equities Rule 8.600 will be subject to the full panoply of NYSE Arca Equities rules and procedures that currently govern the trading of equity securities on the Exchange.

For the initial listing of each series of Managed Fund Shares under proposed NYSE Arca Equities Rule 8.600(d)(1), the Exchange must establish a minimum number of Managed Fund Shares required to be outstanding at the commencement of trading. In addition, the Exchange must obtain a representation from the issuer of Managed Fund Shares that the NAV per share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

The Commission believes that the proposed continued listing and trading standards under proposed NYSE Arca Equities Rule 8.600(d)(2) are adequate to ensure transparency of key values and information regarding the securities. For continued listing of each series of Managed Fund Shares, the Portfolio Indicative Value must be widely disseminated by one or more major market data vendors at least every 15 seconds during the time when the Managed Fund Shares trade on the Exchange. Further, the Disclosed Portfolio must be disseminated at least once daily and made available to all market participants at the same time.

The Commission finds that the Exchange's rules with respect to trading halts under proposed NYSE Arca Equities Rule 8.600(d)(2)(D) should help ensure the availability of key values and information relating to Managed Fund Shares. If the Portfolio Indicative Value is not being disseminated as required, the Exchange may halt trading during

¹⁸ The Commission believes that the proposed rules and procedures are adequate with respect to the Fund Shares. However, the Commission notes that other proposed series of Managed Fund Shares may require additional Exchange rules and procedures to govern their listing and trading on the Exchange. For example, in the case of a proposed series of Managed Fund Shares that are based on a portfolio, at least in part, of non-U.S. securities, rules relating to comprehensive surveillance sharing agreements and quantitative initial and continued listing standards may be required.

¹⁴ See *supra* note 5.

the day in which the interruption to the dissemination of the Portfolio Indicative Value occurs. If the interruption of such value persists past the trading day in which it occurred, the Exchange must halt trading no later than the beginning of the trading day following the interruption.¹⁹ In addition, if the Exchange becomes aware that the NAV or Disclosed Portfolio related to a series of Managed Fund Shares is not being disseminated to all market participants at the same time, the Exchange will halt trading in such series of Managed Fund Shares.²⁰ Finally, in exercising its discretion to halt or suspend trading in the Shares, the Exchange may consider all relevant factors, including the extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of a Fund or whether other unusual conditions or circumstances that are detrimental to the maintenance of a fair and orderly market are present.

The Exchange may also consider the suspension of trading in, or removal from listing of, a series of Managed Fund Shares if: (1) Following the initial twelve-month period after commencement of trading on the Exchange of a series of Managed Fund Shares, there are fewer than 50 beneficial holders of the series of the Managed Fund Shares for 30 or more consecutive trading days; (2) the value of the Portfolio Indicative Value is no longer calculated or available, or the Disclosed Portfolio is not made available to all market participants at the same time; (3) the Trust has not filed, on a timely basis, any required filings with the Commission, or if the Exchange becomes aware that the Trust is not in compliance with the conditions of any exemptive order or no-action relief granted by the Commission to or otherwise applicable to the Trust; or (4) such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings of the Managed Fund Shares on the Exchange inadvisable.

The Commission believes that the foregoing requirements of proposed NYSE Arca Equities Rule 8.600 should

help to prevent trading when a reasonable degree of transparency cannot be assured and to maintain a fair and orderly market for Managed Fund Shares. The Commission also believes that the proposed listing and trading rules for Managed Fund Shares, many of which track existing Exchange rules relating to Investment Company Units, are reasonably designed to promote a fair and orderly market for such Managed Fund Shares by, among other things, requiring disclosure of information that may be necessary to price Managed Fund Shares. The proposed rules also require surveillance procedures,²¹ establish trading guidelines,²² and impose other requirements.²³ In addition, Commentary .07 to proposed NYSE Arca Equities Rule 8.600 requires that: (1) If the investment adviser of the Investment Company is affiliated with a broker-dealer, such investment adviser must erect a "firewall" between such investment adviser and broker-dealer with respect to access to information regarding the composition and/or changes to the Investment Company's portfolio; and (2) personnel who make decisions on the Investment Company's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Investment Company's portfolio. Lastly, proposed NYSE Arca Equities Rule 8.600(d)(2)(B)(ii) requires that the Reporting Authority that provides the Disclosed Portfolio implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.

Amendments to NYSE Arca Equities Rule 7.34 and Listing Fees

As proposed, Managed Fund Shares will be: (1) Added to the list of securities for which the Core Trading Session on the Exchange concludes at 4:15 p.m. ET; and (2) included under the term "Derivative Securities Products," as defined in NYSE Arca Equities Rule 7.34(a)(4), in connection with trading halts for trading pursuant to UTP on the Exchange. In addition, Managed Fund Shares will be included under the term "Derivative Securities Products," as defined in the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services, and, as a result,

the Exchange's listing fees will be applicable to a series of Managed Fund Shares. The Commission finds that the conforming changes made to the Exchange's rules governing trading hours, trading halts, and listing fees are reasonable and promote transparency of the rules to be imposed with respect to a series of Managed Fund Shares.

Proposal To List and Trade the Shares of the Fund

The Exchange proposes to list and trade the Fund Shares pursuant to proposed NYSE Arca Equities Rule 8.600 and Commentary thereto. The Exchange represents that the Shares will conform to the initial and continued listing criteria under such proposed rule.²⁴

The Commission believes that the proposal to list and trade the Shares of the Fund on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,²⁵ which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotations and last-sale information for the Shares will be disseminated by means of the facilities of the CTA. In addition, the Portfolio Indicative Value will be disseminated at least every 15 seconds during the Core Trading Session, in accordance with proposed NYSE Arca Equities Rule 8.600(d)(2)(A), and on each business day before commencement of the Core Trading Session, each Fund will disclose on its respective Web site the Disclosed Portfolio that will form the basis for the Funds' calculation of NAV at the end of the business day, which ordinarily occurs at 4 p.m. ET. The Funds' Web site will also include for each Fund additional quantitative information updated on a daily basis, including, among other things, daily trading volume, prior reported closing prices, and NAV-related data.

Furthermore, the Commission believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange is required to obtain a representation from the Trust, prior to listing, that the NAV per Share for the

¹⁹ Under proposed NYSE Arca Equities Rule 8.600(d)(2)(D), if a series of Managed Fund Shares is trading on the Exchange pursuant to unlisted trading privileges, the Exchange will halt trading in that series as specified in NYSE Arca Equities Rule 7.34(a)(4). See NYSE Arca Equities Rule 7.34(a)(4) (setting forth rules regarding trading halts for trading pursuant to UTP of certain derivative securities products).

²⁰ The Exchange may resume trading in such series of Managed Fund Shares only when the NAV or Disclosed Portfolio is disseminated to all market participants. See proposed NYSE Arca Equities Rule 8.600(d)(2)(D).

²¹ See Commentary .04 to proposed NYSE Arca Equities Rule 8.600. See also *supra* note 18.

²² See Commentaries .02 and .03 to proposed NYSE Arca Equities Rule 8.600.

²³ See, e.g., Commentaries .05 and .06 to proposed NYSE Arca Equities Rule 8.600.

²⁴ See *supra* note 10.

²⁵ 15 U.S.C. 78k-1(a)(1)(C)(iii).

Funds will be calculated daily, and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.²⁶ The Exchange may consider the suspension of trading in, or removal from listing of, the Shares if the value of the Portfolio Indicative Value is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time.

Commentary .07 to proposed NYSE Arca Equities Rule 8.600 restricts certain personnel of PowerShares Capital Management LLC with respect to use and dissemination of information concerning the composition and/or changes to the Fund's portfolio and requires the establishment of a "firewall" between PowerShares Capital Management LLC and any affiliated broker-dealers.²⁷ In addition, proposed NYSE Arca Equities Rule 8.600(d)(2)(B)(ii) requires that the Reporting Authority that provides the Disclosed Portfolio implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.

The Commission further believes that the trading rules and procedures to which the Shares will be subject pursuant to this proposal are consistent with the Act. The Exchange has represented that the Shares are equity securities subject to Exchange's rules governing the trading of equity securities.

In support of this proposal, the Exchange has made the following representations:

(1) The Shares will conform to the initial and continued listing criteria under proposed NYSE Arca Equities Rule 8.600.

(2) The Exchange's surveillance procedures are adequate to properly monitor the trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules. Specifically, the Exchange intends to utilize its existing surveillance procedures applicable to derivative products, which will include Managed Fund Shares, to monitor trading in the Shares.²⁸

(3) Prior to the commencement of trading, the Exchange will inform its ETP Holders in a Bulletin of the special characteristics and risks associated with trading the Shares, including procedures for purchases and

redemptions of Shares, suitability requirements under NYSE Arca Equities Rule 9.2(a), the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated, information regarding the Portfolio Indicative Value, prospectus delivery requirements, and other trading information. In addition, the Bulletin will disclose that the Funds are subject to various fees and expenses, as described in the Registration Statement, and will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. Finally, the Bulletin will disclose that the NAV for the Shares will be calculated after 4 p.m. ET each trading day.

(4) The Exchange represents that the Trust is required to comply with Rule 10A-3 under the Act²⁹ for the initial and continued listing of the Shares, as provided under NYSE Arca Equities Rule 5.3.

This approval order is based on the Exchange's representations.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 1 to the proposed rule change, including whether the proposed rule change, as modified by Amendment No. 1 thereto, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2008-25 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2008-25. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2008-25 and should be submitted on or before May 1, 2008.

V. Accelerated Approval

The Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1 thereto, prior to the thirtieth day after the date of publication of notice of filing of Amendment No. 1 in the **Federal Register**. In Amendment No. 1, the Exchange provided additional safeguards in Commentary .07 to proposed NYSE Arca Equities Rule 8.600 that relate to restricted access and dissemination of key information regarding the composition of, and changes to, the Investment Company portfolio, including the requirement of "firewalls" to be erected around certain personnel of the investment adviser to the Investment Company, to the extent such investment adviser is a registered broker-dealer or affiliated with a registered broker-dealer, and procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio. In addition, the Exchange represented that PowerShares Capital Management LLC, the investment adviser of the Funds, has implemented a firewall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the Fund's portfolio and is already subject to the provisions of applicable rules under the Advisers Act.³⁰ The Commission notes that Commentary .07 is based on, and substantially similar to, Commentary .01(b)(1) to NYSE Arca

²⁶ See proposed NYSE Arca Equities Rule 8.600(d)(1)(B).

²⁷ See *supra* note 10.

²⁸ See *supra* note 18.

²⁹ 17 CFR 240.10A-3. See *supra* note 10.

³⁰ See *supra* note 10.

Equities Rule 5.2(j)(3) and Commentary .06 to Amex Rule 1000B.³¹ The Commission believes that Amendment No. 1 strengthens the proposal by promoting fair disclosure of Investment Company portfolio information and raises no new regulatory issues. Accordingly, the Commission finds good cause for approving the proposal, as modified by Amendment No. 1 thereto, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,³² that the proposed rule change (SR-NYSEArca-2008-25), as modified by Amendment No. 1 thereto, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8-7514 Filed 4-9-08; 8:45 am]

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DEPARTMENT OF STATE

[Public Notice 6184]

Bureau of Educational and Cultural Affairs (ECA) Request for Cooperative Agreement Proposals: English Language Fellow Program for Academic Year (AY) 2009–2010

Announcement Type: Cooperative Agreement.

Funding Opportunity Number: ECA/A/L—09-01.

Catalog of Federal Domestic Assistance Number: 19.421.

Key Program Dates: N/A.

Application Deadline: June 13, 2008.

The Office of English Language Programs of the Bureau of Educational and Cultural Affairs announces an open competition for proposals to advance the Bureau's objectives through support of academic exchanges that will result in the improvement of English teaching capacity around the world and the enhancement of mutual understanding between the people of the United States and those of other countries through exchanges of U.S. English language educators to all regions of the world.

The English Language Fellow (EL Fellow) Program sends U.S. educators in the field of Teaching English as a Foreign Language (TEFL) on ten-month fellowships to overseas academic institutions. The Program also will bring Exchange EFL (English as a Foreign Language) Educators to the U.S. for a three-week workshop/institute including participation in the annual TESOL Convention. Pending the availability of Fiscal Year (FY) 2009 funds, the Bureau anticipates the placement of approximately 88 English Language Fellows (EL Fellows) overseas in AY 2009–2010. Public and private non-profit organizations meeting the provisions described in Internal Revenue Code, Section 26 U.S.C. 501(c)(3) may submit proposals to administer and manage the EL Fellow Program for AY 2009–2010.

I. Funding Opportunity Description

Authority

Overall Grant and Agreement-making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87-256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries. . . ; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations. . . and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation.

Purpose

The English Language Fellow Program fosters mutual understanding between the people of the United States and those of other countries through exchanges of U.S. English language educators. The EL Fellow Program sends talented, highly qualified U.S. educators in the field of Teaching English to Speakers of Other Languages (TEFL) on ten-month assignments to academic institutions in all regions of the world. Through projects recommended by U.S. embassies, EL Fellows share their expertise, hone their skills, gain international experience, and learn other cultures. Upon returning to the United States, they share their experiences and acquired knowledge with their communities and

professional colleagues. Projects are carried out with host-country ministries of education, universities, teacher-training institutions, NGOs, binational centers, and other English language teaching institutions.

The EL Fellow Program allows students and teachers at host institutions to benefit from the EL Fellows' expertise and to gain a better understanding of American values, representative government, free enterprise, and the rule of law. EL Fellows provide foreign educators, professionals, and students with communications skills they need to participate in the global economy and to improve their access to diverse perspectives on a broad variety of issues.

During the program, EL Fellows typically serve as full-time (up to 20 classroom contact hours per week) educators and may be engaged in teacher training, curriculum and materials development, English for Specific Purposes (ESP) instruction, assessment, evaluation, research, English club or American Corner programming, summer camps, and other outreach projects.

The overarching goals of the EL Fellow Program are to:

- Advance the Department of State's mutual understanding objectives;
- Enhance English teaching capacity overseas in order to provide foreign teachers and students with the communication skills they need to participate in the global economy;
- Allow students and teachers at host institutions to benefit from the EL Fellows' expertise and to gain a better understanding of American values, representative government, free enterprise, and the rule of law; and
- Provide an opportunity for U.S. English language educators to share their expertise, hone their skills, and learn about other cultures, so that upon returning to the United States, they can share their experiences and acquired knowledge with their communities and professional colleagues.

EL Fellow Eligibility Requirements

- U.S. citizenship;
- Master's degree with a focus in the field of Teaching English as a Foreign Language (TEFL), conferred no later than end of 2009 spring semester;
- Minimum of two years of professional experience in the field of Teaching English as a Foreign Language (TEFL); and
- Teacher training experience for a small cadre of "Senior" EL Fellows for projects requiring special expertise within the TEFL discipline.

³¹ See Securities Exchange Act Release No. 57514 (March 17, 2008), 73 FR 15230 (March 21, 2008) (SR-Amex-2008-02) (approving, among other things, the listing standards for Managed Fund Shares, including Commentary .06 to Amex Rule 1000B, which relates to "firewalls" and the protection of information regarding the Investment Company's portfolio).

³² 15 U.S.C. 78s(b)(2).

³³ See 17 CFR 200.30-3(a)(12).

Background

The Bureau seeks to award Cooperative Agreement funding to an applicant with the ability to achieve these objectives, incorporate lessons learned, and build upon past successes. A Cooperative Agreement will be awarded to a Recipient that has the necessary infrastructure and experience conducting academic exchange programs. The timing of the award and the amount of funding for the EL Fellow Program are subject to the availability of funds in FY 2009.

EL Fellow Program Guidelines

With the approval of the Office of English Language Programs, the roles and responsibilities of the Recipient administering the EL Fellow Program are to:

- Design and develop promotional materials to support advertisement and recruitment for the EL Fellow Program.
- Conduct an extensive, comprehensive, and ongoing promotional and advertising campaign to recruit qualified and experienced candidates for the EL Fellow Program.
- Identify and review with the Bureau of Educational and Cultural Affairs, Office of English Language Programs, and U.S. embassies' candidates for approximately 88 EL Fellow projects selected by the U.S. Department of State (approximately 70 EL Fellows and 18 Senior EL Fellows). Staff who are qualified and experienced in the field of TESOL must interview candidates and match candidates' skills to the needs of specific projects. The recruitment, selection, and placement process shall be completed by June 1, 2009.
- Plan and conduct a pre-departure orientation in Washington, DC.
- Conduct all financial management aspects of the EL Fellow Program, including processing of all EL Fellow grant payments electronically to EL Fellows' designated bank accounts. Maintain an EL Fellow Program budget spreadsheet.
- Provide fiscal management for EL Fellows' professional development activities during the assignment. These activities are selected by the Bureau and are supported by U.S. embassies and the Public Diplomacy Offices of the U.S. Department of State's Regional Geographic Bureaus.
- Make all necessary travel arrangements for the EL Fellows including reservations and issuance of tickets and itineraries.
- Enroll the selected EL Fellows in the Bureau Accident and Sickness Program for Exchanges (ASPE) Benefit Plan.

- Collect EL Fellows' health verification forms and arrange for proper medical clearance by a qualified medical practitioner.
- Monitor the EL Fellow Program activities and the EL Fellows, including making regional site visit(s).
- Develop evaluation strategies designed to measure the impact and outcome of the EL Fellow Program and the effectiveness of each individual EL Fellow's professional activities at his/her designated host institution(s).
- Maintain information sharing tools (e.g., Web site/listserv, database) records for the Bureau's Alumni Office.
- Organize and implement activities related to the annual TESOL Convention, including: conducting a three-week Exchange EFL (English as a Foreign Language) Educators Fellow workshop/institute for foreign participants chosen by the State Department; arranging for the workshop/institute participants to attend the annual TESOL Convention; and making all provisions for the Office of English Language Programs' reception at the TESOL Convention for the workshop/institute participants and EL Fellow Program alumni.
- Prepare Form DS-2019 and send the Form to each selected Exchange EFL Educator Fellow at least 60 days before his/her departure from his/her home country for the workshop/institute.

The responsibilities of the Recipient are clearly detailed in the Project Objectives, Goals, and Implementation (POGI). Due to the diverse responsibilities involved in administering the Cooperative Agreement, the Bureau welcomes the submission of proposals involving partnering organizations. In addition to the primary grantee, these other organizations may be sub-grantees responsible for carrying out specific activities or components of the EL Fellow Program, such as recruitment, financial and logistical management, reporting requirements, pre-departure orientation, evaluations, clearance of health verification records, TESOL 2009-related activities, etc. Applications involving partnering organizations, if applicable, must clearly delineate the role each partnering organization will play and its responsibilities. Letters of commitment from any potential partnering organization(s) must be included.

The Office of English Language Programs and U.S. embassies are substantially involved in the EL Fellows' roles and responsibilities. U.S. embassies facilitate the management of the EL Fellows in-country while the Bureau provides overall program and

policy design and direction, with substantial involvement at all levels of the EL Fellow Program. Under the auspices of the Cooperative Agreement managed by the Bureau, the roles and responsibilities of the Bureau include:

- Inviting U.S. embassies to submit EL Fellow proposals;
 - Reviewing and analyzing the ability of projects to raise the academic standards of English language teaching and to promote the Bureau's public diplomacy and exchanges goals;
 - Analyzing the prospective impact of projects on host-country English teaching institutions and the likelihood of projects meeting host-country institutional needs;
 - Prioritizing and finalizing selection of projects for which the Recipient will recruit EL Fellow candidates;
 - Reviewing candidates' qualifications and résumés;
 - Monitoring projects, participants, and program activities;
 - Communicating and working with U.S. embassies to resolve EL Fellow issues (academic, health, welfare, etc); and
 - Reviewing reports of EL Fellow activities and projects in host countries.
- U.S. embassies submit proposals to the Bureau identifying opportunities for placement of Fellows in host-country institutions in accordance with the guidance provided by the Bureau. U.S. embassies are responsible for managing the EL Fellow Program in-country. The role of the U.S. embassies includes:
- Selecting host institutions, including evaluating the security of prospective sites;
 - Establishing viable partnerships with prospective in-country host institutions that have critical English language programming needs;
 - Developing project proposals in consultation with in-country host institutions to be implemented by EL Fellows;
 - Reviewing applicants' qualifications and making final selections of EL Fellow candidates in consultation with in-country host institutions;
 - Contacting EL Fellows prior to their arrival to answer questions about work-related issues, and to ensure that they have accurate information regarding housing, visa requirements, security, etc.;
 - Conducting an EL Fellows' in-country arrival orientation and ensuring that the EL Fellows receive a security briefing by the embassy's Regional Security Officer;
 - Working to maximize participants' safety and well-being, locating and securing quality housing, ensuring that

the EL Fellows' visa/residency status is adjusted immediately after arrival in host country to comply with host-country immigration regulations, and acting as the EL Fellows' and Bureau's direct point of contact;

- Conducting site visits and monitoring of EL Fellows' programs and activities; and
- Selecting nominees (foreign teachers of English as a Foreign language) for participation in the 43rd Annual TESOL Convention (TESOL 2009) and related activities in the U.S.

II. Award Information

Type of Award: Cooperative Agreement.

Bureau's level of involvement in the EL Fellow Program is listed under number I above.

Fiscal Year Funds: FY 2009 (pending availability of funds).

Approximate Total Funding: \$6,300,000.

Approximate Number of Awards: 1.
Approximate Average Award: \$6,300,000.

Floor of Award Range: N/A.

Ceiling of Award Range: N/A.

Anticipated Award Date: Pending availability of funds, October 1, 2008.

Anticipated Project Completion Date: March 31, 2011.

Additional Information: Pending successful implementation of the EL Fellow Program and the availability of funds in subsequent fiscal years, it is the Bureau's intent to renew this Cooperative Agreement for two additional fiscal years before openly competing it again.

III. Eligibility Information

III.1. Eligible applicants: Applications may be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

III.2. Cost sharing or matching funds: There is no minimum or maximum percentage required for this competition. However, the Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs. When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved Cooperative Agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, the applicant must maintain written records to support all costs which are claimed as contribution, as well as costs to be paid by the Federal government. Such

records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A-110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event the applicant does not provide the minimum amount of cost sharing as stipulated in the approved budget, the Bureau's contribution will be reduced in like proportion.

III.3. Other Eligibility Requirements

Bureau Cooperative Agreement guidelines require that organizations with less than four years experience in conducting international exchanges be limited to \$60,000 in Bureau funding. ECA anticipates awarding one Cooperative Agreement in an amount up to \$6,300,000 to support program and administrative costs required to implement this exchange program. Therefore, organizations with less than four years experience in conducting international exchanges are ineligible to apply under this competition. The Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

IV. Application and Submission of Information

Note: Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1. Contact Information to Request an Application Package: Please contact the Office of English Language Programs, ECA/A/L, Room 304, U.S. Department of State, SA-44, 301 4th Street, SW., Washington, DC 20547, telephone (202) 453-8844, fax: (202) 453-8858, e-mail williamsoncj@state.gov to request a Solicitation Package. Please refer to Funding Opportunity Number ECA/A/L-09-01 located at the top of this announcement when making your request.

Alternatively, an electronic application package may be obtained from Grants.gov. Please see section IV.2 for further information.

The Solicitation Package contains the Proposal Submission Instructions (PSI) document which consists of required application forms, and standard guidelines for proposal preparation.

It also contains the Project Objectives, Goals, and Implementation (POGI) document, which provides specific information, award criteria, and budget instructions tailored to this competition.

Please specify ECA/A/L Program Officer, Catherine Williamson, and refer to Funding Opportunity Number ECA/A/L-09-01 located at the top of this announcement on all other inquiries and correspondence.

IV.2. To Download a Solicitation Package Via Internet: The entire Solicitation Package may be downloaded from the Bureau's Web site at <http://www.exchanges.state.gov/education/rfgps/menu.htm> or from the Grants.gov Web site at <http://www.grants.gov>. Please read all information before downloading.

IV.3. Content and Form of Submission: Applicants must follow all instructions in the Solicitation Package. The application should be submitted per the instructions under IV.3f. "Application Deadline and Methods of Submission" section below.

IV.3a. Applicant is required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a Grant or Cooperative Agreement from the U.S. Government.

This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access <http://www.dunandbradstreet.com> or call 1-866-705-5711. Please ensure that the applicant's DUNS number is included in the appropriate box of the SF-424, which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative, and budget. Please Refer to the Solicitation Package for formatting and technical requirements. The package contains the mandatory Proposal Submission Instructions (PSI) document and the Project Objectives, Goals, and Implementation (POGI) document.

IV.3c. Applicant must have nonprofit status with the IRS at the time of application. *Please note:* Effective March 14, 2008, all applicants for ECA federal assistance awards must include with their application, a copy of page 5, Part V-A, "Current Officers, Directors, Trustees, and Key Employees" of their most recent Internal Revenue Service (IRS) Form 990, "Return of Organization Exempt From Income Tax." If the organization is a private nonprofit which has not received a Grant or Cooperative Agreement from ECA in the past three years, or if the applicant organization has received nonprofit status from the IRS within the past four years, the applicant must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause

the proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing the proposal narrative:

IV.3d.1. Adherence to All Regulations Governing the J Visa

The Bureau of Educational and Cultural Affairs places critical emphases on the security and proper administration of Exchange Visitor (J visa) programs and adherence by the Recipient and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of the Exchange Visitor Programs as set forth in 22 CFR part 62, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting, and other requirements.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at <http://exchanges.state.gov> or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD—SA—44, Room 734, 301 4th Street, SW., Washington, DC 20547, Telephone: (202) 203-5029, FAX: (202) 453-8640.

Please refer to Solicitation Package for further information.

IV.3d.2. Diversity, Freedom, and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into the proposal. Public Law 104-319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide

opportunities for participation in such programs to human rights and democracy leaders of such countries." Public Law 106-113 requires that the governments of the countries described above not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation

Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that the proposal include a draft survey questionnaire, or other technique, plus a description of a methodology to be used to link outcomes to original project objectives. The Bureau expects that the Recipient will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. The evaluation plan should include a description of the project's objectives, the anticipated project outcomes, and how and when the Recipient intends to measure these outcomes (performance indicators). The more that outcomes are "smart" (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. The Recipient should also show how the project objectives link to the goals of the program described in this RFGP.

The monitoring and evaluation plan should clearly distinguish between program *outputs* and *outcomes*. *Outputs* are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes, *i.e.*, the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. *Outcomes*, in contrast, represent specific intended project results to achieve, and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage the applicant to assess the following four levels of outcomes as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. Participant satisfaction with the program and exchange experience.
2. Participant learning, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.
3. Participant behavior, concrete actions to apply knowledge in work or community; such as greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.
4. Institutional changes, such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes. Overall, the quality of the monitoring and evaluation plan will be judged on how well it (1) specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (*i.e.*, surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

The Recipient will be required to provide reports analyzing the evaluation findings to the Bureau in the regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV. 3d.4. Describe plans for sustainability, *e.g.*, overall program management, staffing, coordination with ECA and embassies.

IV.3e. Please take the following information into consideration when preparing the budget:

IV.3e.1. Applicants must submit a comprehensive budget for the entire program. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program

component, phase, location, or activity to provide clarification.

IV.3e.2. For allowable costs for the program and complete budget guidelines and formatting instructions, please refer to the Solicitation Package and POGI.

IV.3f. Application Deadline and Methods of Submission

Application Deadline Date: June 13, 2008.

Reference Number: ECA/A/L-09-01.

Methods of Submission:

Applications may be submitted in one of two ways:

1. In hard-copy, via a nationally recognized overnight delivery service (i.e., DHL, Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, etc.), or

2. Electronically through <http://www.grants.gov>. Along with the Project Title, all applicants must enter the above Reference Number in Box 11 on the SF-424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.1. Submitting Printed Applications

Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadline are ineligible for consideration under this competition. ECA will *not* notify the applicant upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages *may not* be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing the submission please make sure to include one extra copy of the completed SF-424 form and place it in an envelope addressed to "ECA/EX/PM."

The original and 14 copies of the application should be sent to: U.S. Department of State, SA-44, Bureau of Educational and Cultural Affairs, Ref.: ECA/A/L-09-01, Program Management,

ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

IV.3f.2. Submitting Electronic Applications

Applicants have the option of submitting proposals electronically through Grants.gov (<http://www.grants.gov>). Complete solicitation packages are available at Grants.gov in the "Find" portion of the system. Please follow the instructions available in the 'Get Started' portion of the site (<http://www.grants.gov/GetStarted>).

Several of the steps in the Grants.gov registration process could take several weeks to complete. Therefore, applicants should check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov.

Once the applicant has registered, the amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of the applicant's Internet connectivity.

Therefore, we strongly recommend that the applicant not wait until the application deadline to begin the submission process through Grants.gov.

Direct all questions regarding Grants.gov registration and submission to: Grants.gov Customer Support.

Contact Center Phone: 800-518-4726.

Business Hours: Monday-Friday, 7 a.m.-9 p.m. Eastern Time.

E-mail: support@grants.gov.

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the Grants.gov system and will be technically ineligible.

Applicants will receive a confirmation e-mail from Grants.gov upon the successful submission of an application. ECA will *not* notify applicants upon receipt of electronic applications.

It is the responsibility of all applicants submitting proposals via the Grants.gov Web portal to ensure that proposals have been received by Grants.gov in their entirety, and ECA bears no responsibility for data errors resulting from transmission or conversion processes.

IV.3g. Intergovernmental Review of Applications: Executive Order 12372 does not apply to this program.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau Grant and Agreement panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for Cooperative Agreement resides with the Bureau's Grants Officer.

V.2. Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Quality of the program idea/program planning:* Proposals should exhibit originality, substance, precision, and relevance to the Bureau's mission. Detailed agenda and relevant work plan should demonstrate substantive undertakings and logistical capacity. Agenda and plan should adhere to the program overview and guidelines described above.

2. *Ability to achieve program objectives:* Objectives should be reasonable, feasible, and flexible. Proposals should clearly demonstrate how the institution will meet the program's objectives and plan.

3. *Multiplier effect/impact:* Proposed programs should strengthen long-term mutual understanding, including maximum sharing of information and establishment of long-term institutional and individual linkages.

4. *Support of diversity:* Proposals should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (selection of participants, program venue, and program evaluation) and program content (orientation and wrap-up sessions, program meetings, resource materials, and follow-up activities).

5. *Institutional capacity:* Proposed personnel and institutional resources should be adequate and appropriate to achieve the program or project's goals.

6. *Institution's record/ability:* Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau Grants or Cooperative Agreements as determined by Bureau Grants staff. The Bureau will consider the past performance of prior Recipients and the demonstrated potential of new applicants.

7. *Follow-on activities:* Proposals should provide a plan for continued follow-on activity (without Bureau support), ensuring that Bureau supported programs are not isolated events.

8. *Project evaluation:* Proposals should include a plan to evaluate the activities' success, both as the activities unfold and at the end of the program. A draft survey questionnaire, or other technique, plus description of a methodology to be used to link outcomes to original project objectives is recommended.

9. *Cost-effectiveness and Cost Sharing:* The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other budgeted items should be necessary and appropriate. Proposals should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

10. *Professional expertise in TEFL:* Proposals should demonstrate a publicity and recruitment plan that allows for the greatest dissemination of information to professionals in the areas of teaching English as a foreign language, Applied Linguistics, and related fields. The applicant must be able to provide knowledgeable, experienced management staff with TEFL/TESOL qualifications who are capable of interviewing candidates and accurately evaluating their teaching qualifications for the Fellow program.

VI. Award Administration Information

VI.1a. Award Notices

Final awards cannot be made until funds have been appropriated by Congress, allocated, and committed through internal Bureau procedures. Successful applicants will receive an Assistance Award Document (AAD) from the Bureau's Grants Office. The AAD and the original Cooperative Agreement proposal with subsequent modifications (if applicable) shall be the only binding authorizing documents between the Recipient and the U.S. Government. The AAD will be signed by

an authorized Grants Officer and mailed to the Recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

Prohibition on the Use of Federal Funds to Promote, Support, or Advocate for the Legalization or Practice of Prostitution.

"The U.S. Government is opposed to prostitution and related activities which are inherently harmful and dehumanizing and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote, support, or advocate the legalization or practice of prostitution. Nothing in the preceding sentence shall be construed to preclude assistance designed to ameliorate the suffering of, or health risks to, victims while they are being trafficked or after they are out of the situation that resulted from such victims' being trafficked."

The Recipient shall insert the foregoing provision in all sub-agreements under the award.

This provision includes express terms and conditions of the agreement and any violation of it shall be grounds for unilateral termination of the agreement by the Department of State prior to the end of its term.

VI.2. Administrative and National Policy Requirements

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A-122, "Cost Principles for Nonprofit Organizations."

Office of Management and Budget Circular A-21, "Cost Principles for Educational Institutions."

OMB Circular A-87, "Cost Principles for State, Local, and Indian Governments."

OMB Circular No. A-110 (Revised), "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations."

OMB Circular No. A-102, "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments."

OMB Circular No. A-133, "Audits of States, Local Government, and Non-profit Organizations."

Please reference the following Web sites for additional information:

<http://www.whitehouse.gov/omb/grants>.

<http://exchanges.state.gov/education/grantsdiv/terms.htm#articleI>.

VI.3. *Reporting Requirements:* The Recipient must provide ECA with a hard copy original plus two copies of the following reports:

(1) *Interim Program Reporting:* A report describing and evaluating the activities undertaken pursuant to the award document shall be submitted within 30 days following each calendar year quarter.

(2) *Interim Financial Reporting:* A report reflecting expenditures against each line item set forth in Article II of the Bureau Specific Requirements shall be submitted within 30 days following each calendar year quarter. The Recipient's Chief Fiscal Officer or an officer of comparable rank must certify this report.

(3) *Final Program Reporting:* A report describing and evaluating the activities undertaken pursuant to the award document shall be submitted within 90 days after the expiration date of the Agreement.

(4) *Final Financial Reporting:* A report reflecting expenditures against each line item set forth in Article II of the Bureau Specific Requirements shall be submitted within 90 days after the expiration date of the Agreement. The report must disclose cost sharing and be certified by the Recipient's Chief Fiscal Officer or an officer of comparable rank.

The Recipient will be required to provide reports analyzing evaluation findings to the Bureau in the regular program reports. (Please refer to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information).

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VI.4. *Optional Program Data Requirements:* Organizations awarded a Cooperative Agreement will be required to maintain specific data on program participants and activities in an electronically accessible database format that can be shared with the Bureau as required. As a minimum, the data must include the following:

(1) Name, address, contact information, and biographic sketch of all persons who travel internationally on funds provided by the Cooperative Agreement or who benefit from the Cooperative Agreement funding but do not travel.

(2) Itineraries of international and domestic travel, providing dates of travel and cities in which any exchange experiences take place. Final schedules for in-country and U.S. activities must be received by the ECA Program Officer at least three work days prior to the official opening of the activity.

VII. Agency Contacts

For questions about this announcement, contact: Catherine Williamson, Office of English Language Programs, ECA/A/L, U.S. Department of State, SA-44, 301 4th Street, SW., Washington, DC 20547, telephone (202) 453-8844, fax (202) 453-8858, e-mail williamsoncj@state.gov.

All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/A/L-09-01. Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: April 3, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. E8-7625 Filed 4-9-08; 8:45 am]

BILLING CODE 4710-05-P

DEPARTMENT OF STATE

[Public Notice 6172]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals: Arts Exchanges on International Issues Announcement Type: New Grants

Funding Opportunity Number: ECA/PE/C/CU-08-43.

Catalog of Federal Domestic Assistance Number: 00.000

Key Dates:

Application Deadline: May 22, 2008.

Executive Summary: The Cultural Programs Division of the Office of Citizen Exchanges, in the Bureau of Educational and Cultural Affairs announces an open competition for grants to implement programs that utilize the arts to engage civil society—particularly youth and diverse and underserved populations—and that foster linkages and build partnerships between U.S. and overseas non-profit arts and cultural organizations, and local communities. These international arts exchange projects will encourage democracy building by demonstrating opportunities for freedom of thought and expression and by underscoring the importance of empowerment in an open society. The Bureau anticipates that approximately 1,250,000 will be available to support this competition. ECA/PE/C/CU expects to fund approximately two to four projects under this competition in FY-2008. Public and non-profit arts and cultural organizations meeting the provisions described in Internal Revenue code section 26 U.S.C. 501(c)(3) may submit proposals that support the goals of the Arts Exchanges on International Issues Program. As applicable, programs should include two-way exchanges of participants from the U.S. and foreign countries.

Proposed projects should transform institutional and individual understanding of key international, arts and/or cultural issues, foster dialogue, develop professional expertise and develop leadership capacity. Through these people-to-people exchanges, the Bureau seeks to reach out to young people, counter negative perceptions, promote good governance, contribute to conflict prevention and management, and build respect for cultural expression and identity in the world. Projects should be structured to encourage American professionals and their international counterparts in eligible countries to develop a common dialogue for dealing with shared challenges and concerns. The Bureau is especially interested in engaging socially and economically diverse groups that may not have had extensive contact with counterpart institutions in the United States.

Applicants may only submit one proposal under this open competition. An applicant may not include in its project proposal countries not eligible under each specific theme as designated in the RFGP. Proposals that contain

countries that are not listed under each theme in the RFGP will be considered technically ineligible, and will not receive further consideration in the review process.

For this competition, all eligible organizations must demonstrate a minimum of five years' experience successfully conducting international arts exchange programs that involved the exchange of participants.

The Bureau is interested in receiving proposals from organizations with a strong interest, thematic expertise, institutional commitment and a successful track-record in conducting international exchanges. We welcome proposals from organizations that have not previously received ECA funding. Organizations that have the expertise, interest and institutional commitment but lack the required experience of conducting exchanges may wish to consider developing proposals based on consortia-type relationships with more experienced, eligible organizations. Please note that for these proposals, the role of each organization must be clearly defined and any sub-granting agreements must be included in the proposal submission.

I. Funding Opportunity Description

Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87-256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation.

Purpose: This grant competition is based on the premise that people-to-people exchanges encourage and strengthen understanding of democratic values and nurture the cultural and social growth of societies. Under this premise, the Bureau seeks proposals for projects in which U.S. visual artists and arts educators work with their counterparts overseas to create mutually beneficial and self-sustaining partnerships between cultural

organizations and/or professional communities. Proposals that show strong prospects for enhancing existing long-term collaborations or establishing new collaborative efforts among participating organizations. Proposals with a finished product will be deemed more competitive under the program planning criterion listed below.

The two project themes for which the Bureau will accept proposals under this competition are as follows: (1) Mixed Visual Artistic Mediums: Cultural Exchange Between American Indigenous and Minority Artists and Indigenous and Afro-Latino Artists from Latin and Central America; and (2) Mixed Visual Artistic Mediums: Cultural Exchange Between American Women Artists and Women Artists from Africa and/or the Middle East.

Under this grant program, U.S. non-profit organizations will conduct projects in cooperation with the Bureau of Educational and Cultural Affairs, Cultural Programs Division on the themes listed above, with their counterparts in the world regions described under each project theme. Interested applicants will need to read each of the following theme descriptions below in order to determine the eligible countries of exchange for each theme. No guarantee is made or implied that grants will be awarded in both themes and in all targeted countries.

In addition to describing extensive expertise in the specific thematic area, proposals should reflect a practical understanding of global issues, and demonstrate sensitivity to cultural, political, economic and social differences in the specific world regions in which the exchange project will occur. Special attention should be given to describing the applicant organization's experience with planning and implementing people-to-people international cultural exchange projects. Applicants should outline their project team's capacity for successfully implementing projects of this nature and provide a detailed sample program and time line to illustrate planning capacity and ability to achieve program objectives. Applicants must identify all U.S. and foreign partner organizations and/or venues with whom they are proposing to collaborate, and describe previous cooperative projects in the section on "Institutional Capacity." For this competition, applicants must include in their proposal supporting materials or documentation that demonstrates a minimum of five years' experience in conducting international arts exchange programs. Proposals must include references with name and

contact information for other assistance awards the applicant has received in the event the Bureau chooses to be in touch directly.

U.S. Embassy Involvement: Before submitting a proposal, applicants are strongly encouraged to consult with the Bureau's Cultural Programs Division in Washington, DC—for the themes/regions listed in this solicitation. It is important that the proposal narrative clearly state the applicant's commitment to consult closely with the Public Affairs Section of the U.S. Embassy in the relevant country(ies) to develop plans for project implementation and to select project participants. Proposals should also acknowledge U.S. Embassy involvement in the final selection of all participants. Applicants should state their willingness to invite representatives of the Embassy(ies) and/or consulate(s) to participate in program sessions or site visits.

For the 2008 Arts Exchanges on International Issues Program, U.S. non-profit organizations may submit grant proposals for either one of the two project themes and countries of exchange that are listed below. Please note that for additional information about this grant competition, a contact program officer is listed under each of the following two themes:

1. Mixed Visual Artistic Mediums

Two-way cultural exchange between American indigenous and minority artists and indigenous and Afro-Latino artists from countries in Latin and Central America.

Program Contact: E.J. Montgomery, tel: (202) 203-7520, e-mail: montgomeryEJ@state.gov with copy to: bensonMN@state.gov.

Project Goals:

ECA seeks programs that will bring together emerging foreign and U.S. indigenous and Afro-Latino professional artists to address common issues facing them and express their reactions to these issues through multiple, mixed artistic media. The program should focus on the challenges faced by minorities in the modern world and how minority artists can use art for self-expression and as a way to engage others in the community to address challenges facing minorities. The program should also help the artists develop a deeper understanding of themselves as artists and as opinion shapers and community leaders. Issues to be examined/explored include: identity, diversity, educational opportunities, role of indigenous and Afro-Latino minorities within a multi-ethnic society, minorities as artists, censorship, and artistic/professional

development. The program should explore similarities and unique qualities of members of minority populations and focus on how art can be used to promote tolerance and respect for diversity.

Participants:

Participants (foreign and U.S.) should be emerging indigenous and Afro-Latino artists from the U.S. and selected countries in Latin and Central America whose artistic disciplines include photography, painting, mural art, textile & fiber art, or small sculpture. They should have demonstrated a commitment to their profession as well as to positively influencing their communities, particularly other minorities and youth. A diverse mix of participants from a variety of countries in Latin and Central America is desired.

Participant Selection:

Foreign participants will be nominated in two ways: By the Department of State through a call for nominations from U.S. Embassies and posts, and; by the grantee organization, which will utilize its own network of contacts overseas (including museums, minority organizations and artistic associations) and its own resources (such as visiting U.S. artists) to make a concurrent call for nominations. The American participants will be selected via a competitive process that will include an open call for applications in the U.S. All participant applications will be reviewed by a panel organized and convoked by the grantee organization and consisting of artists and art professionals, and an ECA representative as an observer. Procedures for the nomination and for selection of participants and panel members must be detailed in the proposal. ECA will review and approve nominees (foreign and U.S.) prior to and following panel consideration, in consultation with posts.

Eligible Countries:

ECA is particularly interested in projects in the following countries: Bolivia, Ecuador, Colombia, Venezuela, Guatemala, Peru and Nicaragua.

Successful programs will achieve the following:

- Provide participants with a deeper understanding of issues facing minorities in Latin and Central America and in the U.S. This may include the role and identity of minorities in their particular cultures and how this affects their ability to reach the desired level of professional and personal development. The program should also develop and explore tools that will permit participants to address these issues.
- Provide participants an understanding of how international cultural

exchange and networking can positively influence their lives and those of others and provide them the tools to accomplish successful networking.

- Provide participants with an appreciation and a greater understanding and respect for diverse cultures—focusing specifically on U.S. society and culture. Provide them a greater understanding of the similarities, including shared values between the U.S. and the foreign country(ies).
- Enhance participant leadership capacity and their ability to initiate and support follow-on activities in their home countries intended to empower other minorities.
- Provide a platform for cross-cultural dialogue and develop enduring professional ties between U.S. and foreign artists.

Successful applicants must fully demonstrate a capacity to achieve the following:

(1) Work jointly with foreign and U.S. partners and/or contacts to design, develop, and execute a multi-lingual, multi-regional, international program of exchanges, professional development, artistic enrichment and cross-cultural dialogue that achieves the goals described above.

(2) Identify, screen, recruit and select approximately 10 to 16 indigenous and Afro-Latino artists from specified countries in Latin and Central America (at least 2 participants from each country) and between 5–8 artists from the U.S. fitting the above description.

(3) Provide a sound infrastructure for coordination and implementation of the entire program. This refers to both substantive and administrative components of the program, including but not limited to: fellowship and workshops content and organization, travel, housing, orientation, visa applications, and language interpretation. Successful applicants will also have U.S. and/or Latin and Central America partners able and willing to provide cost-sharing (including in-kind) in order to cover program costs.

(4) Design, build and implement intensive one- to two-week visual arts programs in the foreign countries and three- to four-week visual arts programs in the U.S. that will achieve program objectives.

(5) Develop enhancement activities and opportunities that reinforce program goals after the participants return to their home countries. Follow-on components could be public presentations by program participants.

Possible Program Model:

1. In the first phase of the program selected American visual artists will travel to Latin and Central America for a one- to two-week program to meet with counterparts and to conduct workshops with young emerging artists in the selected countries. The program should include visits to local universities and visual arts or other cultural partner institutions as well as events that engage broader audiences of minorities and youth from diverse and underserved populations. Through this interaction, the U.S. grantee will identify artists from the region as possible candidates for the U.S.-based program. Concurrently, overseas posts will also be making nominations. Final selection of foreign participants will then be made as described above.

2. In phase two of the program, the selected foreign artists will travel to the U.S. to participate in a three- to four week collaborative visual arts program with their American counterparts. The program should provide an overview of the role of minorities in the selected participant countries and the U.S. and the visual art techniques and traditions used by them to express identity. It should provide an opportunity for analysis, exploration and dialogue. It should include workshops and master classes that explore the role of art in self-expression and identity, underscore the importance of education for minorities, and inform about the resources available to artists. Participants should also have the opportunity to visit places of cultural interest in the visual arts field where they can interact with other artists. Through visits to community centers and other social venues, they should also have been provided an opportunity to engage broader audiences from diverse and underserved populations.

3. In phase three of the program, grantee organizes a public exhibition of the collaborative work or individual pieces produced by the participants during their fellowship that reflect themes about minorities and identity explored through the fellowship.

4. In phase four, the foreign participants return to their countries. Follow-on components to the program could be a virtual exhibit on the website of the work done by the artists during their fellowship and the opportunity to continue to network with other artist participants and engage the local communities.

5. This model cycle would be repeated, with the expectation that the grantee will seek to involve first cycle participants in some elements of the second year's program.

2. Mixed Visual Artistic Mediums

Two-way cultural exchange between American Women artists and Women artists from countries in the Middle East and/or Africa.

Program Contact: E.J. Montgomery, tel: (202) 203–7520, e-mail: montgomeryEJ@state.gov with copy to bensonMN@state.gov.

Project Goals:

ECA seeks programs that will bring together emerging foreign and U.S. professional women artists to address common issues facing women as expressed through multiple, mixed artistic media. The program should focus on the challenges faced by women in the modern world and how female artists can use art for self-expression and as a way to engage others in the community to address challenges facing them. The program should also help the artists develop a deeper understanding of themselves as artists and as opinion shapers and community leaders. Issues to be examined/ explored include: identity, censorship, equal rights, educational opportunities, violence against women, the roles of women in society, women as artists, and artistic/ professional development. The program should focus on how art can promote tolerance and respect for women.

Participants:

Participants should be emerging women artists from the U.S. and selected countries in the Middle East and/or Africa whose artistic disciplines include photography, painting, mural art, textile and fiber art, or small sculpture. They should have demonstrated a commitment to their profession as well as to positively influencing their communities, particularly other women and youth. A diverse mix of participants from a variety of countries in the Middle East and/or Africa regions is suggested.

Participant Selection:

Foreign participants will be nominated in two ways: By ECA through a call for nominations from U.S. Embassies and posts, and; by the grantee organization, which will utilize its own network of contacts overseas (including museums, minority organizations and artistic associations) and its own resources (such as visiting U.S. artists) to make a concurrent call for nominations. The American participants will be selected via a competitive process that includes an open call for applications in the U.S. All participant applications will be reviewed by a panel organized and convoked by the grantee organization and consisting of artists and art professionals, and an ECA representative as an observer.

Procedures for the nomination and for selection of participants and panel members must be detailed in the proposal. ECA will review and approve nominees (foreign and U.S.) prior to and following panel consideration in consultation with posts.

Eligible Countries

ECA seeks projects in the Middle East and/or Africa.

Successful programs will achieve the following:

- Provide participants a deeper understanding of issues facing women in the Middle East and/or Africa and in the U.S. This may include the role and identity of women in their particular cultures and how this affects their ability to reach the desired level of professional and personal development. The program should also develop and explore tools that will permit participants to address these issues.
- Provide participants an understanding of how international cultural exchange and networking can positively influence their lives and those of others and provide them the tools to accomplish successful networking.
- Provide participants with an appreciation and a greater understanding and respect for diverse cultures—focusing specifically on U.S. society and culture. Provide them a greater understanding of the similarities, including shared values between the U.S. and the foreign country(ies).
- Enhance participant leadership capacity and their ability to initiate and support follow-on activities in their home countries intended to empower other women.
- Provide a platform for cross cultural dialogue and for developing enduring professional ties between U.S. and foreign artists.

Successful applicants must fully demonstrate a capacity to achieve the following:

(1) Work jointly with foreign and U.S. partners and contacts to design, develop, and execute a multi-lingual, multi-regional, international program of exchanges, professional development, artistic enrichment and cross-cultural dialogue that achieves the goals described above.

(2) Identify, screen, recruit and select approximately 10 to 16 women throughout countries in the Middle East and/or Africa (at least 2 participants from each country) and between 5–8 artists from the U.S. fitting the above description.

(3) Provide a sound infrastructure for coordination and implementation of the entire program. This refers to both substantive and administrative components of the program, including but not limited to: Fellowship and workshop content and organization, travel, housing, orientation, visa applications, and language interpretation. Successful applicants will also have partners in the U.S. and/or Middle East and Africa that are able and willing to provide cost-sharing (including in-kind) in order to cover program costs.

(4) Design, build and implement intensive one- to two-week visual arts programs in the foreign countries and three- to four-week visual arts programs in the U.S. that will achieve program objectives.

(5) Develop enhancement activities and opportunities that reinforce program goals after the participants return to their home countries. Follow-on components could be public presentations by program participants.

Possible Program Model:

1. In the first phase of the program selected American visual artists will travel to the Middle East and/or Africa for a one- to two-week program to meet with counterparts and to conduct workshops with young emerging artists in the selected countries. The program should include visits to local universities and visual arts partner institutions as well as events that engage broader audiences of women and youth from diverse and underserved populations. At this time the U.S. grantee and the Middle Eastern and African partners will identify women from the region to participate in the U.S. based program. Concurrently, overseas posts will also be making nominations. Final selection of foreign participants will then be made as described above.

2. In phase two of the program, the selected foreign artists will travel to the U.S. for a three- to four-week program to participate in collaborative visual arts projects with their American counterparts. The program should provide an overview of the role of women in the selected participant countries and the U.S. and the visual art techniques and traditions used by them to express identity. It should provide an opportunity for analysis, exploration and dialogue. It should include workshops and master classes that explore the role of art in self-expression and identity, underscore the importance of education for women and inform about the resources available to artists. Participants should also have the opportunity to visit places of cultural interest in the visual arts field where

they can interact with other artists. Through visits to community centers and other social venues, they should also have been provided an opportunity to engage broader audiences from diverse and underserved populations.

3. In phase three of the program, the grantee organizes a public program to include an exhibition of the collaborative work or individual pieces produced by the participants during their fellowship that reflect themes about women and their identity explored through the fellowship.

4. In phase four the foreign participants return to their countries. Follow-on components to the program could be a virtual exhibit on the website of the work done by the women during their fellowship and the opportunity to continue to network with other artist participants and engage the local communities.

5. This model cycle would be repeated, with the expectation that the grantee will seek to involve first cycle participants in some elements of the second year's program.

II. Award Information

Type of Award: Grant Agreement.

Fiscal Year Funds: FY–2008.

Approximate Total Funding:
\$1,250,000.

Approximate Number of Awards: 2–4 awards.

Approximate Average Award:
\$450,000.

Floor of Award Range: \$200,000.

Ceiling of Award Range: \$600,000.

Anticipated Award Date: August 15, 2008.

Anticipated Project Completion Date: August 30, 2010.

Additional Information: Pending successful implementation of this program and the availability of funds in subsequent fiscal years, it is ECA's intent to renew this grant for two additional fiscal years, before openly competing it again.

III. Eligibility Information

III.1. Eligible applicants: Applications may be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

III.2. Cost Sharing or Matching Funds: There is no minimum or maximum percentage required for this competition. However, the Bureau strongly encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of

cost sharing as stipulated in its proposal and later included in an approved grant agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, you must maintain written records to support all costs that are claimed as your contribution, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A-110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event you do not provide the minimum amount of cost sharing as stipulated in the approved budget, ECA's contribution will be reduced in like proportion. Organizations that provide no cost-sharing will be deemed not competitive under the Cost Effectiveness and Cost-Sharing Review criterion.

III.3. Other Eligibility Requirements:

(a.) Bureau grant guidelines require that organizations with less than four years experience in conducting international exchanges be limited to \$60,000 in Bureau funding. Under this competition, ECA anticipates awarding grants in the range of \$200,000–\$600,000. Therefore, organizations with less than four years experience in conducting international exchanges are ineligible to apply under this competition. The Bureau encourages applicants to provide the maximum levels of cost sharing and funding in support of its programs.

(b.) *Technical Eligibility:* In addition to the requirements outlined in the Proposal Submission Instructions (PSI) technical format instructions document, all proposals must comply with the following or they will result in your proposal being declared technically ineligible and given no further consideration in the review process.

1. The Office does not support proposals limited to conferences or seminars (i.e., one- to fourteen-day programs with plenary sessions, main speakers, panels and passive audiences). It will support conferences only when they are a small part of a larger project in duration that is receiving Bureau funding from this competition.

2. No funding is available exclusively to send U.S. citizens to conferences or conference-type seminars overseas; nor is funding available for bringing foreign nationals to conferences or to routine professional association meetings in the United States.

3. The Office of Citizen Exchanges does not support academic research or faculty or student fellowships.

4. Proposals for projects involving countries/regions, themes and/or artistic

disciplines not listed in the RFGP will be deemed technically ineligible. Please carefully read the eligible countries listed under each theme.

5. No funding is available to send individual artists, arts educators, filmmakers and/or amateur arts groups to perform or study overseas.

The Arts Exchanges on International Issues Program is solely intended to support the international exchange work of non-profit organizations. Our grant program is not open to amateur or community-based visual artists. Individuals are not eligible to apply for funding of their own work. While our program emphasizes outreach to youth, all exchange participants must be at least 21 years of age.

IV. Application and Submission Information

Note: Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1. Contact Information to Request an Application Package:

Please contact the LaFaye Proctor, Cultural Programs Division, ECA/PE/C/ CU, Room 568, U.S. Department of State, SA-44, 301 4th Street, SW., Washington, DC 20547, phone number: (202) 203-7488; e-mail:

ProctorLM@state.gov to request a Solicitation Package. Please refer to the Funding Opportunity Number ECA/PE/C/ CU-08-43 located at the top of this announcement when making your request. Alternatively, an electronic application package may be obtained from grants.gov. Please see section IV.3f for further information.

The Solicitation Package contains the Proposal Submission Instruction (PSI) document, which consists of required application forms and standard guidelines for proposal preparation.

Please specify the program theme and program officer listed under each theme and refer to the Funding Opportunity Number ECA/PE/C/ CU-08-43 located at the top of this announcement on all other inquiries and correspondence.

IV.2. To Download a Solicitation Package Via Internet: The entire Solicitation Package may be downloaded from the Bureau's Web site at <http://exchanges.state.gov/education/rfgps/menu.htm>, or from the Grants.gov Web site at <http://www.grants.gov>.

Please read all information before downloading.

IV.3. Content and Form of Submission: Applicants must follow all instructions in the Solicitation Package.

The application should be submitted per the instructions under IV.3f. "Application Deadline and Methods of Submission" section below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access <http://www.dunandbradstreet.com> or call 1-866-705-5711. Please ensure that your DUNS number is included in the appropriate box of the SF-424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget.

Please refer to the Solicitation Package. It contains the mandatory Proposal Submission Instructions (PSI) document for additional formatting and technical requirements.

IV.3c. You must have nonprofit status with the IRS at the time of application.

Please note: Effective March 14, 2008, all applicants for ECA federal assistance awards must include with their application, a copy of page 5, Part V-A, "Current Officers, Directors, Trustees, and Key Employees" of their most recent Internal Revenue Service (IRS) Form 990, "Return of Organization Exempt From Income Tax." If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1. Adherence to All Regulations Governing the J Visa. The Bureau of Educational and Cultural Affairs places critically important emphases on the security and proper administration of the Exchange Visitor (J visa) Programs and adherence by grantees and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of the Exchange Visitor Programs as set forth in 22 CFR 62, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of

forms, record-keeping, reporting and other requirements.

ECA will be responsible for issuing DS-2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at <http://exchanges.state.gov> or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD-SA-44, Room 734, 301 4th Street, SW., Washington, DC 20547, Telephone: (202) 203-5029, Fax: (202) 453-8640.

Please refer to Solicitation Package for further information.

IV.3d.1. Adherence To All Regulations Governing the J Visa

The Office of Citizen Exchanges of the Bureau of Educational and Cultural Affairs is the official program sponsor of the exchange program covered by this RFGP, and an employee of the Bureau will be the "Responsible Officer" for the program under the terms of 22 CFR part 62, which covers the administration of the Exchange Visitor Program (J visa program). Under the terms of 22 CFR part 62, organizations receiving grants under this RFGP will be third parties "cooperating with or assisting the sponsor in the conduct of the sponsor's program." The actions of grantee program organizations shall be "imputed to the sponsor in evaluating the sponsor's compliance with" 22 CFR part 62. Therefore, the Bureau expects that any organization receiving a grant under this competition will render all assistance necessary to enable the Bureau to fully comply with 22 CFR part 62 *et seq.*

The Bureau of Educational and Cultural Affairs places critically important emphases on the secure and proper administration of Exchange Visitor (J visa) Programs and adherence by grantee program organizations and program participants to all regulations governing the J visa program status. Therefore, proposals should *explicitly state in writing* that the applicant is prepared to assist the Bureau in meeting all requirements governing the administration of Exchange Visitor Programs as set forth in 22 CFR 62. If your organization has experience as a designated Exchange Visitor Program Sponsor, the applicant should discuss their record of compliance with 22 CFR part 62 *et seq.*, including the oversight of their Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants,

proper maintenance and security of forms, record-keeping, reporting and other requirements.

The Office of Citizen Exchanges of ECA will be responsible for issuing DS-2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at <http://exchanges.state.gov> or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD-SA-44, Room 734, 301 4th Street, SW., Washington, DC 20547, Telephone: (202) 203-5029, Fax: (202) 453-8640.

IV.3d.2. Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socioeconomic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the "Support for Diversity" section for specific suggestions on incorporating diversity into your proposal. Public Law 104-319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Public Law 106-113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation

Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives. The Bureau expects that the grantee will track participants or partners and be able to

respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project's objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are "smart" (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program *outputs* and *outcomes*. *Outputs* are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. *Outcomes*, in contrast, represent specific results a project is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. *Participant satisfaction* with the program and exchange experience.
2. *Participant learning*, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.
3. *Participant behavior*, concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.
4. *Institutional changes*, such as increased collaboration and

partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (i.e., surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3e. Please take the following information into consideration when preparing your budget:

IV.3e.1. Applicants must submit a comprehensive budget for the entire program. Budget requests may not be less than \$200,000 and may not exceed \$625,000. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification.

IV.3e.2. Allowable costs for the program include the following:

1. *Travel.* International and domestic airfare; visas; transit costs; ground transportation costs. Please note that all air travel must be in compliance with the Fly America Act. There is no charge for J-1 visas for participants in Bureau sponsored programs.

2. *Per Diem.* For U.S.-based programming, organizations should use the published Federal per diem rates for individual U.S. cities. Domestic per diem rates may be accessed at: http://www.gsa.gov/Portal/gsa/ep/content/View.do?programId=9704&channelId=15943&oid=16365&contentId=17943&pageTypeId=8203&contentType=GSA_BASIC&programPage=%2Fep%2Fprogram%2FgsaBasic.jsp&P=MTT.

ECA requests applicants to budget realistic costs that reflect the local economy and do not exceed Federal per diem rates. Foreign per diem rates can be accessed at: http://aoprals.state.gov/content.asp?content_id=184&menu_id=78.

3. *Interpreters.* For U.S.-based activities, ECA strongly encourages applicants to hire their own locally based interpreters. However, applicants may ask ECA to assign State Department interpreters. One interpreter is typically needed for every four participants who require interpretation. When an applicant proposes to use State Department interpreters, the following expenses should be included in the budget: Published Federal per diem rates (both "lodging" and "M&IE") and "home-program-home" transportation in the amount of \$400 per interpreter. Salary expenses for State Department interpreters will be covered by the Bureau and should not be part of an applicant's proposed budget. Bureau funds cannot support interpreters who accompany delegations from their home country or travel internationally.

4. *Book and Cultural Allowances.* Foreign participants are entitled to a one-time cultural allowance of \$150 per person, plus a book allowance of \$50. Interpreters should be reimbursed up to \$150 for expenses when they escort participants to cultural events. U.S. program staff, trainers or participants are not eligible to receive these benefits.

5. *Consultants.* Consultants may be used to provide specialized expertise or to make presentations. Honoraria rates should not exceed \$250 per day. Organizations are encouraged to cost-share rates that would exceed that figure. Subcontracting organizations may also be employed, in which case the written agreement between the prospective grantee and sub-grantee should be included in the proposal. Such sub-grants should detail the division of responsibilities and proposed costs, and subcontracts should be itemized in the budget.

6. *Room rental.* The rental of meeting space should not exceed \$250 per day. Any rates that exceed this amount should be cost shared.

7. *Materials.* Proposals may contain costs to purchase, develop and translate materials for participants. Costs for high quality translation of materials should be anticipated and included in the budget. Grantee organizations should expect to submit a copy of all program materials to ECA, and ECA support should be acknowledged on all materials developed with its funding.

8. *Equipment.* Applicants may propose to use grant funds to purchase

equipment, such as computers and printers; these costs should be justified in the budget narrative. Costs for furniture are not allowed.

9. *Working meal.* Normally, no more than one working meal may be provided during the program. Per capita costs may not exceed \$15–\$25 for lunch and \$20–\$35 for dinner, excluding room rental. The number of invited guests may not exceed participants by more than a factor of two-to-one. When setting up a budget, interpreters should be considered "participants."

10. *Return travel allowance.* A return travel allowance of \$70 for each foreign participant may be included in the budget. This allowance would cover incidental expenses incurred during international travel.

11. *Health Insurance.* Foreign participants will be covered during their participation in the program by the ECA-sponsored Accident and Sickness Program for Exchanges (ASPE), for which the grantee must enroll them. Details of that policy can be provided by the contact officers identified in this solicitation. The premium is paid by ECA and should not be included in the grant proposal budget. However, applicants are permitted to include costs for travel insurance for U.S. participants in the budget.

12. *Wire transfer fees.* When necessary, applicants may include costs to transfer funds to partner organizations overseas. Grantees are urged to research applicable taxes that may be imposed on these transfers by host governments.

13. *In-country travel costs* for visa processing purposes. Given the requirements associated with obtaining J-1 visas for ECA-supported participants, applicants should include costs for any travel associated with visa interviews or DS-2019 pick-up.

14. *Administrative Costs.* Costs necessary for the effective administration of the program may include salaries for grantee organization employees, benefits, and other direct and indirect costs per detailed instructions in the Application Package. While there is no rigid ratio of administrative to program costs, proposals in which the administrative costs do not exceed 25% of the total requested ECA grant funds will be more competitive under the cost effectiveness and cost sharing criterion, per item V.1 below. Proposals should show strong administrative cost sharing contributions from the applicant, the in-country partner and other sources.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3f. Application Deadline and Methods of Submission:

Application Deadline Date: Thursday, May 22, 2008.

Reference Number: ECA/PE/C/CU-08-43.

Methods of Submission:

Applications may be submitted in one of two ways:

(1) In hard-copy, via a nationally recognized overnight delivery service (i.e., DHL, Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, etc.), or

(2) Electronically through <http://www.grants.gov>.

Along with the Project Title, all applicants must enter the above Reference Number in Box 11 on the SF-424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.1. Submitting Printed Applications

Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will *not* notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages *may not* be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF-424 form and place it in an envelope addressed to "ECA/EX/PM".

The original and 9 copies of the application should be sent to: U.S. Department of State, SA-44, Bureau of Educational and Cultural Affairs, Ref.: ECA/PE/C/CU-08-43, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

Applicants submitting hard-copy applications must also submit the "Executive Summary", "Proposal

Narrative" and "Budget" sections of the proposal in text (.txt) or Microsoft Word format on a PC-formatted disk. The Bureau will provide these files electronically to the appropriate Public Affairs Section(s) at the U.S. embassy(ies) for its (their) review.

IV.3f.2. Submitting Electronic Applications

Applicants have the option of submitting proposals electronically through Grants.gov (<http://www.grants.gov>). Complete solicitation packages are available at Grants.gov in the "Find" portion of the system. Please follow the instructions available in the 'Get Started' portion of the site (<http://www.grants.gov/GetStarted>).

Several of the steps in the Grants.gov registration process could take several weeks. Therefore, applicants should check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov.

Once registered, the amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.

Direct all questions regarding Grants.gov registration and submission to: Grants.gov Customer Support, Contact Center Phone: 800-518-4726, Business Hours: Monday-Friday, 7 a.m.-9 p.m. eastern time, E-mail: support@grants.gov.

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the grants.gov system, and will be technically ineligible.

Applicants will receive a confirmation e-mail from grants.gov upon the successful submission of an application. ECA will *not* notify you upon receipt of electronic applications.

It is the responsibility of all applicants submitting proposals via the Grants.gov web portal to ensure that proposals have been received by Grants.gov in their entirety, and ECA bears no responsibility for data errors resulting from transmission or conversion processes.

Optional—IV.3f.3. You may also state here any limitations on the number of

applications that an applicant may submit and make it clear whether the limitation is on the submitting organization, individual program director or both.

IV.3g. Intergovernmental Review of Applications: Executive Order 12372 does not apply to this program.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for grant assistance awards resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Program Planning and Ability to Achieve Objectives:* Detailed agenda and relevant work plan must explain how objectives will be achieved and must include a timetable for completion of major tasks. Program objectives should be clearly described and should reflect the applicant's expertise in the artistic discipline and geographic world region featured in your project. The proposal should include documentation of artistic merit and quality through sources such as published reviews and letters of recommendation from experts in the artistic discipline featured in your project. However, work samples are not requested and cannot be evaluated by the Bureau.

2. *Multiplier Effect/Impact:* Proposed programs should strengthen long-term mutual understanding, including maximum sharing of information and establishment of long-term institutional and individual linkages. Proposals must describe your plans for project sustainability, and for furthering the programs and partnerships beyond the conclusion of a possible ECA grant.

3. *Support of Diversity*: Proposals should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (selection of participants, program venue and program evaluation) and program content (orientation and wrap-up sessions, program meetings, resource materials and follow-up activities).

4. *Institutional Capacity*: Proposed personnel and institutional resources should be adequate and appropriate to achieve the program or project's goals. Proposal should reflect the institution's expertise in the thematic area the proposal addresses, as well as knowledge of the conditions in the specific regions abroad. Proposals should include (1) the institution's mission and date of establishment; (2) an outline of prior awards—U.S. government and/or private support received for tours abroad; (3) resumes of experienced staff members who will be part of the team implementing the program, and; (4) all other documentation requested herein.

5. *Institution's Record/Ability*: Proposals should demonstrate an institutional record of at least five years of international planning and implementation in the thematic area the proposal addresses. This includes demonstrating responsible fiscal management and full compliance with all reporting requirements for past Bureau grants as determined by Bureau Grants Staff. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants. Proposals must include references with name and contact information for other assistance awards the applicant has received in the event the Bureau chooses to be in touch directly.

6. *Project Evaluation*: Proposals should include a plan to evaluate the activity's success, both as the activities unfold and at the end of the program. A draft survey questionnaire or other technique plus description of a methodology used to link outcomes to original project objectives is requested.

7. *Cost-effectiveness and Cost-sharing*: The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Proposals should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

VI. Award Administration Information

VI.1a. Award Notices:

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive an Assistance Award Document (AAD) from the Bureau's Grants Office. The AAD and the original grant proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The AAD will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

VI.1b. The following additional requirements apply to this project:

A critical component of the Administration's Iran policy is the support for indigenous Iranian voices. President Bush himself has pledged this support and the State Department has made the awarding of grants for this purpose a key component of its Iran policy. As a condition of licensing these activities, the Office of Foreign Assets Control (OFAC) has requested the Department of State to follow certain procedures to effectuate the goals of Sections 481(b), 531(a), 571, 582, and 635(b) of the Foreign Assistance Act of 1961 (as amended); 18 U.S.C. 2339A and 2339B; Executive Order 13224; and Homeland Security Presidential Directive 6. These licensing conditions mandate that the Department conduct a vetting of potential Iran grantees and sub-grantees for counter-terrorism purposes. To conduct this vetting the Department will collect information from grantees and sub-grantees regarding the identity and background of their key employees and Boards of Directors.

Note: To assure that planning for the inclusion of Iran complies with requirements, please contact the Office's Iran Policy Coordinator, Lea Perez at (202) 453-8181 for additional information.

All awards made under this competition must be executed according to all relevant U.S. laws and policies regarding assistance to the Palestinian Authority, and to the West Bank and Gaza. Organizations must consult with relevant Public Affairs Offices before entering into any formal arrangements or agreements with Palestinian organizations or institutions.

Note: To assure that planning for the inclusion of the Palestinian Authority complies with requirements, please contact

program officer Jill Staggs, (202) 203-7500, e-mail: staggsjj@state.gov for additional information.

VI.2. Administrative and National Policy Requirements:

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A-122, "Cost Principles for Nonprofit Organizations."

Office of Management and Budget Circular A-21, "Cost Principles for Educational Institutions."

OMB Circular A-87, "Cost Principles for State, Local and Indian Governments".

OMB Circular No. A-110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A-102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A-133, Audits of States, Local Government, and Non-profit Organizations

Please reference the following Web sites for additional information: <http://www.whitehouse.gov/omb/grants>. <http://exchanges.state.gov/education/grantsdiv/terms.htm#articleI>.

VI.3. Reporting Requirements:

You must provide ECA with a hard copy original plus one copy of the following reports:

(1) A final program and financial report no more than 90 days after the expiration of the award;

(2) A concise, one-page final program report summarizing program outcomes no more than 90 days after the expiration of the award. This one-page report will be transmitted to OMB, and be made available to the public via OMB's USAspending.gov Web site—as part of ECA's Federal Funding Accountability and Transparency Act (FFATA) reporting requirements;

(3) Quarterly program and financial reports showing activities carried out, expenses incurred the calendar quarter and any changes to the project time line.

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. (Please refer to IV. Application and Submission Instructions (IV.3.d.3)) above for Program Monitoring and Evaluation information.

All data collected, including survey responses and contact information, must be maintained for a minimum of three

years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

Program Data Requirements:

Organizations awarded grants will be required to maintain specific data on program participants and activities in an electronically accessible database format that can be shared with the Bureau as required. As a minimum, the data must include the following:

(1) Name, address, contact information and biographic sketch of all persons who travel internationally on funds provided by the grant or who benefit from the grant funding but do not travel.

(2) Itineraries of international and domestic travel, providing dates of travel and cities in which any exchange experiences take place. Final schedules for in-country and U.S. activities must be received by the ECA Program Officer at least three work days prior to the official opening of the activity.

VII. Agency Contacts

For general questions about this announcement, contact: Program Officer Evangeline Montgomery, Cultural Programs Division, ECA/PE/C/CU, Room 568, U.S. Department of State, SA-44, 301 4th Street, SW., Washington, DC 20547, (202) 203-7520, e-mail: montgomeryEJ@state.gov, copy to benonMN@state.gov.

All correspondence with the Bureau concerning this RFGP should reference the Arts Exchanges on International Issues Program and ECA/PE/C/CU-08-43.

Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and

evaluation requirements per section VI.3 above.

Dated: April 3, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. E8-7624 Filed 4-9-08; 8:45 am]

BILLING CODE 4710-05-P

DEPARTMENT OF STATE

[Public Notice 6173]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals: National Security Language Initiative—Youth Program (NSLI-Y)

Announcement Type: New Cooperative Agreement.

Funding Opportunity Number: ECA/PE/C/PY-08-39.

Catalog of Federal Domestic Assistance Number: 00.000.

Key Dates:

Application Deadline: June 5, 2008.

Executive Summary: The Office of Citizen Exchange Programs of the Bureau of Educational and Cultural Affairs announces an open competition for projects in support of the National Security Language Initiative (NSLI) to provide short, medium, and/or long-term foreign language instruction and cultural immersion programs overseas for American high school students and those who have just graduated. Public and private non-profit organizations, or consortia of such organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3), may submit proposals to implement these programs in countries where the following target languages are widely spoken: Arabic, Chinese, Korean, Russian, Turkish, Indic, and Farsi. Programs will be designed for U.S. citizens aged 15 to 18 at the start of the program who are either currently enrolled in high school or have just graduated. These programs should offer at least 550 U.S. high school students structured classroom instruction and less formal interactive learning opportunities through a comprehensive exchange experience that primarily emphasizes language learning. The program is designed to develop additional language study opportunities for U.S. students. Proposals from applicant organizations should clearly indicate the building of new, additional institutional language-teaching capacity overseas for these programs. ECA plans to award a single grant for the recruitment and administration of all NSLI-Y programs in all world regions.

The Bureau expects that most students will be placed in host families, but will consider alternative housing arrangements, such as dormitories. Alternative arrangements must include adult resident daily supervision and be combined with brief home stays. In either case, the student must be ensured his or her own bed. The exchange programs will take place between January 2009 and December 2010, and we anticipate that recruitment and planning will begin during the summer/early fall of 2008. The program builds on two years of short (summer-only) intensive language programs in Arabic and Chinese conducted in 2006 and 2007. Information on these programs is available at the NSLI Youth Web site: <http://www.exchanges.state.gov/education/citizens/students/programs/nsli.htm>.

I. Funding Opportunity Description

Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, as amended, Public Law 87-256, also known as the Fulbright-Hays Act. The purpose of the Act is “to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world.” The funding authority for the program above is provided through legislation.

Purpose

The Bureau of Educational and Cultural Affairs (ECA) is supporting the participation of American high school students in intensive, substantive foreign language study to further strengthen national security and prosperity in the 21st century as part of the National Security Language Initiative (NSLI), launched by President Bush in January 2006.

Foreign language skills are essential to engaging foreign governments and peoples, especially in critical world regions, to promote understanding and convey respect for other cultures. Americans will use these skills to support the nation’s foreign affairs priorities, its economic competitiveness, and its educational institutions as they

prepare future citizens for full engagement in the global environment. The broad NSLI initiative focuses resources on improving language learning for U.S. citizens across the educational spectrum and emphasizes the need to achieve mastery of critical languages. NSLI-Y programs support the participation of American high school students and those who have just graduated in intensive, substantive educational exchange programs that will promote language learning, as well as engage the successor generation in a dialogue for greater understanding.

The goals of the NSLI-Y program are:

- To improve the ability of Americans to engage with the people of Arabic, Turkish, Indic, Farsi, Russian, Korean, and Chinese-speaking countries through shared language;
- To develop a cadre of Americans with advanced linguistic skills and related cultural understanding who are able to advance international dialogue, promote the security of the United States, compete effectively in the global economy; and
- To provide a tangible incentive for the learning and use of foreign languages by developing additional overseas language study opportunities for U.S. high school students; and
- To spark a lifetime interest in foreign cultures among American youth.

In order to achieve these goals, the Bureau supports programs for American high school students to gain and improve language proficiency in Arabic, Chinese, Korean, Russian, Indic, Farsi, and Turkish. ECA plans to award a single cooperative agreement for the recruitment and administration of all NSLI-Y programs in all world regions. Organizations with expertise in one or more of the indicated languages are encouraged to seek partners in the other languages to submit a single proposal. Consortia must designate a lead institution to receive the grant award. Applicant organizations may submit grant proposals requesting funds not exceeding \$7,400,000 to implement these exchanges between January 2009 and December 2010. The applicant must also propose to organize a sub-grant competition so that individual institutions or consortia such as schools, school districts, non-profits, etc. may compete to organize their own independent language study abroad programs.

Through these institutes, U.S. high school students and those who have just graduated from high school will participate in short, medium, or academic year programs abroad beginning January 2009. Since there is an emphasis on substantial progress in

foreign language advancement, applicant organizations should concentrate most efforts on language instruction and explain clearly the utility and advantages of proposing each type of program. The programs will provide intensive language instruction in a classroom setting, and should also provide language-learning opportunities through immersion in the cultural, social, and educational life of the partner country. Language study must be the primary focus of the program, and must offer a range of proficiencies: beginning, intermediate and advanced. The exchange program should also expand the participants' knowledge of the host country's history, culture, and political system as these support language learning.

Indicators of a successful program:

- Participants will demonstrate a measurable improvement in language skills verified through testing that includes a baseline (entry) assessment, a mid-term (in semester and year-long programs especially) assessment, and a final assessment. Assessment must measure both colloquial and formal language acquisition.
- Participants will demonstrate—for example, through surveys, essays, focus groups, or presentations—a deeper understanding of the host country's culture, society, and institutions.
- Alumni will continue their foreign language study and/or participate in other exchanges to countries where the target languages are spoken.
- Students and families from the host country who engage with the U.S. participants will demonstrate an interest in learning more about the United States.

Capacity of Administering Organization

U.S. applicant organizations or consortia must have the necessary capacity in the partner country or countries to implement the program through either their own offices or partner institutions. Organizations may demonstrate their organization's direct expertise, or they may partner with other organizations to best respond to the requirements outlined in the RFGP. Organizations that opt to work in sub-grant arrangements should clearly outline all duties and responsibilities of the partner organizations, ideally in the form of sub-grant agreements and accompanying budgets. The lead institution may not host more than one-third of total exchange participants.

Organizations or consortia applying for this cooperative agreement must demonstrate their (or their partners') capacity for conducting projects of this nature, focusing on five areas of

competency: (1) Provision of program support to American high school students; (2) quality of language instruction programs for the target audience; and (3) age-appropriate cultural programming; and (4) alumni tracking and follow-up on language acquisition; and (5) experience working with individuals from the proposed host countries. Applicant organizations must clearly address the building of new and increased institutional language study capacity overseas, especially for high school students.

Programs Models and Information

Proposals must include each of the three following program models: Short language institutes, semester, and academic year study programs.

Intensive language institutes: Each six- to eight-week program will focus on language study and cultural immersion, and will include four to six hours per day of formal language instruction, plus excursions, briefings and discussions on key cultural issues. Institutes may be offered in June/July 2009 and 2010; organizations may propose other timeframes with a justification. Language institutes should also include follow-on programs in a range of successive proficiencies for returning participants or those who have language experience.

Semester programs: High school juniors and seniors and those who have just graduated. Semester (three to five months) programs will focus on language study and cultural immersion and will include significant formal language instruction, plus excursions, briefings, and discussions on key cultural issues. Programs may take place in spring and fall semesters 2009, and spring and fall semesters 2010. Applicants are encouraged to explore options for providing academic coursework outside of the target language so that high school students are not disadvantaged when they return to their U.S. school.

Academic year programs: These programs will be limited to juniors and seniors (and recent high school graduates who begin the program activities before their 19th birthday). Academic year programs will focus on language study and cultural immersion and will include significant daily formal language instruction, plus excursions, briefings, and discussions on key cultural issues. Applicants are encouraged to explore options for providing academic coursework outside of the target language so that high school students are not disadvantaged when they return to their U.S. school.

For All Program Models

While teaching conversational vocabulary will be necessary to help students cope with their immersion setting, classes will also provide formal instruction in grammar, vocabulary, and pronunciation, and will cover speaking, listening, reading, and writing.

All programs should also include a secondary cultural immersion component designed to reinforce language learning with planned excursions that give the students the opportunity to participate in activities designed to teach them about the society, culture and history of the host country. The program activities will introduce the students to the community as feasible and appropriate and will include educational excursions that serve to enhance the visitors' understanding of contemporary society, culture, media, political institutions, ethnic diversity, history, and environment of the region.

Cooperating organizations should make every effort to identify American students at all levels of language competency—beginning, intermediate, and advanced—for each language, including heritage speakers. To the fullest extent possible, grantees should strive to place students of different levels in each program model (summer, semester and academic year).

Staff should be physically present and available to support the participants throughout the course of all programs.

Country and Language Information

The Bureau reserves the right to make changes in eligible countries for programming based on safety and security concerns.

For Arabic Programs

Applicant organizations should present plans for approximately 75 participants in the language institutes, 30 participants for the semester program, and 15 participants for the academic year program. Arabic language instruction should be available for three levels of students at the beginning, intermediate, and advanced level. Approximately 1/3 of participants should be at the intermediate and advanced level; every effort should be made to achieve a balance of programs at the different instruction levels. The program should describe a plan to test all students prior to placement to determine the appropriate level of instruction. The proposed program should make explicit accommodation for learners of varying skill levels.

Classroom instruction should emphasize Modern Standard Arabic

with class time devoted also to colloquial Arabic, so that students may interact with host families and peers in Arabic.

Applicant organizations should plan to send students to a country in North Africa, the Middle East, or the Gulf region, with the exception of Algeria, Iraq, Israel, Libya, Lebanon, Saudi Arabia, and West Bank/Gaza. Any proposal to place students in Syria is limited to short-term study in Damascus only, with a maximum of nine participants. Applicant organizations should include venues in Egypt, Morocco, and Jordan.

For Chinese Programs

Applicant organizations should present plans for approximately 75 participants in the language institutes, 30 participants for the semester program, and 15 participants for the academic year program. Chinese language instruction should be available for three levels of students: beginner, intermediate and advanced. Approximately 1/3 of the participants should be at the intermediate and advanced level. The program should describe a plan to test all students prior to placement to determine the appropriate level of instruction. The proposed program should make explicit accommodation for learners of varying skill levels.

Students should study Mandarin in class and through informal study and interaction with their host community. Teaching materials used in the program should be available in both simplified and traditional character versions. The Hanyu pinyin romanization system should be used.

Applicant organizations should plan to send students to the People's Republic of China (mainland China) or Taiwan for study.

For Farsi Programs

Applicant organizations should present plans for approximately 15 participants in an intensive language institute only (NOT for semester or academic year programs). Farsi language instruction should be available for three levels of students: beginning, intermediate, and advanced. Approximately 1/3 of participants should be at the intermediate and advanced level. The program should devise a plan to test all students prior to placement to determine the appropriate level of instruction. The proposed program should make explicit accommodation for learners of varying skill levels.

Formal instruction in written and spoken Farsi must be offered. Students should learn Farsi in class and through

informal study and interaction with their host community.

For Farsi, applicants may not plan to send students to Iran, Afghanistan, or Uzbekistan. Organizations may propose sending students to any other country with a significant Farsi-speaking population, subject to approval by ECA and the Mission in that country. Programs in Tajikistan and the United Arab Emirates will be given favorable consideration under the review criterion: institutional capacity.

For Indic Programs

Applicant organizations may submit a proposal for up to ten participants for intensive language institutes only (NOT for semester or academic-year programs). Instruction in Indic languages should include Hindi, and may also include Bengali, Punjabi, and Urdu, subject to Embassy approval. The program should devise a plan to test all students prior to placement to determine the appropriate level of instruction. The proposed program should make explicit accommodation for learners of varying skill levels, including intermediate and advanced if students place at those levels.

Students should learn the target language in class and through informal study and interaction with their host community.

Applicant organizations should plan to send students to New Delhi, India, or to cities close to a U.S. mission, and should consult with that mission.

For Korean Programs

Applicant organizations should present plans for approximately 50 participants in the language institutes, 10 participants for the semester program, and 10 participants for the academic year program. Korean language instruction should be available for three levels of students: elementary, intermediate, and advanced. Approximately 1/2 of participants should be at the intermediate and advanced level. The program should devise a plan to test all students prior to placement to determine the appropriate level of instruction. The proposed program should make explicit accommodation for learners of varying skill levels.

Students should learn Korean in class and through informal study and interaction with their host community. The Hangeul alphabet system should be used. Students should also be introduced to NAKL.

Applicant organizations should plan to send students to South Korea.

For Russian Programs

Applicant organizations should present plans for approximately 75 participants in the language institutes, 25 participants for the semester program, and ten participants for the academic year program. Russian language instruction should be available for three levels of students: beginning, intermediate, and advanced. Approximately $\frac{1}{2}$ of participants should be at the intermediate and advanced level. The program should devise a plan to test all students prior to placement to determine the appropriate level of instruction. The proposed program should make explicit accommodation for learners of varying skill levels.

Students should learn Russian in class and through informal study and interaction with their host community.

Applicant organizations should plan to send students to Russia. Applicants are encouraged to propose programs outside of Moscow and St. Petersburg, in order to maximize opportunities for language learning.

For Turkish Programs

Applicant organizations should present plans for approximately 50 participants in the intensive language institute, 22 participants for the semester program, and 5 participants for the academic year program. Turkish language instruction should be available for three levels of students: beginning, intermediate, and advanced. Approximately $\frac{1}{3}$ of participants should be at the intermediate and advanced level. The program should devise a plan to test all students prior to placement to determine the appropriate level of instruction. The proposed program should make explicit accommodation for learners of varying skill levels.

Students should learn Turkish in class and through informal study and interaction with their host community.

Applicant organizations should plan to send students to Turkey. If applicants propose programs in Ankara and Istanbul, they are encouraged to provide excursions to other parts of the country. Other cities close to a U.S. consulate may be considered following consultations with the mission.

The participant numbers outlined above are approximate and intended as suggestions only. The Bureau reserves the right to amend or modify the list of eligible countries and the target numbers of participants should conditions change in the host country.

Statement of Work

Participant Recruitment and Selection

The cooperating agency will recruit, screen, and select US high school and just-graduated students ages 15–18 at the beginning of the program. Selected participants should show strong evidence of ability to succeed academically in an intensive, demanding language study program and to adjust socially in an overseas environment. Participants should represent the diversity of the United States. Diversity addresses differences of religion, ethnicity, socio-economic status, and physical abilities. Selected students should also represent diversity of geography, type of school, and a balance between genders. Selected students should demonstrate a strong intention of continuing their language study beyond the scholarship period and applying their critical language skills later in their academic careers.

The Bureau should be consulted regarding the selection of candidates, and will approve the selection of finalists and alternates for the program.

Information about the program, along with all accompanying application materials, should be posted online. Applicant organizations should propose under Tab E a comprehensive outreach plan to publicize and recruit for the program at high schools and elsewhere nationwide.

The Bureau requests that interested students apply to the program through an online application system. An alternate paper-based application should also be provided for those candidates unable to apply online. These paper-based applications, however, must be entered into the online system by cooperating organization program staff. All application materials should be available in a sortable, searchable, electronically accessible database format that can be easily shared with the Bureau upon request.

Orientations/Pre-Departure Preparations

The administering organization will facilitate medical screening and clearance to ensure that students are healthy and have immunizations necessary for safe travel to the host country. It will also develop a parental/participant release form to be signed before departure.

The administering organization will organize a substantive, in-person, pre-departure orientation for all students. Working in consultation with ECA, the organization should include in the orientation a security briefing on the

host country. The cooperating organization may also need to work in consultation with ECA and the U.S. Embassy in the host country to arrange an in-country security briefing to be held by the Embassy's Regional Security Officer. The orientations will take place in Washington, DC. The applicant organization will provide a compelling justification if they propose to host these orientations in any other location. Comprehensive information packets will be provided to all orientation participants. A sample of the contents of these packets will be provided under Tab E.

At the end of the exchange, the cooperating agency will organize closing workshops for the students prior to departure from their host countries, which will focus on summarizing the experience, completing an evaluation, language testing, developing plans for activities at home, and preparing for re-entry.

Project Activities for All Program Models

Describe in sufficient detail the major components of the program, including project planning; publicity and recruitment, including responding to and management of a significant volume of queries and applications; the host venues; selection; orientations (U.S. and overseas); assessment and testing; language instruction; educational enrichment activities; cultural activities; participant monitoring, particularly host families and living situations; reporting to ECA of issues; and logistics.

The administering organization will provide instruction in a target language for U.S. high school students who may be beginning and/or intermediate/advanced students of the language. While teaching conversational language skills will be necessary to help students cope with their immersion setting, classes should also provide formal instruction in grammar, vocabulary, and pronunciation, and will cover reading, speaking, listening, and writing. Instruction should provide a solid foundation for future study of the language.

During the exchange, the students will also have the opportunity to participate in activities designed to teach them about community life, citizen participation, and the culture and history of the host country. Activities will engage host country peers as much as possible. The program activities will introduce the students to the community—its leaders and institutions, the ways citizens participate in local government and the resolution of societal problems—and

will include educational excursions that serve to enhance the participants' understanding of contemporary life through study of the community's history, culture, media, political institutions, ethnic diversity, and environment. Embassy and Consular personnel may pose limits or guidelines on all aspects of the community and outreach portions of the exchange.

Students will have opportunities for volunteerism and community service, and these activities should involve interacting with host country peers. Cooperating agencies will encourage students to share their culture, lifestyle, and traditions with local citizens throughout their stay and especially during International Education Week (November 17–21). Enhancement activities will increase and enhance students' appreciation of the importance of tolerance and respect for the views, beliefs, and practices of people from other cultures. Enhancement activities may include, but are not limited to, integrated projects with host country nationals, including foreign alumni of ECA programs. The applicant will work with ECA to develop strategies to identify and work with these alumni.

Living Arrangements

Applicants should describe a plan to provide students with qualified, screened, and well-motivated host families. With justification, proposals may include reasonable living allowances for the host families to cover costs associated with hosting a student. Living allowances will be reviewed and approved on a case-by-case basis. Applicants must propose a standardized screening process in the selection of host families, and for consulting about their proposed placement locations (neighborhoods, regions) with the Public Affairs Sections (PAS) of the U.S. Embassy and with the Bureau of Education and Cultural Affairs. Since the purpose of the programs is to provide an immersion experience for the language learners and increase their language skills, ECA strongly recommends home stays with local families for as much time during the program as possible, balancing this with time spent in a dormitory setting where the participants may be more inclined to speak English.

While full-time host family placements are preferred, students may be placed in a dormitory setting that includes daily adult resident supervision to ensure the security of participants and that affords the opportunity for visits with designated and screened host families who can offer brief home stays throughout the

course of the exchange. In either case, the student must be ensured his or her own bed.

Programs should provide three meals a day. While participants may receive meal stipends for some meals, program organizers should ensure that a majority of meals are provided through homestays, pre-paid board plans, group meals, etc., to ensure that students are eating properly.

With justification, applicants may provide students with monthly stipends adequate to cover necessary expenses. Proposals may include a reasonable living allowance to host families. The amounts of any stipends or allowances should be justified based on the host country's local economy.

Applicants must provide students with a local representative on whom the student may call for resolution of any cultural, academic, or adjustment issue. The person must be an English speaker that is either American or a host country national with significant experience living in the United States. Students should also be provided with an English speaking emergency contact available at any time, and with the means to communicate with this person. In some cases—and with proper justification—cell phones may be issued to the students for health and safety reasons.

Each program should have an adult accompany the students on the international flight, and an adult, English speaking staff member must be available in country to support the participants during the course of the program.

Assessment and Testing

Standardized pre- and post-institute testing should be done to determine participants' language proficiency and progress.

Pre- and post-testing should measure the student's advancement in language learning. Applicants should describe plans and instruments to measure students' increased language proficiency due to participation in this program. The data need to be analyzed and reported by the cooperating agency to ECA for the program, disaggregated by institute.

Alumni Tracking and Follow-On Activities

Alumni activities and tracking are important parts of ECA exchange programs. The applicant must provide a plan of follow-up with alumni by e-mail, through a website or weblog, newsletter, listservs, and/or in person, and should assist alumni in maintaining connections with organizations and individuals in the host country. The

cooperating organization will be expected to develop a plan to track the activities of alumni and their continued interest in studying the language.

The cooperating organization will be strongly encouraged to coordinate with ECA's Global Connections and Exchange Program (GCE) to facilitate school connectivity between the schools where the U.S. participants study, and schools in the host countries. This type of follow-on activity will increase the competitiveness of proposal submissions under the criterion: Follow-on activities. Information about the countries and specific programs can be found at: <http://exchanges.state.gov/education/citizens/students/programs/connections/>.

As an element of follow-on activities, cooperating organizations will be expected to provide opportunities for maintaining participants' involvement and interest in intercultural communication. The cooperating agency is strongly urged to outline how it will creatively organize and financially support alumni activities at a minimal cost to ECA.

Publicity

The proposal must describe how these programs will be publicized to media outlets, including print, online, and broadcast to reach the widest possible audience of qualified students. The cooperating agency will also work closely with ECA to publicize the successes of the students involved in these institutes, as well as the National Security Language Initiative as a whole. Under Tab E, the applicant organization should provide information on successful media outreach campaigns it has conducted in the past.

Institutional Grant Program

The applicant must also propose to organize a sub-grant competition so that individual institutions or consortia such as colleges, schools, school districts, non-profit organizations, etc. may compete to organize their own independent short-term (six to eight week) language study abroad programs for 10–20 high school students in a critical language listed above. Recipients of small grants would be expected to conduct their own recruitment, selection, orientation, language study, and participant monitoring and evaluations. Individual student participants of these programs should still use the EGOALS evaluation system, should complete a common online application, and should be included in NSLI-Y alumni tracking and other alumni programming. The purpose of the small grants is to

encourage the development of new or beginning exchange programs and build institutional language instruction capacity and cultural understanding in institutions in the United States and overseas. All elements of this competition will be developed in collaboration with ECA/PE/C/Y and with Embassies overseas. No less than \$1,500,000 should be set aside for this purpose. ECA envisions 10–12 grants to be awarded and at least 150 students to travel through these small grant programs.

Cooperative Agreement

In a cooperative agreement, ECA/PE/C/PY is substantially involved in program activities above and beyond routine grant monitoring. ECA/PE/C/PY activities and responsibilities for this program are as follows:

(1) Review all print and online materials (including, but not limited to, those for recruitment and orientation) regarding the institutes before publication and dissemination. Review does not include instructional materials, though the Bureau does reserve the right to request these materials as needed.

(2) Work with the cooperating agency on a recruitment strategy.

(3) Work with the cooperating agency to publicize the program, and the National Security Language Initiative (NSLI) as a whole, through various media outlets.

(4) Review and approve application forms.

(5) Participate in selection committees.

(6) Confirm final selection of principal and alternate candidates.

(7) Work with cooperating agency to implement participant orientations.

(8) Review project activity schedules for all programs.

(9) Be kept informed by the cooperating agency of its progress at each stage of the project's implementation through timely updates. In addition to these updates, ECA should be informed immediately of any serious participant issues, including, but not limited to health, safety, and security issues.

(10) Provide Bureau-approved evaluation surveys for completion by participants after completion of program.

(11) Provide substantive input on alumni activities and follow-up events.

(12) Work with cooperating agency on the recruitment, selection of grantees, and the implementation of institutional grants.

Note: All materials, publicity, and correspondence related to the program must acknowledge this as a program of the Bureau

of Educational and Cultural Affairs of the U.S. Department of State. The Bureau will retain copyright use of and distribute materials related to this program as it sees fit.

Funding

Grant funding will support costs including for recruitment and selection of participants, testing, orientation, travel, tuition and maintenance costs, educational enhancements, cultural and social activities, alumni activities, institutional grants, and administrative costs. The cooperating agency should budget for travel to Washington, DC to review program parameters with ECA.

State Department Evaluation

Independently of the cooperating organization, the Bureau's Office of Policy and Evaluation will also conduct evaluations of the NSLI-Y program through E-GOALS, its online system for surveying program participants and collecting data about program performance.

E-GOALS system evaluations assist ECA and its program grantees in meeting the requirements of the Government Performance Results Act (GPRA) of 1993. This Act requires federal agencies to measure the results of their programs in meeting pre-determined performance goals and objectives.

All NSLI-Y program participants will take three online surveys:

- Standardized pre-program surveys, at the beginning of the program;
- Standardized post-program surveys, at the end of the program; and
- Standardized follow-up surveys, approximately six months to a year after the conclusion of the program.

Further details on specific program responsibilities can be found in the Project Objectives, Goals, and Implementation document. Interested organizations should read the entire **Federal Register** announcement prior to preparing proposals. Please refer to the Proposal Submission Instructions for further information.

II. Award Information

Type of Award: Cooperative agreement.

Fiscal Year Funds: 2008.

Approximate Total Funding: \$7.4 million.

Approximate Number of Awards: 1.

Anticipated Award Date: August 30, 2008.

Anticipated Project Completion Date: December 30, 2010.

Additional Information: Pending successful implementation of this program and the availability of funds in subsequent fiscal years, ECA reserves

the right to renew the cooperative agreement for two additional fiscal years.

III. Eligibility Information

III.1. Eligible applicants: Applications may be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

III.2. Cost Sharing or Matching Funds: There is no minimum or maximum percentage required for this competition. However, the Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved grant agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, you must maintain written records to support all costs which are claimed as your contribution, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A-110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event you do not provide the minimum amount of cost sharing as stipulated in the approved budget, ECA's contribution will be reduced in like proportion.

III.3. Other Eligibility Requirements

Bureau grant guidelines require that organizations with less than four years experience in conducting international exchanges be limited to \$60,000 in Bureau funding. ECA anticipates awarding a grant (or grants) in an amount over \$60,000 to support program and administrative costs required to implement this exchange program. Therefore, organizations with less than four years experience in conducting international exchanges are ineligible to apply under this competition. The Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

IV. Application and Submission Information

Note: Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1 Contact Information To Request an Application Package

Please contact the Youth Programs Division, Office of Citizen Exchanges (ECA/PE/C/PY), room 568, U.S. Department of State, SA-44, 301 4th Street, SW., Washington, DC 20547, Telephone (202) 203-7502, Fax (202) 203-7529, or E-mail Nowlin/R@state.gov to request a Solicitation Package. Please refer to the Funding Opportunity Number (ECA/PE/C/PY-08-39) when making your request.

The Solicitation Package contains the Proposal Submission Instruction (PSI) document which consists of required application forms, and standard guidelines for proposal preparation.

Please specify Bureau Program Officer Dan Neher or Catharine Cashner and refer to the Funding Opportunity Number (ECA/PE/C/PY-08-39) located at the top of this announcement on all other inquiries and correspondence.

IV.2. To Download a Solicitation Package Via Internet

The entire Solicitation Package may be downloaded from the Bureau's Web site at <http://exchanges.state.gov/education/rfgps/menu.htm> or from the grants.gov Web site at <http://www.grants.gov>. Please read all information before downloading.

IV.3. Content and Form of Submission

Applicants must follow all instructions in the Solicitation Package. The original and eight copies of the application should be sent per the instructions under IV.3f. "Submission Dates and Times section" below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access <http://www.dunandbradstreet.com> or call 1-866-705-5711. Please ensure that your DUNS number is included in the appropriate box of the SF-424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget.

Please Refer to the Solicitation Package. It contains the mandatory PSI document for additional formatting and technical requirements.

IV.3c. You must have nonprofit status with the IRS at the time of application.

Please note: Effective March 14, 2008, all applicants for ECA federal assistance awards

must include with their application, a copy of page 5, Part V-A, "Current Officers, Directors, Trustees, and Key Employees" of their most recent Internal Revenue Service (IRS) Form 990, "Return of Organization Exempt From Income Tax." If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1. Adherence to All Regulations Governing the J Visa

While the students will not travel on J-1 visas, which are for foreign exchange visitors to the United States, the Bureau of Educational and Cultural Affairs places critically important emphasis on the security and proper administration of the Exchange Visitor (J visa) Programs and recipients and sponsors responsibilities to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's plan to meet all similar requirements as those governing the administration of Exchange Visitor Programs for students coming to the U.S. as set forth in 22 CFR part 62, for American participants traveling abroad, including screening and selection of program participants and host families, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements.

Please refer to Solicitation Package for further information. A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at <http://exchanges.state.gov> or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD-SA-44, 301 4th Street, SW., Room 734, Washington, DC 20547, Telephone: (202) 203-5029, FAX: (202) 453-8640.

IV.3d.2. Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender,

religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into your proposal. Public Law 104-319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Public Law 106-113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation

Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives. The Bureau expects that the cooperating organization will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project's objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are "smart" (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between

program outputs and outcomes. Outputs are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. Outcomes, in contrast, represent specific results a project is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. *Participant satisfaction* with the program and exchange experience.

2. *Participant learning*, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.

3. *Participant behavior*, concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.

4. *Institutional changes*, such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) Specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (i.e., surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Cooperating organizations will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All

data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3e. Please take the following information into consideration when preparing your budget:

IV.3e.1. Applicants must submit a comprehensive budget for the entire program. The anticipated per person cost for a six-to-eight-week program is \$8,000 to \$10,000. For the semester-long program, anticipated cost is \$20,000. For the academic year program, cost is estimated at \$30,000. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification. Applicants should also provide copies of any sub-grant agreements that would be implemented under terms of this award.

IV.3e.2. Allowable costs for the program include the following:

- (1) Recruitment/selection;
- (2) Preparation/orientation;
- (3) Visas and associated costs;
- (4) Travel;
- (5) Institute costs, including language instruction, program activities, and monitoring;
- (6) Room and board, as necessary;
- (7) Reasonable living allowance for host families;
- (8) Follow-on activities, including costs for school connectivity and alumni tracking;
- (9) Evaluation/Administration.

Maximum limits on grant funding are as follows: Conference room rental costs-\$250 per day per room; Consultant fees and honoraria-\$250/day; Evaluation costs-2% to 5% of the grant.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3f. Application Deadline and Methods of Submission

Application Deadline Date: June 5, 2008.

Reference Number: ECA/PE/C/PY-08-39.

Methods of Submission: Applications may be submitted in one of two ways:

- (1) In hard-copy, via a nationally recognized overnight delivery service (i.e., DHL, Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, etc.), or
- (2) Electronically through <http://www.grants.gov>.

Along with the Project Title, all applicants must enter the above Reference Number in Box 11 on the SF-

424 contained in the mandatory PSI of the solicitation document.

IV.3f.1 Submitting Printed Applications

Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will not notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages may not be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF-424 form and place it in an envelope addressed to "ECA/EX/PM".

The original and eight copies of the application should be sent to: U.S. Department of State, SA-44, Bureau of Educational and Cultural Affairs, Ref.: ECA/PE/C/PY-08-39, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

Applicants submitting hard-copy applications must also submit the "Executive Summary" and "Proposal Narrative" sections of the proposal in text (.txt) or Microsoft Word format on a PC-formatted disk. The Bureau will provide these files electronically to the appropriate Public Affairs Section(s) at the U.S. embassies for their review.

IV.3f.2. Submitting Electronic Applications

Applicants have the option of submitting proposals electronically through Grants.gov (<http://www.grants.gov>). Complete solicitation packages are available at Grants.gov in the "Find" portion of the system. Please follow the instructions available in the "Get Started" portion of the site (<http://www.grants.gov/GetStarted>).

Several of the steps in the Grants.gov registration process could take several weeks. Therefore, applicants should

check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov. Once registered, the amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.

Direct all questions regarding Grants.gov registration and submission to: Grants.gov Customer Support, Contact Center Phone: 800-518-4726, Business Hours: Monday-Friday, 7 a.m.-9 p.m. Eastern Time, E-mail: support@grants.gov.

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the Grants.gov system, and will be technically ineligible.

Applicants will receive a confirmation e-mail from Grants.gov upon the successful submission of an application. ECA will not notify you upon receipt of electronic applications.

It is the responsibility of all applicants submitting proposals via the Grants.gov Web portal to ensure that proposals have been received by Grants.gov in their entirety, and ECA bears no responsibility for data errors resulting from transmission or conversion processes.

IV.3g. Intergovernmental Review of Applications

Executive Order 12372 does not apply to this program.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department

elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for assistance awards grants resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. Quality of the program idea: Proposals should exhibit originality, substance, precision, and relevance to the Bureau's mission and the purposes outlined in this solicitation. Proposals should demonstrate how students would be recruited, selected, monitored, instructed in the target language, and supported as alumni. The level of creativity, resources, and effectiveness will be primary factors for review. Proposals should be clearly and accurately written, with sufficient relevant detail. Proposed programs should deliver high quality language instruction and strengthen long-term mutual understanding, including maximum sharing of information and establishment of long-term institutional and individual linkages. Proposals should include creative ways to involve students in their host communities.

2. Program planning: Proposals should clearly demonstrate an understanding of the program's objectives and how the organization will achieve them. The Narrative should address all of the items in the Statement of Work and Guidelines described above. A detailed agenda and relevant work plan should demonstrate organizational competency and logistical capacity. Agenda and plan should adhere to the program overview, timetable and guidelines described in this solicitation.

3. Support of Diversity: Proposals should demonstrate substantive support of the Bureau's policy on diversity in all program aspects including all participants (exchange students and hosts), sending and hosting communities, orientation, and program activities. Proposals should articulate a diversity plan, not just a statement of compliance.

4. Follow-on activities: Proposals should provide a plan for continued contact with returnees to ensure that they are tracked over time, utilized and/or organized as alumni, and provided opportunities to reinforce the knowledge and skills they acquired on the exchange and share them with others. Proposals should articulate

mechanisms to be used to foster ongoing interaction through mechanisms like ECA's Global Connections program.

5. Institutional Record/Capacity: Applicants must demonstrate a well-established infrastructure in the country or countries with which they plan to send high school students. Proposals for a consortium must have clearly defined roles for each partner organization and a plan for monitoring the work of each partner. Proposed personnel and institutional resources should be adequate and appropriate to achieve the program's goals. Proposals should demonstrate the capacity of in-country organizations to fully support and ensure the safety and well-being of participants throughout the duration of their program. Submissions should also demonstrate an understanding of the complexities of the exchange environment.

6. Program Evaluation: Successful applicants will demonstrate clear program goals and objectives as well as strategies for monitoring student and alumni progress. Proposals should include a plan to evaluate the activity's success, both as the activities unfold and at the end of the program. Submission of a sample program-specific draft survey questionnaire, or other technique, plus description of a methodology to use to link outcomes to original project objectives are highly recommended. Applicants may describe any experience conducting results-oriented evaluations. Proposals should indicate a language acquisition assessment plan that includes a baseline (entry) assessment, a mid-term (for semester and year-long programs) assessment, and a final assessment. The cooperating organization will be expected to submit quarterly reports that include student and alumni activities and progress. The final project evaluation should provide qualitative and quantitative data about the project's influence on the participants, including their language gain and continuing study of the target language, as well as their surrounding communities.

7. Cost-effectiveness/Cost-Sharing: The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Proposals should maximize cost-sharing through institutional direct funding contributions, as well as other private sector support. Preference will be given to organizations whose proposals demonstrate a quality, cost-effective program.

VI. Award Administration Information

VI.1a. Award Notices

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive an Assistance Award Document (AAD) from the Bureau's Grants Office. The AAD and the original grant proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The AAD will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

VI.2. Administrative and National Policy Requirements

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A-122, "Cost Principles for Nonprofit Organizations."

Office of Management and Budget Circular A-21, "Cost Principles for Educational Institutions."

OMB Circular A-87, "Cost Principles for State, Local and Indian Governments".

OMB Circular No. A-110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A-102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A-133, Audits of States, Local Government, and Non-profit Organizations.

Please reference the following Web sites for additional information:
<http://www.whitehouse.gov/omb/grants>.
<http://exchanges.state.gov/education/grantsdiv/terms.htm#articleI>.

VI.3. Reporting Requirements

You must provide ECA with a hard copy original plus two copies of the following reports:

(1.) A final program and financial report no more than 90 days after the expiration of the award;

(2.) A concise, one-page final program report summarizing program outcomes no more than 90 days after the

expiration of the award. This one-page report will be transmitted to OMB, and be made available to the public via OMB's USAspending.gov Web site—as part of ECA's Federal Funding Accountability and Transparency Act (FFATA) reporting requirements.

(3.) Quarterly program and financial reports that include information on the progress made on the program plan and program results to date.

Cooperating organizations will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. Please refer to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VI.4. Program Data Requirements

Organizations awarded grants will be required to maintain specific data on program participants and activities in an electronically accessible database format that can be shared with the Bureau as required. As a minimum, the data must include the following:

(1) Name, address, contact information and biographic sketch of all persons who travel internationally on funds provided by the grant or who benefit from the grant funding but do not travel.

(2) Itineraries of international and domestic travel, providing dates of travel and cities in which any exchange experiences take place. Final schedules for in-country and U.S. activities must be received by the ECA Program Officer at least three work days prior to the official opening of the activity.

VII. Agency Contacts

For questions about this announcement, contact: Daniel Neher or Catharine Cashner, Youth Programs Division, Office of Citizen Exchanges, Bureau of Educational and Cultural Affairs, ECA/PE/C/PY-08-39, U.S. Department of State, SA-44, 301 4th Street, SW., Room 568, Washington, DC 20547, Telephone (202) 453-8173 (Daniel) or (202) 453-8152 (Catharine), Fax (202) 203-7529, E-mail: neherde@state.gov or cashnerce@state.gov.

All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/PE/C/PY-08-39.

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice: The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: April 3, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. E8-7630 Filed 4-9-08; 8:45 am]

BILLING CODE 4710-05-P

DEPARTMENT OF STATE

[Public Notice 6171]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals: Youth Exchange and Study (YES) Program

Announcement Type: New Grant.

Funding Opportunity Number: ECA/PE/C/PY-08-27.

Catalog of Federal Domestic Assistance Number: 00.000

Key Dates: September 1, 2008–September 30, 2011.

Application Deadline: May 29, 2008.

Executive Summary: The Office of Citizen Exchanges of the Bureau of Educational and Cultural Affairs (ECA) announces an open competition for grants to support exchanges and relationship building between high school students from countries with significant Muslim populations and people of the United States. Public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3) and public institutions may submit proposals to recruit and select students and to carry out projects for an academic year or semester of study in the United States, incorporating themes promoting civil society, leadership, and mutual understanding.

I. Funding Opportunity Description

Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87-256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation.

Purpose

The Youth Exchange and Study (YES) program is designed to foster a global community of shared interests and values developed through better mutual understanding via first-hand participation of high school students, preferably aged 15-17, from countries with significant Muslim populations in academic year or semester exchanges to the United States. The program seeks to select students with leadership potential, to develop their leadership skills while in the U.S., and to support them in alumni activities after they return home.

The overarching goals of the program are to:

1. Promote better understanding by youth from selected countries about American society, people, institutions, values and culture;
2. Foster lasting personal ties;
3. Engage the exchange participants in activities that advance mutual understanding, respect for diversity, leadership skills, and understanding of civil society during their exchange in the U.S.;
4. Enhance Americans' understanding of the foreign students' countries and cultures;
5. Increase the capacity of organizations in participating countries to engage youth in activities that enhance mutual understanding, respect for diversity, leadership skills, and understanding of civil society through alumni activities.

Grant Funding History

This initiative is intended to build on a solid foundation of exchanges carried

out since the program began with grants awarded in FY 2002 to bring students to the U.S. in the fall of 2003. The first competition for the YES program was conducted in 2002 and grants awarded were subsequently renewed in FY 2003 and FY 2004. The second competition for grants to assist ECA in expanding the reach of the program was conducted in FY 2005, and the grants awarded were subsequently renewed in FY 2006 and FY 2007. In this third competition, ECA encourages applicants to apply as it continues expansion of the program both in the number of students and the number of countries participating. The YES program has grown incrementally each year from approximately 165 students from 11 countries in 2003-04 to 850 students from over 30 countries anticipated in 2008-09.

Through this open competition ECA seeks to provide awards to fund approximately 1,000 students from an expanded list of countries to participate in the program during the 2009-2010 academic year. Applicants that have not participated in the YES program previously are encouraged to view the program's Web site at: <http://exchanges.state.gov/education/citizens/students/programs/yes.htm> and to contact the Youth Division Program Office representatives listed in this solicitation.

Scope of Program, Timeline, and Applicant Infrastructure

Funding for the YES program will support academic year-long exchanges (between August 2009 and June 2010) with students enrolled in accredited U.S. schools and living with host families. Proposals for single semester exchanges (fall 2009 or spring 2010) may be proposed only for partner countries where the academic year is not compatible with the U.S. academic calendar.

It is anticipated that awards will be concluded in September 2008, with marketing, recruitment, selection of students and exchange program planning taking place throughout the 2008-2009 period. Grantees will be required to incur expenses beginning before September 30, 2008.

Given current U.S. visa processing timelines in some countries, students must be selected early enough to allow up to six months between the visa interview date and the date of departure for students to obtain visas in time for an August 2009 arrival. Grantees must work with the U.S. Embassy in each country to ensure timely processing of U.S. visas for all participants.

Most student participants will arrive in their U.S. host communities during

the month of August 2009 and remain for 10 or 11 months until their departure during the period of mid-May to early July 2010. August post-arrival and June pre-departure orientations for students in Washington, DC at the beginning and end of the program are encouraged. If such orientations in Washington, DC are proposed, applicants must coordinate travel and activity dates with ECA to allow opportunity for students to meet with Department of State officials and possibly with other groups of YES students. For countries where the standard of English instruction does not provide an adequate qualified applicant pool, selected students requiring additional language instruction may arrive earlier if additional preparation in the U.S. is necessary; alternatively, applicants may propose in-country or third-country language preparation and orientation prior to the students' arrival in the U.S. During the exchange period, students will participate in activities designed to teach them about American community life and values, citizen participation in a democracy, respect for diversity, and U.S. culture. Participants will have opportunities to give presentations on their countries and cultures in community forums. Therefore, students must be prepared beforehand on how to present information on their home countries.

ECA will accept proposals for either multiple-country or single-country programs. Applicants proposing multiple-country programs should include in their appendices additional country specific information about staffing, recruitment strategies, and details that may be unique to each country.

ECA will accept proposals from individual organizations with adequate infrastructure in both the U.S. and the partner country(ies) to conduct all aspects of the program, or from organizations that have formed consortia with qualified organizations or representatives to implement specified tasks to complete the project. In the latter case, the applicant must have a significant role in implementing either the U.S. or overseas component of the programs and meet all eligibility criteria discussed in this solicitation.

Applicants may propose value-added programming for students as long as it directly supports YES program objectives, themes, and goals, including full time school enrollment and enhancement activities related to the YES program mission. Examples could include special workshops or student projects focused on issues particularly relevant in the students' home country or region.

Applicants may not propose names other than "Youth Exchange and Study" (YES) for their program, so that all student participants and alumni will identify themselves first and foremost with the YES program. All materials produced for grant activities should bear the YES logo, acknowledge the Department of State as the funding source and reflect the State Department's objectives for the program. An exception to this requirement can only be made upon agreement from ECA and the U.S. Embassy in the respective countries.

The YES program is for all students from countries with significant Muslim populations. It is not, however, limited to Muslim students. It is ECA's expectation that the participants from each country will collectively reflect the religious, ethnic, socio-economic, and geographic diversity of their country, to the extent possible. In order to support cross-cultural communication and understanding, ECA encourages applicants to request funding for specially-skilled consultants. These consultants will provide training for grantee staff and volunteers to develop printed and online resource materials that support the unique cultural needs of their YES students, and offers services such as an on-call resource for staff, volunteers, host and natural families, and to provide students with support.

Eligible Countries

The partner countries for this program have been selected based on several factors: (1) Foreign policy considerations, (2) a favorable climate for exchange, and (3) anticipated recruitment and placement capacity for students from the listed country. The first list includes the countries that are currently participating in the YES program. An approximate target number of students is indicated for each country based on the experience of previous years and/or anticipated capacities for successful recruitment and placement. Proposals should be for at least the targeted number:

Afghanistan (50)
Bahrain (10)
Bangladesh (40)
Brunei (10)
Egypt (50)
Ethiopia (10)
Gaza (10)
Ghana (25)
India (45)
Indonesia (100)
Iraq (20)
Israel (Arab Communities) (20)
Jordan (30)
Kenya (20)

Kuwait (18)
Lebanon (50)
Malaysia (40)
Mali (10)
Morocco (25)
Nigeria (30)
Oman (15)
Pakistan (70)
Philippines (40)
Qatar (7)
Saudi Arabia (20)
Senegal (10)
Tanzania (30)
Thailand (20)
Tunisia (20)
Turkey (40)
West Bank (15)
Yemen (35)

In addition to the these countries currently involved in the YES program, ECA is requesting proposals to implement the YES program in the following new countries, with students to participate for the first time in 2009–10. Again, an approximate target number of students is indicated for each country.

Albania (15)
Bosnia and Herzegovina (15)
Bulgaria (7)
Burkina Faso (5)
Cote d'Ivoire (5)
Gambia (10)
Guinea (5)
Guyana (5)
Kosovo (7)
Macedonia (15)
Maldives (2)
Mauritania (5)
Mozambique (5)
Niger (5)
Sierra Leone (5)
Suriname (5)
Togo (5)
Uganda (10)

The Bureau reserves the right to amend this list at any time as conditions change. Should an applicant have questions in regards to countries on this list or an interest in proposing an exchange with additional countries not on this list, please contact the Bureau. (See Section IV.1 for contact information.)

Only one organization will be awarded a grant to implement the program in each country.

General Responsibilities

The grantee organization will be responsible for all aspects of the YES Program's implementation, including marketing, recruitment, and selection of students, procurement of U.S. visas and transit visas as required, transportation to and from the U.S., host family and school placement of students, orientations of students, natural and

host families, support of students throughout the year, and follow-on alumni activities for returning students. The responsibilities of grantees are described in further detail in the accompanying Program Objectives, Goals, and Implementation (POGI) document.

- To recruit, select, and place high school students from countries with significant Muslim populations in qualified, screened, and well-motivated and financially-able host families.
- To provide extensive orientation of students to the program prior to their coming to the U.S. English language training may also be provided to encourage diversity in the selection pool and as needed, to meet projected recruitment levels.
- To provide post-arrival, mid-year, and pre-departure orientations to students to address program rules and goals and to provide support to students while in the U.S.
- To place students in schools that are accredited by the departments of education in the respective state.
- To expose program participants to American culture and civil society through homestay experiences and enhancement activities that will enable them to attain a broad view of the society and culture of the U.S.
- To expose YES program participants to opportunities for volunteerism and community service that respond to the needs of the host community.
- To prepare YES program participants to share their culture, lifestyle, and traditions with U.S. citizens throughout their stay and during special international events that highlight exchanges such as International Education Week and Global Youth Service Day.
- To provide YES students with leadership training and opportunities that will foster skills they can take back with them and use in their home countries.
- To provide activities that will increase and enhance students' understanding of the importance of tolerance and respect for the views, beliefs, and practices of others in a diverse society.
- To develop alumni databases and create alumni programs giving opportunities for returning students to incorporate their knowledge and skills into service in their home countries.

Through participation in the YES program, students should:

1. Acquire an understanding of important elements of a civil society. This includes concepts such as volunteerism, the idea that American

citizens can and do act at the grassroots level to deal with societal problems, and an awareness of and respect for the rule of law.

2. Develop an appreciation for American culture, an understanding of the diversity of American society and increased respect for diversity, and appreciation for others with differing views, beliefs and practices.

3. Interact with Americans and generate enduring ties.

4. Teach Americans about the cultures of their home countries.

5. Gain leadership capacity that will enable them to initiate and support activities in their home countries that focus on development and community service in their role as YES alumni.

Further Considerations

1. There is no minimum or maximum number of students that may be selected and placed by one organization; however cost effectiveness will be a review criterion in all applications. It is anticipated that approximately 5–7 grants will be awarded for the YES program. Placements may be in any region in the U.S. Strong preference will be given to organizations that choose to place participants in clusters of at least three ECA funded academic year students to facilitate program enhancement activities. Applicants must demonstrate that training of local staff ensures their competence in providing culture and YES-specific orientation programs, appropriate enhancement activities, and quality supervision and counseling of students from participating countries. Please refer to the Solicitation Package for details on essential program elements, permissible costs, and criteria used to select students.

2. ECA anticipates grants beginning no later than September 2008.

3. Administration of the YES program must be in compliance with reporting and withholding regulations for federal, state, and local taxes as applicable.

4. Applicants should submit the health and accident insurance plans they intend to use for students on this program. Insurance can be provided through ECA's Accident and Sickness Program for Exchanges (ASPE) policy, however, if use of a grantee's private plan is proposed, the insurance coverage must be of equal or greater value.

5. All grantees are required to make an effort to recruit and include students with disabilities in the exchange. The ECA Program Office intends to award a grant to a separate organization to provide a special arrival orientation (in August 2009) and a pre-departure

orientation in the spring of 2010 as well as on-going support throughout the year for the students with disabilities. These orientations are in addition to general orientations required to be conducted by the recipients of this grant who will also be expected to assist in accommodating for the timing of these special orientations.

6. All exchange participants must travel on J–1 visas using DS–2019s issued by the ECA program office under its program designation.

7. Applicants should reflect an understanding of the related youth work of various international agencies in the proposed country(ies), such as the U.S. Agency for International Development, World Bank, non-governmental organizations (NGOs) working with youth, and development foundations as a way to enhance alumni programming and provide participants with resources and support when they return home.

8. Projects should promote youth awareness of and involvement in civic and democratic processes, including respect for diversity, accountability of government, human rights, and inclusiveness of women, people with disabilities, and minorities. Proposals may include small grants to encourage alumni to utilize what they have learned while on the exchange upon their return to their home countries to promote civic education projects and community development and community service initiatives.

9. Proposals must contain letters of commitment from any foreign or domestic partners to be involved in the program, and these letters should be tailored to the activities being proposed.

Please refer to the Solicitation Package for further information, especially the Project Objectives, Goals and Implementation (POGI) and the Proposal Submission Instructions (PSI).

II. Award Information

Type of Award: Grant Agreement.

Fiscal Year Funds: 2008.

Approximate Total Funding:

\$18,700,000.

Approximate Number of Awards: 5–7.

Approximate Average Award:

\$4,500,000.

Floor of Award Range: \$150,000.

Ceiling of Award Range: \$9,000,000.

Anticipated Award Date:

Approximately September 1, 2008.

Anticipated Project Completion Date: September 30, 2011.

Additional Information: The anticipated per participant cost is expected to be between \$16,000 and \$19,000 within each grant depending on the number of countries, number of students per country, special programs

provided (consulting and enhancement activities), and in-country factors that may impact costs.

Pending successful implementation of this program and the availability of funds in subsequent fiscal years, it is ECA's intent to renew this grant for two additional fiscal years, before openly competing it again.

III. Eligibility Information

III.1. Eligible applicants: Applications may be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

III.2. Cost Sharing or Matching Funds: There is no minimum or maximum percentage required for this competition. However, the Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved grant agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, you must maintain written records to support all costs which are claimed as your contribution, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110 (Revised), Subpart C.23—Cost Sharing and Matching. In the event you do not provide the minimum amount of cost sharing as stipulated in the approved budget, ECA's contribution will be reduced in like proportion.

III.3. Other Eligibility Requirements:

(a.) Grants awarded to eligible organizations with less than four years of experience in conducting international exchange programs will be limited to \$60,000. *Since the minimum award is set at \$150,000, proposals from organizations with less than four years of experience in conducting international exchange programs are ineligible to apply under this competition.*

(b.) *Technical Eligibility:* All proposals must comply with the following, or they may be declared technically ineligible and given no further consideration in the review process:

- Proposed programs must include full-time U.S. high school enrollment for a semester or full academic year;
- Proposed programs may not involve multiple year exchanges or exchanges to

take place other than within the dates of August 2009 and June 2010;

- Proposals must identify essential partners and include letters of commitment from partners critical to the implementation of the program.

IV. Application and Submission Information

Note: Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1. Contact Information to Request an Application Package: Please contact Matt O'Rourke at ECA/PE/C/PY, U.S. Department of State, SA-44, 301 4th Street, SW., Washington, DC 20547, telephone: 202-453-8170 or ORourkeMM@state.gov to request a Solicitation Package. Please refer to the Funding Opportunity Number ECA/PE/C/PY-08-27 located at the top of this announcement when making your request.

Alternatively, an electronic application package may be obtained from grants.gov. Please see section IV.3f for further information.

The Solicitation Package contains the Proposal Submission Instruction (PSI) document which consists of required application forms, and standard guidelines for proposal preparation. It also contains the Project Objectives, Goals and Implementation (POGI) document, which provides specific information, award criteria and budget instructions tailored to this competition.

For other inquiries and correspondence please contact Kevin Baker, Program Officer, tel.: 202-453-8153 or email: BakerKM1@state.gov and refer to Funding Opportunity Number ECA/PE/C/PY-08-27 that is also located at the top of this announcement.

IV.2. To Download a Solicitation Package Via Internet: The entire Solicitation Package may be downloaded from the Bureau's Web site at <http://exchanges.state.gov/education/rfgps/menu.htm> or from the Grants.gov Web site at <http://www.grants.gov>. Please read all information before downloading.

IV.3. Content and Form of Submission: Applicants must follow all instructions in the Solicitation Package. The application should be submitted per the instructions under IV.3f. "Application Deadline and Methods of Submission" section below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative

agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and free of charge. To obtain a DUNS number, access <http://www.dunandbradstreet.com> or call 1-866-705-5711. Please ensure that your DUNS number is included in the appropriate box of the SF-424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget. Please refer to the Solicitation Package. It contains the mandatory Proposal Submission Instructions (PSI) document and the Project Objectives, Goals and Implementation (POGI) document for additional formatting and technical requirements.

IV.3c. You must have nonprofit status with the IRS at the time of application.

Please note: Effective March 14, 2008, all applicants for ECA federal assistance awards must include with their application, a copy of page 5, Part V-A, "Current Officers, Directors, Trustees, and Key Employees" of their most recent Internal Revenue Service (IRS) Form 990, "Return of Organization Exempt From Income Tax."

If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1 Adherence to All Regulations Governing the J Visa

The Office of Citizen Exchanges of the Bureau of Educational and Cultural Affairs is the official program sponsor of the exchange program covered by this RFGP, and an employee of the Bureau will be the "Responsible Officer" for the program under the terms of 22 CFR part 62, which covers the administration of the Exchange Visitor Program (J-visa program). Under the terms of 22 CFR part 62, organizations receiving grants under this RFGP will be third parties "cooperating with or assisting the sponsor in the conduct of the sponsor's program." The actions of grantee program organizations shall be "imputed to the sponsor in evaluating the sponsor's compliance with" 22 CFR part 62. Therefore, the Bureau expects that any organization receiving a grant under this competition will render all

assistance necessary to enable the Bureau to fully comply with 22 CFR part 62 *et seq.*

The Bureau of Educational and Cultural Affairs places great emphasis on the secure and proper administration of Exchange Visitor (J visa) Programs and adherence by grantee program organizations and program participants to all regulations governing the J visa program status. Therefore, proposals should *explicitly state in writing* that the applicant is prepared to assist the Bureau in meeting all requirements governing the administration of Exchange Visitor Programs as set forth in 22 CFR part 62. If your organization has experience as a designated Exchange Visitor Program Sponsor, the applicant should discuss their record of compliance with 22 CFR 62 *et seq.*, including the oversight of their Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements.

The Office of Citizen Exchanges of ECA will be responsible for issuing DS-2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at <http://exchanges.state.gov> or from: United States Department of State, SA-44, Office of Exchange Coordination and Designation, ECA/EC/ECD, Room 734, 301 4th Street, SW., Washington, DC 20547, Telephone: (202) 203-5029, Fax: (202) 453-8640.

IV.3d.2. Diversity, Freedom and Democracy Guidelines: Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the "Support for Diversity" section for specific suggestions on incorporating diversity into your proposal. Public Law 104-319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the

Bureau “shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries.” Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation: Proposals must include a plan to monitor and evaluate the project’s success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives. The Bureau expects that the grantee will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program, changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project’s objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are “smart” (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program *outputs* and *outcomes*. *Outputs* are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. *Outcomes*, in contrast, represent specific results a project is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. *Participant satisfaction* with the program and exchange experience.
2. *Participant learning*, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.
3. *Participant behavior*, concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.
4. *Institutional changes*, such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (*i.e.*, surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

Describe your plans for sustainability, overall program management, staffing, coordination with ECA and PAS or any other requirements etc.

IV.3e. Please take the following information into consideration when preparing your budget:

IV.3e.1. Applicants must submit a comprehensive budget for the entire program. Awards may not exceed \$9,000,000. There must be a summary budget as well as breakdowns reflecting

both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification.

IV.3e.2. Required and allowable costs are provided in the accompanying POGI. Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3.f. Application Deadline and Methods of Submission: Application Deadline Date: May 29, 2008.

Reference Number: ECA/PE/C/PY–08–27.

Methods of Submission—Applications may be submitted in one of two ways:

- (1.) In hard-copy, via a nationally recognized overnight delivery service (*i.e.*, DHL, Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, etc.), or
- (2.) Electronically through <http://www.grants.gov>.

Along with the Project Title, all applicants must enter the above Reference Number in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.1. Submitting Printed Applications:

Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition.

Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will *not* notify you upon receipt of application. It is each applicant’s responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages *may not* be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF–424 form and place it in an envelope addressed to “ECA/EX/PM”.

The original and seven (7) copies of the application should be sent to: U.S.

Department of State, SA-44, Bureau of Educational and Cultural Affairs, Ref.: ECA/PE/C/PY-08-27, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

Applicants submitting hard-copy applications must also submit the "Executive Summary", "Proposal Narrative", "Budget" and "Budget Narrative" sections of the proposal electronically. ECA will provide these files to the respective Public Affairs Section at each U.S. embassy for their review.

IV.3f.2. Submitting Electronic Applications:

Applicants have the option of submitting proposals electronically through Grants.gov (<http://www.grants.gov>). Complete solicitation packages are available at Grants.gov in the "Find" portion of the system. Please follow the instructions available in the "Get Started" portion of the site (<http://www.grants.gov/GetStarted>). Several of the steps in the Grants.gov registration process could take several weeks. Therefore, applicants should check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov. Once registered, the amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your internet connection. *Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.* Direct all questions regarding Grants.gov registration and submission to: Grants.gov Customer Support, Contact Center Phone: 800-518-4726. Business Hours: Monday-Friday, 7 a.m.-9 p.m. EST. E-mail: support@grants.gov.

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the Grants.gov system, and will be technically ineligible.

Applicants will receive a confirmation e-mail from Grants.gov upon the successful submission of an application. ECA will *not* notify you upon receipt of electronic applications.

It is the responsibility of all applicants submitting proposals via the Grants.gov web portal to ensure that proposals have been received by

Grants.gov in their entirety. ECA bears no responsibility for data errors resulting from transmission or conversion processes.

IV.3g. Intergovernmental Review of Applications: Executive Order 12372 does not apply to this program.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as to the appropriate Public Affairs Section overseas. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for assistance awards grants resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Quality of the program idea and planning:* Proposals should exhibit originality, substance, precision, and relevance to the Bureau's mission and the purposes outlined in the solicitation. Detailed agenda and relevant work plan should demonstrate the ability to ensure that the proposed project accomplishes the stated objectives in the desired time frame. Proposals should demonstrate how students will be recruited, selected, monitored, trained and prepared for their role as YES alumni. The level of creativity, resources, and effectiveness will be primary factors for review. Proposals should be clearly and accurately written, with sufficient, relevant detail. The Narrative should address all of the items in the Statement of Work and Guidelines described above.

2. *Multiplier effect/Follow-on activities:* Proposed programs should strengthen long-term mutual understanding, including maximum sharing of information and establishment of long-term institutional and individual ties both during the

exchange and after the participants return home. Proposals should provide a plan for continued contact with alumni to ensure that they are tracked over time, utilized and/or organized as alumni, and provided opportunities to reinforce the knowledge and skills they acquired on the exchange and share them with others.

3. *Support of Diversity:* Proposals should demonstrate substantive support of the Bureau's policy on diversity in all program aspects including participants (exchange students and hosts), sending and hosting communities, as well as content of orientation and program activities. Proposals should articulate a diversity plan, not just a statement of compliance.

4. *Institutional Record/Capacity:* Proposed personnel and institutional resources should be adequate and appropriate to achieve the program's goals. Proposals for infrastructure building should convincingly describe the need and the plan to address that need in specific terms (e.g., staffing, staff training, equipping and maintaining an office). The plan should demonstrate a thorough understanding of local requirements for establishing and registering an NGO, if necessary. Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past ECA grants as determined by ECA Grant Staff. ECA will consider the past performance of prior recipients and the demonstrated potential of new applicants.

5. *Project Evaluation:* The proposal narrative must demonstrate how the applicant plans to assess the program's success in achieving program objectives and efficient operations, and what instruments will be employed to evaluate the program. Applicants may describe any experience conducting results-oriented evaluations. Successful applicants will demonstrate clear program goals and objectives as well as strategies for monitoring student and alumni progress. Grantees are also expected to submit quarterly reports that include student and alumni activities and progress.

6. *Cost-effectiveness/Cost-Sharing:* The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Proposals should maximize cost-sharing through institutional direct funding contributions, as well as other private sector support. Preference will be given to organizations whose proposals

demonstrate a quality, cost-effective program.

7. *Value to U.S.-Partner Country Relations:* Proposals should indicate how the program is of value to U.S. and partner countries' interests, and receive positive assessments by the U.S. Department of State's geographic area desks and overseas officers of program need, potential impact, and significance in the partner countries.

VI. Award Administration Information

VI.1a. *Award Notices:* Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive an Assistance Award Document (AAD) from the Bureau's Grants Office. The AAD and the original grant proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The AAD will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

All awards made under this competition must be executed according to all relevant U.S. laws and policies regarding assistance to the Palestinian Authority, and to the West Bank and Gaza. Organizations submitting proposals for this competition must consult with relevant Public Affairs Offices before entering into any formal arrangements or agreements with Palestinian organizations or institutions.

Note: To assure that planning for the inclusion of the Palestinian Authority complies with requirements, please contact Kevin Baker, Program Officer, telephone (202) 453-8153 or BakerKM1@state.gov for additional information.

VI.2. *Administrative and National Policy Requirements:* Terms and Conditions for the Administration of ECA agreements include the following: Office of Management and Budget Circular A-122, "Cost Principles for Nonprofit Organizations."

Office of Management and Budget Circular A-21, "Cost Principles for Educational Institutions."

OMB Circular A-87, "Cost Principles for State, Local and Indian Governments".

OMB Circular No. A-110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education,

Hospitals, and other Nonprofit Organizations.

OMB Circular No. A-102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A-133, Audits of States, Local Government, and Non-profit Organizations.

Please reference the following Web sites for additional information: <http://www.whitehouse.gov/omb/grants>. <http://exchanges.state.gov/education/grantsdiv/terms.htm#articleI>.

VI.3. *Reporting Requirements:* You must provide ECA with one hard copy original plus one copy of the following reports:

Mandatory:

1. Monthly school and housing placement reports of the students should be provided in the Excel spreadsheet format provided by ECA.

2. A final program and financial report no more than 90 days after the expiration of the award;

3. A concise, one-page final program report summarizing program outcomes no more than 90 days after the expiration of the award. This one-page report will be transmitted to OMB, and be made available to the public via OMB's USAspending.gov website—as part of ECA's Federal Funding Accountability and Transparency Act (FFATA) reporting requirements.

Grantees will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. (Please refer to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VII. Agency Contacts

For questions about this announcement, contact: Kevin Baker, Program Officer, ECA/PE/C/PY, Room 220, Ref. Nr. ECA/PE/C/PY-08-27, U.S. Department of State, SA-44, 301 4th Street, SW., Washington, DC 20547, tel. 202-453-8153 or e-mail: BakerKM1@state.gov.

All correspondence with the Bureau concerning this RFGP should reference the program title and the corresponding Reference number.

Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP

deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: April 3, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. E8-7631 Filed 4-9-08; 8:45 am]

BILLING CODE 4710-05-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Salt Lake and Davis Counties, UT

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Termination.

SUMMARY: The FHWA is issuing this notice to advise the public that the effort to prepare an Environmental Impact Statement (EIS) for transportation improvements in the I-15 North Corridor from downtown Salt Lake City to Kaysville will be terminated.

SUPPLEMENTARY INFORMATION: The project was initiated in 1997 and was a companion project to the Legacy Parkway EIS. Portions of the I-15 North Corridor and the Legacy Parkway project study areas overlapped and results of environmental studies performed for the I-15 North Corridor project were utilized in the Legacy Parkway EIS. Due to litigation on the Legacy Parkway project, the I-15 North Corridor Project was placed on hold. There were no federal funds used for the I-15 North Corridor EIS project. There are no immediate plans for substantial improvements in the I-15 North Corridor; therefore the EIS for the North Corridor Project will be terminated.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Woolford, Environmental Program Manager, Federal Highway Administration, 2520 West 4700 South, Suite 9A, Salt Lake City, Utah 84047, Office Hours: 7 a.m. to 3:30 p.m. MST, Edward.Woolford@DOT.gov. Ms. Rebecka Stromness, Environmental Program Manager, Utah Department of Transportation, 4501 South 2700 West, Salt Lake City, Utah 84119, Office Hours 7 a.m. to 4:30 p.m. MST RStromness@Utah.gov.

SUPPLEMENTARY INFORMATION: The Notice of Intent for this project was originally published on January 22, 1997. The FHWA, in conjunction with the Utah Department of Transportation, has decided to discontinue efforts on this project.

Issued on: April 4, 2008.

Edward T. Woolford,
Environmental Program Manager, Salt Lake City, Utah.

[FR Doc. E8-7577 Filed 4-9-08; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket Number FHWA-2008-0037]

Proposed Memorandum of Understanding (MOU) Assigning Environmental Responsibilities to the State of Utah

AGENCY: Federal Highway Administration (FHWA), Utah Division Office, DOT.

ACTION: Notice of proposed MOU and request for comments.

SUMMARY: This notice announces that the FHWA and the Utah Department of Transportation, have developed a proposed MOU, pursuant to 23 U.S.C. 326, under which the FHWA would assign to the State the FHWA's responsibility for determining whether a project is categorically excluded from preparation of an environmental impact statement under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA), and for carrying out certain other responsibilities for conducting environmental reviews, consultations, and related activities for Federal-aid highway projects. The public is invited to comment on any aspect of the proposed MOU, including the proposed designations of categorical exclusions and scope of environmental review, consultation and other activities to be assigned.

DATES: Please submit comments by May 27, 2008.

ADDRESSES: You may submit comments through the U.S. Document Management System (DMS), identified by Docket Number FHWA-2008-0037, or by any of the methods described below:

Web site: <http://www.udot.utah.gov/go/environmental>.

Fax: 1-202-493-2251.

Mail: Docket Management Facility; U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

Hand Delivery: Ground Floor Room W12-140, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001 between 9 a.m. and 5 p.m. (EST), Monday through Friday, except Federal holidays.

Docket: For access to the docket to view a complete copy of the proposed MOU, or to read background documents or comments received, go to <http://www.regulations.gov> at anytime or go to the ground floor U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001 between 9 a.m. and 5 p.m. (EST), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Woolford, Environmental Program Manager, Federal Highway Administration, 2520 West 4700 South, Suite 9A, Salt Lake City, Utah 84118, Office Hours: 7 a.m. to 3:30 p.m. (MST), Edward.Woolford@DOT.gov; Ms. Rebecka Stromness, Environmental Program Manager, Utah Department of Transportation, 4501 South 2700 West, Salt Lake City, Utah 84119, Office Hours 7 a.m. to 4:30 p.m. (MST), RStromness@Utah.gov.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the Office of the Federal Register's home page at <http://www.archives.gov> and the Government Printing Office's Web site at <http://www.access.gpo.gov>. An electronic version of the proposed MOU may be downloaded by accessing the electronic DMS docket, as described above, at <http://www.regulations.gov>.

Background

Section 6004(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-059), codified as Section 326 of amended Chapter 3 of Title 23, United States Code (23 U.S.C. 326), allows the Secretary of the United States Department of Transportation (USDOT Secretary), to assign, and a State to assume, responsibility for determining whether certain designated activities are included within classes of action that are categorically excluded from requirements for environmental assessments or environmental impact statements pursuant to regulations promulgated by the Council on Environmental Quality under part 1500 of Title 40, Code of Federal Regulations (CFR) (as in effect on October 1, 2003). The FHWA is authorized to act on behalf of the USDOT Secretary with respect to these matters. Under the proposed MOU, the FHWA would assign to the State the responsibility for making decisions on the following types of categorical exclusions:

1. Activities listed in 23 CFR 771.117 (c);
2. The example activities listed in 23 CFR 771.117(d); and
3. Additional actions listed in Appendix A: None.

The proposed MOU also would assign to the State the responsibility for conducting Federal environmental review, consultation, and other related activities for projects that are subject to the MOU with respect to the following Federal laws and Executive Orders:

1. Clean Air Act (CAA), 42 U.S.C. 7401-7671q (determinations of project-level conformity if required for the project).
2. Compliance with the noise regulations in 23 CFR Part 772.
3. Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531-1544 and Section 1536.
4. Marine Mammal Protection Act, 16 U.S.C. 1361.
5. Anadromous Fish Conservation Act, 16 U.S.C. 757a-757g.
6. Fish and Wildlife Coordination Act, 16 U.S.C., 661-667d.
7. Migratory Bird Treaty Act, 16 U.S.C. 703-712.
8. Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801 *et seq.*
9. Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C., 470(f) *et seq.*
10. Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. 138 and 49 U.S.C. 303.

11. Archeological and Historic Preservation Act of 1966, as amended, 16 U.S.C., 469–469(c).

12. American Indian Religious Freedom Act, 42 U.S.C. 1966.

13. Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201–4209.

14. Clean Water Act, 33 U.S.C. 1251–1377 (Section 404, Section 401, Section 319).

15. Coastal Barrier Resources Act, 16 U.S.C. 3501–3510.

16. Coastal Zone Management Act, 16 U.S.C. 1451–1465.

17. Safe Drinking Water Act (SDWA), 42 U.S.C., 300f–300j–6.

18. Rivers and Harbors Act of 1899, 33 U.S.C., 401–406.

19. Wild and Scenic Rivers Act, 16 U.S.C., 1271–1287.

20. Emergency Wetlands Resources Act, 16 U.S.C., 3921–3931.

21. TEA–21 Wetlands Mitigation, 23 U.S.C., 103(b)(6)(m), 133(b)(11).

22. Flood Disaster Protection Act, 42 U.S.C. 4001–4128.

23. Land and Water Conservation Fund (LWCF), 16 U.S.C., 4601–4 (known as section 6(f)).

24. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675.

25. Superfund Amendments and Reauthorization Act of 1986 (SARA).

26. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901–6992k.

27. Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. 319.

28. Executive Orders Relating to Highway Projects (E.O. 11990, Protection of Wetlands; E.O. 11988, Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593, Protection and Enhancement of Cultural Resources; E.O. 13007, Consultation and Coordination with Indian Tribal Governments; E.O. 13112, Invasive Species).

The MOU would allow the State to act in the place of the FHWA in carrying out the functions described above, except with respect to government-to-government consultations with federally-recognized Indian tribes. The

FHWA will retain responsibility for conducting formal government-to-government consultation with federally-recognized Indian tribes, which is required under some of the listed laws and executive orders. The State will continue to handle routine consultations with the tribes and understands that a tribe has the right to direct consultation with the FHWA upon request. The State also may assist the FHWA with formal consultations, with consent of a tribe, but the FHWA remains responsible for the consultation. This assignment includes transfer to the State of Utah the obligation to fulfill the assigned environmental responsibilities on any proposed projects meeting the criteria in Stipulation I(B) of the MOU that were determined to be CE's prior to the effective date of the proposed MOU but that have not been completed as of the effective date of the MOU.

A copy of the proposed MOU may be viewed on the DOT DMS Docket, as described above, or may be obtained by contacting the FHWA or the State at the addresses provided above. A copy also may be viewed online at the following URL: <http://www.udot.utah.gov/go/environmental>. Once the FHWA makes a decision on the proposed MOU, the FHWA will place in the DOT DMS Docket, a statement describing the outcome of the decision-making process and a copy of the final MOU, if any. Copies of those documents also may be obtained by contacting the FHWA or the State at the addresses provided above, or by viewing the documents at <http://www.udot.utah.gov/go/environmental>.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 326; 42 U.S.C. 4331, 4332; 23 CFR 771.117; 40 CFR 1507.3, 1508.4.

Issued on: April 4, 2008.

Walter C. Waidehlich, Jr.,

Division Administrator, Salt Lake City, Utah.

[FR Doc. E8–7572 Filed 4–9–08; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Office of Hazardous Materials Safety; Notice of Delays in Processing of Special Permits Applications

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of Applications Delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

FOR FURTHER INFORMATION CONTACT:

Delmer F. Billings, Director, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue, Southeast, Washington, DC 20590–0001, (202) 366–4535.

Key to “Reason for Delay”

1. Awaiting additional information from applicant.
2. Extensive public comment under review.
3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis.
4. Staff review delayed by other priority issues or volume of special permit applications.

Meaning of Application Number Suffixes

N—New application.

M—Modification request.

PM—Party to application with modification request.

Issued in Washington, DC, on April 3, 2008.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

MODIFICATION TO SPECIAL PERMITS

Application No.	Applicant	Reason for delay	Estimated date of completion
11579–M	Austin Powder Company, Cleveland, OH	3, 4	04–30–2008
10964–M	Kidde Aerospace & Defense, Wilson, NC	4	04–30–2008
11650–M	Autoliv ASP, Inc., Ogden, UT	4	04–30–2008

MODIFICATION TO SPECIAL PERMITS—Continued

Application No.	Applicant	Reason for delay	Estimated date of completion
13173-M	Dynetek Industries Ltd., Calgary Alberta, Canada	1	04-30-2008
New Special Permit Applications			
14385-N	Kansas City Southern Railway Company, Kansas City, MO	4	04-30-2008
14566-N	Nantong CIMC Tank Equipment Co. Ltd., Nantong City	3	04-30-2008
14584-N	WavesinSolids LLC, State College, PA	3, 4	04-30-2008

[FR Doc. E8-7499 Filed 4-9-08; 8:45 am]

BILLING CODE 4910-60-M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35124]

**R.J. Corman Railroad Company/
Central Kentucky Lines, LLC—
Trackage Rights Exemption—CSX
Transportation, Inc.**

Pursuant to an oral agreement, CSX Transportation, Inc. (CSXT), has agreed with R.J. Corman Railroad Company/Central Kentucky Lines, LLC (RJCC), to modify an existing limited overhead trackage rights agreement¹ regarding RJCC's use of a CSXT line of railroad from the parties' connection at CSXT milepost T1.8, at the end of CSXT's line known as the Water Street Lead, in Louisville, KY, to another point of connection at CSXT milepost 12.49, at HK Tower, near Anchorage, KY, a distance of approximately 10.75 miles.²

The earliest this transaction can be consummated is April 24, 2008, the effective date of the exemption (30 days after the exemption is filed).

¹ The original rights were obtained by R.J. Corman Railroad Property, LLC (RJCP) as incidental trackage rights to a lease of another line exempted under 49 CFR 1150.41 in *R.J. Corman Railroad Property, LLC—Lease Exemption—Line of CSX Transportation, Inc.*, STB Finance Docket No. 34625 (STB served Mar. 4, 2005). RJCP assigned the trackage rights to RJCC, its corporate affiliate. The assignment was exempted under 49 CFR 1150.41 in *R.J. Corman Railroad Company/Central Kentucky Lines, LLC—Acquisition and Operation Exemption—Line of R.J. Corman Railroad Property, LLC*, STB Finance Docket No. 34624 (STB served Feb. 23, 2005).

² RJCC originally filed its verified notice of exemption on March 25, 2008. That notice covered agreements for trackage rights modifications over two lines, the subject line and a line of railroad from the point of the parties' connection at CSXT milepost VB 113.81 near Winchester in Clark County, KY, to the industry track at CSXT milepost KC 131.0 near Berea, in Garrard County, KY, a distance of approximately 35 miles (the Berea Line). In a March 28, 2008 amendment to the original filing, RJCC withdrew the Berea Line agreement from what was sought to be exempted by this notice. RJCC states that it will file a separate verified notice of exemption with respect to the agreement modification for that segment.

The purpose of the amendment is to relax the restrictions in the original agreement to permit two new types of direct service by RJCC over portions of its own track and CSXT's line. Specifically, the modification would allow RJCC to move carloads of cement and general merchandise cars between the Water Street Lead and its main line at Anchorage.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed by April 17, 2008 (at least 7 days before the exemption becomes effective).

Pursuant to the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: Collecting, storing, or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting, and shredding). The term "solid waste" is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35124, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423-0001. In addition, a copy of each pleading must be served on Ronald A. Lane, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606-2832.

Board decisions and notices are available on our Web site at <http://www.stb.dot.gov>.

Decided: April 2, 2008.

By the Board, David M. Konschnik,
Director, Office of Proceedings.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. E8-7398 Filed 4-8-08; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

**Proposed Collection; Comment
Request for Form 12885**

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 12885, Supplement to OF-612, Optional Application for Federal Employment.

DATES: Written comments should be received on or before June 9, 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 Carolyn N. Brown at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622-6688, or through the Internet at (Carolyn.N.Brown@irs.gov).

SUPPLEMENTARY INFORMATION:

Title: Supplement to OF-612, Optional Application for Federal Employment.

OMB Number: 1545-1918.

Form Number: 12885.

Abstract: Form 12885 is used as a supplement to the OF-612 to provide additional space for capturing work history.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 24,813.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 12,406.

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: March 28, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8-7516 Filed 4-9-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 720X

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 720X, Amended Quarterly Federal Excise Tax Return.

DATES: Written comments should be received on or before June 9, 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 Carolyn N. Brown at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622-6688, or through the Internet at (*Carolyn.N.Brown@irs.gov*).

SUPPLEMENTARY INFORMATION:

Title: Amended Quarterly Federal Excise Tax Return.

OMB Number: 1545-1759.

Form Number: 720X.

Abstract: Form 720X is used to make adjustments to correct errors on form 720 filed for previous quarters. It can be filed by itself or it can be attached to any subsequent Form 720. Code section 6416(d) allows taxpayers to take a credit on a subsequent return rather than filing a refund claim. The creation of Form 720X is the result of a project to provide a uniform standard for trust fund accounting.

Current Actions: There are no changes being made to Form 720X at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations.

Estimated Number of Responses: 22,000.

Estimated Time per Response: 6 hrs, 56 minutes.

Estimated Total Annual Burden Hours: 152,460.

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: March 19, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8-7517 Filed 4-9-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 12114

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 12114, Continuation Sheet for Item #16 (Additional Information) OF-306, Declaration for Federal Employment.

DATES: Written comments should be received on or before June 9, 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 Carolyn N. Brown at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622-6688, or through the Internet at (*Carolyn.N.Brown@irs.gov*).

SUPPLEMENTARY INFORMATION:

Title: Continuation Sheet for Item #16 (Additional Information) OF-306, Declaration for Federal Employment.

OMB Number: 1545-1921.

Form Number: 12114.

Abstract: Form 12114 is used as a continuation to the OF-306 to provide additional space for capturing additional information.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 24,813.

Estimated Time per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 6,203.

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: March 28, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8-7519 Filed 4-9-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 99-21

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 Revenue Procedure 99-21, Disability Suspension.

DATES: Written comments should be received on or before June 9, 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 revenue procedure should be directed to Carolyn N. Brown, (202) 622-6688, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Carolyn.N.Brown@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Disability Suspension.

OMB Number: 1545-1649.

Revenue Procedure Number: Revenue Procedure 99-21.

Abstract: Revenue Procedure 99-21 describes the information that is needed

to establish a claim that a taxpayer was financially disabled for purposes of section 6511(h) of the Internal Revenue Code. Under section 6511(h), the statute of limitations on claims for credit or refund is suspended for any period of an individual taxpayer's life during which the taxpayer is unable to manage his or her financial affairs because of a medically determinable mental or physical impairment, if the impairment can be expected to result in death, or has lasted (or can be expected to last) for a continuous period of not less than 12 months. Section 6511(h)(2)(A) requires that proof of the taxpayer's financial disability be furnished to the Internal Revenue Service.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 48,200.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 24,100.

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: March 19, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8-7521 Filed 4-9-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 99-17

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 Revenue Procedure 99-17, Mark to Market Election for Commodities Dealers and Securities and Commodities Traders.

DATES: Written comments should be received on or before June 9, 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 revenue procedure should be directed to Carolyn N. Brown, (202) 622-6688, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at Carolyn.N.Brown@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Mark to Market Election for Commodities Dealers and Securities and Commodities Traders.

OMB Number: 1545-1641.

Revenue Procedure Number: Revenue Procedure 99-17.

Abstract: This revenue procedure prescribes the time and manner for dealers in commodities and traders in securities or commodities to elect to use the mark-to-market method of accounting under sections 475(e) and (f) of the Internal Revenue Code. The collections of information in this revenue procedure are required by the

IRS in order to facilitate monitoring taxpayers changing accounting methods resulting from making the elections under Code section 475(e) or (f).

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

The reporting burden for the collections of information in section 5.01-5.04 of this revenue procedure is as follows:

Estimated Number of Respondents/Recordkeepers: 1,000.

Estimated Time per Respondent/Recordkeeper: 30 minutes.

Estimated Total Annual Reporting/Recordkeeping Hours: 500.

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: March 19, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8-7522 Filed 4-9-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Revenue Procedure 2002-23

AGENCY: Internal Revenue Service (IRS), Treasury.

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 Revenue Procedure 2002-23, Taxation of Canadian Retirement Plans Under U.S.-Canada Income Tax Treaty.

DATES: Written comments should be received on or before June 9, 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 revenue procedure should be directed to Carolyn N. Brown, (202) 622-6688, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at Carolyn.N.Brown@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Taxation of Canadian Retirement Plans Under U.S.-Canada Income Tax Treaty.

OMB Number: 1545-1773.

Revenue Procedure Number: Revenue Procedure 2002-23.

Abstract: Revenue Procedure 2002-23 provides guidance for the application by U.S. citizens and residents of the U.S.-Canada Income Tax Treaty, as amended by the 1995 protocol, in order to defer U.S. income taxes on income accrued in certain Canadian retirement plans.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 20,000.

Estimated Average Time per Respondent: 30 minutes.

Estimated Total Annual Reporting Hours: 10,000.

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: March 19, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8-7526 Filed 4-9-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG-119436-01]

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-119436-01 (TD 9171), New Markets Tax Credits.

DATES: Written comments should be received on or before June 9, 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 Carolyn N. Brown, (202) 622-6688, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at Carolyn.N.Brown@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: New Markets Tax Credits.

OMB Number: 1545-1765.

Regulation Project Number: REG-119436-01 (Final).

Abstract: These regulations finalize the rules relating to the new markets tax credit under section 45D and replace the temporary regulations which expired on December 23, 2004. A taxpayer making a qualified equity investment in a qualified community development entity that has received a new markets tax credit allocation may claim a 5-percent tax credit with respect to the qualified equity investment on each of the first 3 credit allowance dates and a 6-percent tax credit with respect to the qualified equity investment on each of the remaining 4 credit allowance dates.

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: 816.

Estimated Time per Respondents: 15 minutes.

Estimated Total Annual Burden

Hours: 210.

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: March 19, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8-7529 Filed 4-9-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG-164754-01 (NPRM)]

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-164754-01, Split-Dollar Life Insurance Arrangements.

DATES: Written comments should be received on or before June 9, 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 regulations should be directed to Carolyn N. Brown, (202) 622-6688,

Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at Carolyn.N.Brown@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Split-Dollar Life Insurance Arrangements.

OMB Number: 1545-1792.

Regulation Project Number: REG-164754-01 (Final).

Abstract: The regulations relate to the income, employment, and gift taxation of split-dollar life insurance arrangements. The final regulations provide needed guidance to persons who enter into split-dollar life insurance arrangements.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 115,000.

Estimated Time per Respondent: 17 minutes.

Estimated Total Annual Burden Hours: 32,500.

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: March 19, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8-7530 Filed 4-9-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 102132-05

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 Notice 102132-05, Domestic Reinvestment Plans and Other Guidance under Section 965.

DATES: Written comments should be received on or before June 9, 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 Carolyn N. Brown at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622-6688, or through the Internet at (Carolyn.N.Brown@irs.gov).

SUPPLEMENTARY INFORMATION:

Title: Domestic Reinvestment and Other Guidance under Section 965.

OMB Number: 1545-1926.

Regulation Project Number: 102132-05.

Abstract: This document provides guidance under new section 965 enacted by the American Jobs Creation Act of 2004 (Pub. L. 108-357). In general, and subject to limitations and conditions, section 965(a) provides that a corporation that is a U.S. shareholder of a controlled foreign corporation (CFC) may elect, for one taxable year, an 85 percent dividends received deduction (DRD) with respect to certain cash dividends it receives from its CFCs.

Section 965(f) provides that taxpayers may elect the application of section 965 for either the taxpayer's last taxable year which began before October 22, 2004, or the taxpayer's first taxable year which began during the one-year period beginning on October 22, 2004. In general, a taxpayer elects to apply section 965 to a taxable year by filing Form 8895 with its timely-filed tax return (including extensions) for such taxable year. If however, a taxpayer files its tax return for the taxable year to which the taxpayer intends to elect section 965 to apply prior to the issuance of Form 8895, the election must be made on a statement that is attached to its timely-filed tax return (including extensions) for such taxable year. In addition, because the taxpayer must establish to the satisfaction of the Commissioner that it has satisfied the conditions to take the DRD, the taxpayer is required under this guidance to report specified information and provides specified documentation.

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.

Estimated Number of Respondents: 25,000.

Estimated Time per Respondent: 150 hours.

Estimated Total Annual Burden Hours: 3,750,000.

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: March 28, 2008.

Glenn P. Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8-7531 Filed 4-9-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF VETERANS AFFAIRS

DEPARTMENT OF DEFENSE

Department of the Navy

National Cemetery Administration; Record of Decision for the Annex to the Fort Rosecrans National Cemetery at Marine Corps Air Station Miramar, San Diego, CA

AGENCY: National Cemetery Administration, DVA and Department of the Navy, DoD.

ACTION: Notice of Record of Decision.

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4332(2)(c), and the regulations of the Council on Environmental Quality that implement NEPA procedures, 40 CFR Parts 1500-1508, the Department of Veterans Affairs, National Cemetery Administration (VA) and the Department of the Navy (DON) announce their decision to enter into a land use agreement for the construction and operation of an annex to the existing Fort Rosecrans National Cemetery at Marine Corps Air Station (MCAS) Miramar, in San Diego, California. The land use agreement between the DON and the VA will govern the construction and operation of the cemetery annex at MCAS Miramar at Site 2, the preferred alternative, as described in the Final Environmental Impact Statement (FEIS) of July 2007.

FOR FURTHER INFORMATION CONTACT:

Ms. Hiphil Clemente, Naval Facilities Engineering Command, Southwest, 1220 Pacific Highway, San Diego, California 92132-5190, telephone: 619-532-3781, e-mail hphil.clemente@navy.mil.

SUPPLEMENTARY INFORMATION: The VA operates the Fort Rosecrans National Cemetery, located on the Point Loma Submarine Base, San Diego, California. The VA identified a need for additional

burial space for the approximately 253,000 San Diego area military veterans over the next 20 to 30 years. The purpose of the proposed action is to meet the mission of the VA to provide burial space on federal land for military veterans in the San Diego area. Fort Rosecrans National Cemetery, the only national cemetery in San Diego County, has been closed to casketed burials since 1966. It is scheduled to be closed to burials of cremated remains by 2008 and has no additional land available for expansion.

Alternatives Considered: A screening process, based upon criteria set out in the EIS, identified a reasonable range of alternatives that would satisfy the VA's purpose and need while preserving the capabilities of DON to conduct military training. Two site alternatives and the no action alternative were analyzed in detail in the EIS.

The preferred alternative, Site 2, is 323 acres in size and located in the northwest corner of MCAS Miramar. The development footprint for Site 2 is approximately 214 acres. The site is bounded by Miramar Road to the north, the commuter/freight railway to the south and east, and the western boundary of MCAS Miramar to the west. Vehicular access will be via Miramar Road to the north and Nobel Drive to the northwest. Based on the conceptual site plan, Site 2 will provide 50,000 casketed gravesites and 40,000 columbarium niches. As part of cemetery annex establishment, a Public Information Center and Visitor Orientation Facility will be constructed near the main entrance and cortege assembly area. It will consist of a combination building/covered plaza and will include a small visitor parking area separate from the cortege assembly area, and public restrooms and electronic gravesite locator for visitors. Two Committal Service Shelters will be provided for away-from-gravesite internment services. The cemetery annex will have a stand-alone flag area, designed and landscaped to maximize the attractiveness and dignity of the place. The area will include a flagpole, a turf assembly area for ceremonies and small gatherings, and a focal point that could be used by speakers. Separate Administrative and Maintenance Complexes will be constructed, including office and workspace for cemetery staff. The Maintenance Complex will include a 13,700-square foot maintenance yard to accommodate the unloading of a tractor-trailer truck. The cemetery annex will include parking for visitors and staff, signage, benches, recycling and trash receptacles, and flower containers. With

the selection of the Site 2 Alternative, master planning and design of the new cemetery annex will take place. The facilities and burial sites to be developed will stay within the project footprint identified in the Final EIS.

The Site 4 Alternative is located in the south-central portion of MCAS Miramar in the former Camp Elliott area and is approximately 175 acres. The site is completely surrounded by limited-access highways with State Route 163 to the west, State Route 52 to the south, and Interstate 15 to the east. Kearny Villa Road traverses the site in a north-south direction. The Site 4 Alternative would be developed similar to the Site 2 Alternative. The maximum number of casketed gravesites would be 31,000 and 26,000 columbarium niches for cremated remains.

Under the no action alternative, there would be no land use agreement between the DON and the VA for the construction and operation of an annex to Fort Rosecrans National Cemetery. The no action alternative is the environmentally preferred alternative because it does not involve any change to the physical environment. However, this alternative does not meet the purpose and need of the Proposed Action to provide needed burial space on federal land for military veterans in the San Diego area.

Other alternatives were considered, but dismissed as not being practicable. These include 2 other sites on MCAS Miramar, other Federal lands in the San Diego area, and purchase of land by the VA for the cemetery annex.

Environmental Impacts: The VA and the DON prepared an EIS to evaluate the potential environmental impacts associated with the implementation of each of the alternatives for the following resource areas: Land use; socioeconomics/environmental justice; utilities; public services; visual resources; cultural resources; biological resources; soils and geology; water resources; public health and safety; traffic/circulation; air quality; and noise. Chapter 4 of the FEIS provides a detailed discussion of impacts and mitigation measures.

The preferred alternative, Site 2, presents no significant impacts to land use, socioeconomics/environmental justice, utilities, public services, visual resources, cultural resources, soils and geology, water resources, public health and safety, traffic/circulation; and air quality; thus no mitigation measures are offered for those resources. Implementation of the preferred alternative will result in impacts to biological resources and land use

compatibility with noise from nearby military aviation facilities.

Formal consultation with the U.S. Fish and Wildlife (USFWS) resulted in several redesigns of the Site 2 development footprint to reduce potential impacts to sensitive biological resources. The redesigns ultimately reduced the development footprint from 323 acres to 214 acres, although the parcel that is the subject of the land use agreement remains at 323 acres. The proposed action will impact approximately 213.60 acres of undeveloped land, including 17.16 acres of regionally rare plant communities. Approximately 12.97 acres of largely disturbed habitat recently occupied by coastal California gnatcatcher (*Poliophtila californica californica*; CAGN) will also be impacted. Additionally, two vernal pools (0.010 acre) and 27 man-made depressions (0.299 acre) with San Diego fairy shrimp (*Branchinecta sandiegonensis*; SDFS) and 4 vernal pools (0.013 acre) with no federally listed species will be directly impacted. Development of Site 2 will also impact five ephemeral drainages totaling approximately 3,333 feet and 0.230 acre.

Aircraft noise levels over Site 2 range from 68–79 A-weighted decibels (dBA) Community Noise Equivalent Level (CNEL). Cemeteries are a compatible use in this noise range, with the stipulation that noise reduction be provided in buildings where the public is received and in other noise sensitive areas or where the noise level should be low. In these noise-sensitive areas, the interior noise level must be reduced to less than 50 dBA CNEL.

Mitigation: Unless otherwise specified, mitigation measures identified in the FEIS and the U.S. Fish and Wildlife Service Biological Opinion are the responsibility of the VA, and such measures will be specified in the land use agreement governing the relationship between the VA and the DON.

Mitigation measures for impacts to biological resources will be implemented in accordance with the mitigation planning guidance in the MCAS Miramar Integrated Natural Resources Management Plan. Additionally, all reasonable and prudent measures and terms and conditions of the USFWS Biological Opinion issued on 6 April 2007 (1–6–06–F–4652.3) will be incorporated into the project.

Permanent direct effects to plant communities/vegetative cover will be compensated for as follows:

- Compensation for permanently, directly affected undisturbed and

suitable native plant communities recently occupied by the CAGN at a ratio of 2:1;

- Compensation for permanently, directly affected disturbed and suitable native plant communities recently occupied by the CAGN at a ratio of 1:1;
- Compensation for permanently, directly affected disturbed habitat recently occupied by the CAGN at a ratio of 0.5:1; and
- Compensation for permanently, directly affected regionally rare but unoccupied plant communities at a ratio of 1:1 for undisturbed habitat and at a ratio of 0.5:1 for disturbed habitats.

Based on the ratios above, compensation for impacts to approximately 12.97 acres of plant communities/vegetative cover will be 15.98 acres. Compensation will be provided through the VA's acquisition of habitat for permanent preservation accompanied by a one-time contribution for long-term management. The locations of compensation lands will be off MCAS Miramar, and are anticipated to be within the East Fortuna Mountain Preserve within Mission Trails Regional Park, east of MCAS Miramar.

Permanent direct effects to SDFS and the basins supporting the species will be compensated for as follows:

- Compensation for permanently, directly affected, relatively undisturbed, vernal pools that support SDFS, at a ratio of 3:1;
- Compensation for permanently, directly affected, relatively undisturbed or degraded vernal pools without the presence of federally listed species, at a ratio of 1:1 to obtain no net loss; and
- Man-made depressions (i.e., ruts, puddles, impoundments, ditches) with SDFS and vernal pool indicator plants at a ratio of 1.5:1.

Based on the ratios above, compensation impacts to approximately 0.322 acre of vernal habitat will be 0.492 acre. Compensation will occur through restoration/reestablishment of similar quality habitat within the 323-acre parcel that is the subject of the land use agreement. This compensation will include the development and implementation of a restoration, management, and monitoring plan that will outline the process and guidelines of restoration and reestablishment for off-site vernal pool habitat.

Impacts to jurisdictional waters are anticipated with the project. Review and approval by the Army Corps of Engineers (ACOE) for all jurisdiction impacts will be needed to determine final Clean Water Act permitting requirements. A formal wetland assessment of the functions and values of the wetlands and waters for the

project site will be conducted, and will consist of a jurisdictional delineation (i.e., determining whether stream features are jurisdictional waters or contain jurisdictional wetlands) within proposed permanent impacts areas and outside the proposed project footprint for temporary impacts related to construction activities. A formal ACOE jurisdictional determination and delineation report for waters and wetlands will be required for submittal to the ACOE and USFWS to request their review and concurrence of the determination and delineation results. The majority of the drainages within the property are unvegetated waters that would be regulated by the ACOE. The results of this assessment in coordination with the ACOE and USFWS will determine the measures required to mitigate for any impacts to the wetland areas. The VA will be responsible for these studies and the subsequent permitting and mitigation, if required. Wetland mitigation will occur off MCAS Miramar or, if off-Station mitigation is not practicable, within the 323-acre parcel that is the subject of the land use agreement.

To reduce the interior noise levels to a satisfactory level, the VA will design the Administrative Complex to provide an interior noise level less than 50 dBA CNEL.

Although there would be no significant impacts to air quality resulting from the construction and operation of the cemetery, the VA will incorporate measures identified in the FEIS to minimize air emissions from grading, earthwork, and operations.

The VA will promote green building practices identified in the FEIS. This includes, but is not limited to, maximizing the use of reclaimed water for irrigation and non-potable purposes, exploring the use of renewable energy such as solar power where feasible, and providing recycling receptacles throughout the project area.

The preferred alternative presents no other significant impacts that cannot be mitigated.

Response to Comments Received Regarding the Final Environmental Impact Statement: The FEIS was distributed to government agencies and the public on 7 September 2007, for a 30-day public review period. Comments were received from the U.S. Environmental Protection Agency (USEPA), Region IX. USEPA reiterated its previously submitted concerns regarding compensation for permanent impacts to biological resources, including habitats that are rare and/or support endangered species. They continue to recommend a 1:1

compensation ratio for impacts to regionally rare and declining habitats, even if disturbed, and for DoN to compensate for impacts to occupied grasslands. This issue was addressed in the FEIS and the responses to comments on the DEIS.

USEPA also acknowledged the consideration of its recommendations to promote green building practices and reduce air emissions from construction and requested that a commitment to these practices and measures be included in the ROD. The ROD includes this commitment.

Conclusions: After careful consideration of the purpose and need

for the proposed action, the analysis contained in the EIS, and the comments received on the EIS from Federal, state, and local agencies, non-governmental organizations, and individual members of the public, I have determined that the preferred alternative, Site 2, will best meet the needs of the DON and VA for the following reasons:

- It will provide 50,000 full-casket burial sites (19,000 more than site 4) and will provide 40,000 columbarium niches (14,000 more than site 4).
- It has less permanent direct effects to SDFS and the basins supporting this species. Additionally, it has no impacts

to San Diego mesa mint (*Pogogyne abramsii*).

- It has no significant traffic/circulation impacts.
- It has no significant public health and safety or land use impacts.

For: Department of Veterans Affairs.

Dated: January 7, 2008.

William F. Tuerk,

Under Secretary for Memorial Affairs.

For: Department of the Navy.

Dated: April 1, 2008.

BJ Penn,

Assistant Secretary of the Navy (I&E).

[FR Doc. E8-7498 Filed 4-9-08; 8:45 am]

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Federal Register

**Thursday,
April 10, 2008**

Part II

Department of Defense

**Department of the Army, Corps of
Engineers
33 CFR Parts 325 and 332**

Environmental Protection Agency

**40 CFR Part 230
Compensatory Mitigation for Losses of
Aquatic Resources; Final Rule**

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****33 CFR Parts 325 and 332****ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 230**

[EPA-HQ-OW-2006-0020; FRL-8545-4]

RIN 0710-AA55

Compensatory Mitigation for Losses of Aquatic Resources

AGENCIES: U.S. Army Corps of Engineers, DoD; and Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) are issuing regulations governing compensatory mitigation for activities authorized by permits issued by the Department of the Army. The regulations establish performance standards and criteria for the use of permittee-responsible compensatory mitigation, mitigation banks, and in-lieu programs to improve the quality and success of compensatory mitigation projects for activities authorized by Department of the Army permits.

This rule improves the planning, implementation and management of compensatory mitigation projects by emphasizing a watershed approach in selecting compensatory mitigation project locations, requiring measurable, enforceable ecological performance standards and regular monitoring for all types of compensation and specifying the components of a complete compensatory mitigation plan, including assurances of long-term protection of compensation sites, financial assurances, and identification of the parties responsible for specific project tasks.

This rule applies equivalent standards to permittee-responsible compensatory mitigation, mitigation banks and in-lieu fee mitigation to the maximum extent practicable. Since a mitigation bank must have an approved mitigation plan and other assurances in place before any of its credits can be used to offset permitted impacts, this rule establishes a preference for the use of mitigation bank credits, which reduces some of the risks and uncertainties associated with compensatory mitigation. This rule also significantly revises the requirements for in-lieu fee programs to address

concerns regarding their past performance and equivalency with the standards for mitigation banks and permittee-responsible compensatory mitigation.

DATES: The effective date is June 9, 2008.

ADDRESSES: Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW., Washington, DC 20314-1000. Headquarters, U.S. Environmental Protection Agency, Wetlands Division, Mail code 4502T, 1200 Pennsylvania Ave, NW., Washington, DC 20460.

The Corps and EPA have established a docket for this action under Docket ID No. EPA-HQ-OW-2006-0020. All documents in the docket are listed on the <http://www.regulations.gov> web site. 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 electronically through <http://www.regulations.gov> or in hard copy at the Water Docket, 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 Water Docket is (202) 566-2426.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202-761-4922 or by e-mail at david.b.olson@usace.army.mil, or Mr. Palmer Hough at 202-566-1374 or by e-mail at hough.palmer@epa.gov. Additional information can also be found at the Corps Headquarters Regulatory Program webpage at: <http://www.usace.army.mil/cw/cecwo/reg/index.html> or the EPA compensatory mitigation webpage at: <http://www.epa.gov/wetlandsmitigation>.

SUPPLEMENTARY INFORMATION:**I. Background****II. General Comments and Responses****A. Overview****B. Most Frequently Raised Issues****1. Section 404(b)(1) Guidelines****2. Compensatory Mitigation Standards for Streams****3. Discretionary Language****4. Watershed Approach****5. In-Lieu Fee Programs****C. Other General Comments****III. In-Lieu Fee Programs****IV. Compliance With Section 314 of the NDA****V. Organization of the Final Rule****VI. Discussion of Specific Sections of the Final Rule****VII. Administrative Requirements****I. Background**

Compensatory mitigation involves actions taken to offset unavoidable adverse impacts to wetlands, streams and other aquatic resources authorized by Clean Water Act section 404 permits and other Department of the Army (DA) permits. As such, compensatory mitigation is a critical tool in helping the federal government to meet the longstanding national goal of "no net loss" of wetland acreage and function. For impacts authorized under section 404, compensatory mitigation is not considered until after all appropriate and practicable steps have been taken to first avoid and then minimize adverse impacts to the aquatic ecosystem pursuant to 40 CFR part 230 (i.e., the CWA Section 404(b)(1) Guidelines).

Compensatory mitigation can be carried out through four methods: the *restoration* of a previously-existing wetland or other aquatic site, the *enhancement* of an existing aquatic site's functions, the *establishment* (i.e., creation) of a new aquatic site, or the *preservation* of an existing aquatic site. There are three mechanisms for providing compensatory mitigation: *permittee-responsible compensatory mitigation*, *mitigation banks* and *in-lieu fee mitigation*. Permittee-responsible mitigation is the most traditional form of compensation and continues to represent the majority of compensation acreage provided each year. As its name implies, the permittee retains responsibility for ensuring that required compensation activities are completed and successful. Permittee-responsible mitigation can be located at or adjacent to the impact site (i.e., on-site compensatory mitigation) or at another location generally within the same watershed as the impact site (i.e., off-site compensatory mitigation).

Mitigation banks and in-lieu fee mitigation both involve off-site compensation activities generally conducted by a third party, a mitigation bank sponsor or in-lieu fee program sponsor. When a permittee's compensatory mitigation requirements are satisfied by a mitigation bank or in-lieu fee program, responsibility for ensuring that required compensation is completed and successful shifts from the permittee to the bank or in-lieu fee sponsor. Mitigation banks and in-lieu fee programs both conduct consolidated aquatic resource restoration, enhancement, establishment and preservation projects; however, under

current practice, there are several important differences between in-lieu fee programs and mitigation banks.

First, in-lieu fee programs are generally administered by state governments, local governments, or non-profit non-governmental organizations while mitigation banks are usually (though not always) operated for profit by private entities. Second, in-lieu fee programs rely on fees collected from permittees to initiate compensatory mitigation projects while mitigation banks usually rely on private investment for initial financing. Most importantly, mitigation banks must achieve certain milestones, including site selection, plan approval, and financial assurances, before they can sell credits, and generally sell a majority of their credits only after the physical development of compensation sites has begun. In contrast, in-lieu fee programs generally initiate compensatory mitigation projects only after collecting fees, and there has often been a substantial time lag between permitted impacts and implementation of compensatory mitigation projects. Additionally, in-lieu fee programs have not generally been required to provide the same financial assurances as mitigation banks. For all of these reasons, there is greater risk and uncertainty associated with in-lieu fee programs regarding the implementation of the compensatory mitigation project and its adequacy to compensate for lost functions and services.

As noted in the preamble for the March 2006 proposal, the majority of the existing guidance regarding compensatory mitigation and the use of these three mechanisms for providing compensation exists in a number of national guidance documents released by the Corps and EPA over the past seventeen years (sometimes in association with other federal agencies such as the U.S. Fish and Wildlife Service and the National Marine Fisheries Service). Since these guidance documents were developed at different times, and in different regulatory contexts, concerns have been raised regarding the consistent, predictable and equitable interpretation and application of these guidance documents. In November 2003, Congress called for the development of regulatory standards and criteria for the use of compensatory mitigation in the section 404 program.

Section 314 of the National Defense Authorization Act (NDAA) for Fiscal Year 2004 (section 314) requires the Secretary of the Army, acting through the Chief of Engineers, to issue regulations “establishing performance

standards and criteria for the use, consistent with section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344, also known as the Clean Water Act), of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the Army under such section.” This provision also requires that those regulations, to the maximum extent practicable, “maximize available credits and opportunities for mitigation, provide flexibility for regional variations in wetland conditions, functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation.”

In response to this directive, the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency (the agencies) published a proposed rule in Part II of the March 28, 2006, issue of the **Federal Register** (71 FR 15520), with a 60-day public comment period. As a result of several requests, the Corps and EPA extended the comment period by an additional 30 days. The comment period ended on June 30, 2006.

In the preamble to the March 2006 proposal, the agencies noted their decision, in light of their respective statutory roles in the section 404 program, to pursue this rulemaking as a joint effort between the Corps and EPA. The preamble also discussed the Corps’s decision to develop these standards for all DA permits which could potentially require compensatory mitigation. Thus, in addition to Clean Water Act section 404 permits, these standards also apply to DA permits issued under sections 9 and 10 of the Rivers and Harbors Act of 1899. Finally, the preamble also discussed why these standards should apply to compensatory mitigation for impacts to streams and other open waters in addition to wetlands.

As discussed in the preamble to the March 2006 proposal, in 2001 the National Research Council (NRC) released a comprehensive evaluation of the effectiveness of wetlands compensatory mitigation required under section 404 of the Clean Water Act. This report noted concerns with some past wetland compensatory mitigation and provided recommendations for the federal agencies, states, and other parties to improve compensatory mitigation. This report was an important resource in the development of today’s rule.

II. General Comments and Responses

In response to the proposed rule, approximately 12,000 comments were received, including about 850 distinct comments and 11,150 additional

substantially identical e-mails and letters. Comments were provided by regulated entities, the scientific community, non-governmental organizations, mitigation bankers, in-lieu fee program sponsors, state and local government agencies, and other members of the public.

A. Overview

Most of the distinct commenters said that this rule is a necessary addition to regulations for implementing the Corps Regulatory Program and some expressed appreciation that the rule incorporates stakeholder feedback and lessons learned. Many commenters expressed general support for the proposed rule because: (1) It will promote predictability and consistency in compensatory mitigation; (2) it will further effective partnerships with private sector mitigation banks; (3) it responds to concerns raised by those participating in the development of Mitigation Action Plan products; (4) many provisions of the rule are consistent with the 2005 Millennium Ecosystem Assessment; (5) it brings greater technical clarity to the process of determining appropriate mitigation; (6) it provides greater focus on accountability through measurable and enforceable ecological performance standards, monitoring, and management; (7) it fosters incorporation of aquatic ecosystem science into compensatory mitigation plans; and (8) it increases public participation in the compensatory mitigation process. Some of these commenters also suggested modifications to the proposed rule, which are discussed in more detail below.

Some commenters, including most of the form letters, opposed the proposed rule or suggested extensive revisions to increase the protection of aquatic resources. The issues most frequently raised, considering both the individual and form letters, were: (1) Interaction of the proposed rule with the existing requirements of the Section 404 (b)(1) Guidelines, (2) compensatory mitigation standards for streams, (3) the amount of discretionary language in the proposed rule, (4) use of the watershed approach for identifying mitigation projects, and (5) the proposed phase-out of in-lieu fee mitigation. These five major issues and our responses to them are discussed below in part II.B. Many other general issues were raised as well, and a number of these are discussed in part II.C. Additional detail, and responses to comments on specific rule provisions, are provided in part VI.

B. Most Frequently Raised Issues

1. Section 404(b)(1) Guidelines

Many commenters stated that, consistent with existing regulations and policy, the rule should emphasize impact avoidance and that compensatory mitigation should not be considered until all efforts have been made to first avoid and then minimize impacts to streams and wetlands. Some commenters also asserted that the proposal would expand the district engineer's existing level of discretion in determining that an applicant has taken all appropriate and practicable steps to first avoid and then minimize impacts to the aquatic ecosystem. Some further asserted that the proposal could be construed to allow permits to be issued even if they cause or contribute to significant degradation of aquatic resources, an action prohibited by the Section 404(b)(1) Guidelines (40 CFR 230.10(c)).

The agencies agree that impacts must be first avoided and then minimized, and that compensatory mitigation should be used only for impacts that cannot be avoided or minimized. The agencies disagree that the rule will weaken or undermine the 404(b)(1) Guidelines, which are codified in regulation and remain unchanged. These requirements are essential to meeting the overall objective of the Clean Water Act to restore and maintain the chemical, physical and biological integrity of the nation's waters. We have clarified that none of them have changed by adding a new paragraph at 33 CFR 332.1(c)(1) [40 CFR 230.91(c)(1)] stating that nothing in these new rules affects the requirement that all DA permits subject to section 404 of the Clean Water Act comply with applicable provisions of the Section 404(b)(1) Guidelines. Thus, this rule does not expand the district engineer's existing level of discretion in determining that an applicant has taken all appropriate and practicable steps to first avoid and then minimize impacts to the aquatic ecosystem. Paragraph (c)(2) of this section has also been modified to clarify that individual section 404 permits will be issued only if compliance with all applicable provisions of the 404(b)(1) Guidelines has been achieved including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to the aquatic ecosystem. For general permits, compliance with the Section 404(b)(1) Guidelines is clarified at 40 CFR 230.7.

In addition, a new paragraph at 33 CFR 332.1(f)(2) [40 CFR 230.91(f)(2)] has been added to the final rule which

clarifies which provisions of the 1990 Memorandum of Agreement (MOA) between the Department of the Army and the Environmental Protection Agency on the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines have been superseded by this rule and which provisions remain in effect. Those that remain in effect include the provisions related to impact avoidance and minimization, evaluation of the least environmentally damaging practicable alternatives, and circumstances where the impacts of the proposed project are so significant that discharges may not be permitted regardless of the compensatory mitigation proposed.

Today's rule is focused on the compensation component of the mitigation sequence. Its purpose is to develop a comprehensive set of standards for compensatory mitigation pursuant to section 314 of the NDAA. Fulfilling this directive necessitates a detailed treatment of all critical aspects of compensatory mitigation. This does not affect compliance with other parts of our regulations, including the 404(b)(1) Guidelines. Additional discussion of this issue can be found in part VI of the preamble.

2. Compensatory Mitigation Standards for Streams

Many commenters stated that compensatory mitigation for stream impacts should not be addressed in this rule. Some stated that there is no scientific evidence that streams can be established (i.e., stream creation) or that other approaches taken in this rule such as stream restoration can compensate for stream losses. They suggested that the agencies should conduct further research on stream mitigation and demonstrate its success before including standards for stream mitigation in the rule. Some also noted that the statutory language in the NDAA refers only to wetlands.

On the other hand, other commenters expressed support for applying the rule to streams and other open waters. These commenters believe that physical alteration of aquatic resources should be mitigated to the extent practicable to support the objectives of the Clean Water Act and that because section 404 of the Clean Water Act authorizes discharges of dredged or fill material into lakes, streams, and wetlands, mitigation for those impacts should be required (and addressed in this rule) as well.

As noted in the preamble to the March 2006 proposal, we believe this rule should apply to compensatory mitigation for all types of aquatic

resources that can be impacted by activities authorized by DA permits, including streams and other open waters. We recognize that the scientific literature regarding the issue of stream establishment and re-establishment is limited and that some past projects have had limited success (Bernhardt and others 2007).¹ Accordingly, we have added a new paragraph at 33 CFR 332.3(e)(3) [40 CFR 230.93(e)(3)] that specifically notes that there are some aquatic resources types that are difficult to replace and streams are included among these. It emphasizes the need to avoid and minimize impacts to these 'difficult-to-replace' resources and requires that any compensation be provided by in-kind preservation, rehabilitation, or enhancement to the extent practicable. This language is intended to discourage stream establishment and re-establishment projects while still requiring compensation for unavoidable stream impacts in the form of stream corridor restoration (via rehabilitation), enhancement, and preservation projects, where practicable. District engineers will evaluate compensatory mitigation proposals for streams, and assess the likelihood of success before deciding whether the proposed compensation should be required.

We recognize that the science of stream restoration is still evolving and that more research is needed; however, the lack of a fully-developed set of tested hypotheses and techniques does not mean that stream mitigation (particularly via restoration, enhancement and preservation) cannot be successfully performed or that it should not be required where avoidance of impacts is not practicable. As noted by Bernhardt and others (2005),² "stream and river restoration can lead to species recovery, improved inland and coastal water quality, and new areas for wildlife habitat and recreational activities." There is a growing body of research that documents successful outcomes for stream restoration projects, examines stream restoration techniques and provides recommendations for effective stream and river restoration.

¹ Bernhardt, E.S., E.B. Sudduth, M.A. Palmer, J.D. Allan, J.L. Meyer, G. Alexander, J. Follstad-Shah, B. Hassett, R. Jenkinson, R. Lave, J. Rumps, and L. Pagano. 2007. Restoring rivers one reach at a time: Results from a survey of U.S. river restoration practitioners. *Restoration Ecology* 15:482-493.

² Bernhardt, E.S., M.A. Palmer, J.D. Allan, G. Alexander, K. Barnas, S. Brooks, J. Carr, S. Clayton, C. Dahm, J. Follstad-Shah, D. Galat, S. Gloss, P. Goodwin, D. Hart, B. Hassett, R. Jenkinson, S. Katz, G.M. Kondolf, P.S. Lake, R. Lave, J.L. Meyer, T.K. O'Donnell, L. Pagano, B. Powell, and E. Sudduth. 2005. Synthesizing U.S. river restoration efforts. *Science* 308: 636-637.

Successful outcomes for stream restoration with respect to water quality, habitat creation, species recovery and recreation, have been documented by Baron and others (2002);³ Buijse and others (2002);⁴ Muotka and Pekka (2002);⁵ Nakamura and Kunihiro (2006);⁶ and Petersen (1999).⁷ Criteria and recommendations for ecologically successful stream restoration have been addressed by Hassett and others (2005)⁸ Kauffman and others (1997)⁹ Lavendel (2002)¹⁰ Palmer and others (2005)¹¹ and Whalen and others (2002).¹² Assessment of the physical and biological effects of restoration activities has been performed by Reeves and others (1997);¹³ Slaney and others (1994)¹⁴ and Solazzi and others (2000).¹⁵ The applicability of specific tools to measure stream restoration success has been investigated by Paller and others (2000)¹⁶ and Lester and

others (2006).¹⁷ Somerville and Pruitt (2004)¹⁸ reviewed existing stream assessment and mitigation protocols and Roni and others (2002)¹⁹ reviewed stream restoration techniques. Shields and others (2003)²⁰ discussed the unique challenges associated with stream restoration research.

Under this final rule, mitigation plans for all wetland compensatory mitigation projects must contain the following twelve elements: Objectives; site selection criteria; site protection instruments (e.g., conservation easements); baseline information (for impact and compensation sites); credit determination methodology; mitigation work plan; maintenance plan; ecological performance standards; monitoring requirements; long-term management plan; adaptive management plan; and financial assurances (see 33 CFR 332.4(c) [40 CFR 230.94(c)]). Existing literature regarding stream restoration, as well as our experience with past stream mitigation projects supports our decision to require mitigation plans for stream compensatory mitigation projects to contain the same twelve fundamental elements. Some commenters noted that aspects of the mitigation work plan will differ between stream and wetland mitigation projects. Today's rule highlights some of these potential differences by noting additional elements that may be necessary for stream mitigation project work plans. These elements include planform geometry, channel form, watershed size, design discharge, and riparian area plantings and can be found at 33 CFR 332.4(c)(7) [40 CFR 230.94(c)(7)].

Another important modification was made to the section of the rule describing ecological performance standards. Like the proposal, today's rule requires that every mitigation plan include objective and verifiable ecological performance standards to assess whether the compensatory

mitigation project is achieving its objectives. Neither the proposal nor today's rule prescribe the individual variables or metrics that should be used to evaluate each aquatic resource type potentially restored, enhanced, established, or preserved in compensatory mitigation projects. Given the extremely large variation among the aquatic resource types found across the country, and the constant advances in the science of aquatic ecosystem restoration, overly prescriptive requirements would be impractical. However, in recognition of the need to strengthen this provision and to ensure that compensatory mitigation project performance standards reflect the latest advances in the science of stream and wetland restoration, we have modified the final rule at 33 CFR 332.5(b) [40 CFR 230.95(b)] to include a requirement that ecological performance standards be based on the best available science that can be measured or assessed in a practicable manner.

As stream scientists have noted, the proportion of stream restoration projects that have been monitored for performance is low (Bernhardt and others 2005).²¹ Today's rule, however, requires monitoring of mitigation projects for a minimum of five years with longer monitoring periods required for aquatic resources with slow development rates. This monitoring requirement will provide new data on stream restoration performance that will serve to increase knowledge and improve stream mitigation over time. (See 33 CFR 332.6 [40 CFR 230.96]). Also, in response to public comment, we removed a provision from 33 CFR 332.6(a) [40 CFR 230.96(a)] that would have allowed the district engineer to waive all monitoring requirements if they were determined not to be practicable.

While section 314 of the NDAA refers only to the development of compensatory mitigation standards for wetlands, we believe that in order to improve the performance and results of all types of compensatory mitigation this rule should include compensatory mitigation standards for all types of aquatic resources that can be impacted by activities authorized by DA permits, including streams and other open waters. Section 404(b) of the Clean Water Act authorizes EPA to develop

³ Baron, J.S. et al. 2002. Meeting ecological and societal needs for freshwater. *Ecological Applications* 12: 1247–1260.

⁴ Buijse, A.D. et al. 2002. Restoration strategies for river floodplains along the large lowland rivers in Europe. *Freshwater Biology* 47: 889–907.

⁵ Muotka, T. and P. Laasonen. 2002. Ecosystem recovery in restored headwater streams: The role of enhanced leaf retention. *Journal of Applied Ecology* 39: 145–156.

⁶ Nakamura, K. and K. Amano. 2006. River and wetland restoration: Lessons from Japan. *Bioscience* 56(5): 419–129.

⁷ Petersen, M.M. 1999. A natural approach to watershed planning, restoration and management. *Water Science and Technology* 39(12): 347–352.

⁸ Hassett, B. et al. 2005. Restoring watersheds project by project: Trends in Chesapeake Bay tributary restoration. *Frontiers in Ecology and the Environment* 3(5): 259–267.

⁹ Kauffman, J. Boone, R.L. Beschta, N.O., and D. Lytjen. 1997. An ecological perspective of riparian and stream restoration in the western United States. *Fisheries* 22(5): 12–24.

¹⁰ Lavendel, B. 2002. The business of ecological restoration. *Ecological Restoration* 20: 173–178.

¹¹ Palmer, M.A. et al. 2005. Standards for ecologically successful river restoration. *Journal of Applied Ecology* 42: 207–217.

¹² Whalen, P.J., L.A. Toth, J.W. Koebel, and P.K. Strayer. 2002. Kissimmee River Restoration: A case study. *Water Science and Technology* 45(11): 55–62.

¹³ Reeves, G.H., D.B. Hohler, B.E. Hansen, F.H. Everest, J.R. Sedell, T.L. Hickman, and D. Shively. 1997. Fish habitat restoration in the Pacific Northwest: Fish Creek of Oregon. Pages 335–359 in J.E. Williams, C.A. Wood, and M.P. Dombeck, editors. *Watershed Restoration: Principles and Practices*. American Fisheries Society, Bethesda, Maryland.

¹⁴ Slaney, P.A., B.O. Rublee, C.J. Perrin, and H. Goldberg. 1994. Debris structure placements and whole-river fertilization for salmonids in a large regulated stream in British Columbia. *Bulletin of Marine Science* 55: 1160–1180.

¹⁵ Solazzi, M.F., T.E. Nickelson, S.L. Johnson, and J.D. Rodgers. 2000. Effects of increasing winter rearing habitat on abundance of salmonoids in two coastal Oregon streams. *Canadian Journal of Fisheries and Aquatic Sciences*. 57: 906–914

¹⁶ Paller, M.H., M.J.M. Reichert, J.M. Dean, and J.C. Seigle. 2000. Use of fish community data to evaluate restoration success of a riparian stream. *Ecological Engineering* 15: 171–187.

¹⁷ Lester, R., W. Wright, and M. Jones-Lennon. 2006. Determining Target Loads of Large and Small Wood for Stream Rehabilitation in High-Rainfall Agricultural Regions of Victoria, Australia. *Ecological Engineering* 28: 71–78.

¹⁸ Somerville, D.E. and B.A. Pruitt. 2004. Physical stream assessment: A review of selected protocols for use in the Clean Water Act Section 404 Program. Prepared for the U.S. Environmental Protection Agency, Office of Wetlands, Oceans, and Watersheds, Wetlands Division (Order No. 3W–0503–NATX). Washington, DC, 213 pp.

¹⁹ Roni, P. et al. 2002. A review of stream restoration techniques and a hierarchical strategy for prioritizing restoration in Pacific Northwest watersheds. *North American Journal of Fisheries Management* 22: 1–20.

²⁰ Shields, F. Douglas, C.M. Cooper Jr., Scott S. Knight and M.T. Moore. 2003. Stream corridor restoration research: A long and winding road. *Ecological Engineering* 20: 441–454.

²¹ Bernhardt, E.S., M.A. Palmer, J.D. Allan, G. Alexander, K. Barnas, S. Brooks, J. Carr, S. Clayton, C. Dahm, J. Follstad-Shah, D. Galat, S. Gloss, P. Goodwin, D. Hart, B. Hassett, R. Jenkinson, S. Katz, G.M. Kondolf, P.S. Lake, R. Lave, J.L. Meyer, T.K. O'Donnell, L. Pagano, B. Powell, and E. Sudduth. 2005. Synthesizing U.S. river restoration efforts. *Science* 308: 636–637.

the substantive environmental criteria used by the Corps in making section 404 permit decisions including those associated with all forms of compensatory mitigation. Also, section 501(a) of the Clean Water Act provides EPA with broad authority to conduct any rulemaking necessary to carry out its functions under the Clean Water Act.

While many stream restoration and rehabilitation activities have been conducted across the country, we recognize that not all of them have been successful. Much of the literature suggests that this is due to a lack of the kinds of comprehensive standards for project planning, implementation and management included in this rule. Accordingly, we determined that including stream mitigation in this rule would improve current standards and practices for compensatory mitigation of streams. Today's rule, with the addition of the above referenced modifications, includes the necessary provisions to appropriately treat stream mitigation. Additional discussion of this issue can be found in part VI of the preamble.

3. Discretionary Language

Many commenters expressed concern that the proposal leaves too much discretion to district engineers. Some commenters objected to use of "may", "should", and "can" in some rule provisions, and/or to use of the qualifier "appropriate and practicable" for some requirements. Commenters were concerned that such discretion might lead to authorization of inappropriate compensatory mitigation projects, inadequate enforcement and oversight, or excessive litigation.

In contrast, other commenters suggested even greater flexibility, to allow cost-effective compensatory mitigation based on case-specific circumstances.

In response to these comments, we have carefully evaluated all of the discretionary language in the proposed rule, and replaced it with binding and/or more clearly articulated requirements where appropriate. Such modifications were made to a number of key provisions in the rule including those related to mitigation type, the amount of mitigation necessary to offset permitted losses, financial assurances, credit releases, the use of preservation, ecological performance standards, and long-term site protection and management. Also, a number of requirements for in-lieu fee programs have been added to the rule, as part of the decision not to phase them out as originally proposed. (Note that the preamble to the proposed rule included an extensive discussion of and request

for comment on alternatives to the proposed phase-out. The new requirements for in-lieu fee programs reflect many of the comments received.) These specific modifications and additions are discussed in more detail in part VI of the preamble.

With these modifications, we believe that today's rule achieves a proper balance of binding requirements and discretion. The rule will help improve the quality and success of compensatory mitigation, while providing flexibility necessary to ensure that compensatory mitigation requirements for a particular DA permit appropriately offset authorized impacts. Some discretionary language is necessary for this rule because resource types, project impacts, and compensatory mitigation practices vary widely across both projects and regions of the country. District engineers need to take such variations into account, including variations in state and local requirements that affect the implementation and long-term management of compensatory mitigation projects. For example, laws and regulations governing real estate instrument and financial assurances vary from state to state. In addition, practices for restoring, establishing, and enhancing aquatic resources vary by resource type and by region. For these reasons, discretionary language is used where appropriate to promote both regulatory efficiency and project success, and to ensure that required mitigation is practicable.

4. Watershed Approach

Many comments addressed the watershed approach included in the proposal. A majority of commenters expressed support for the use of a watershed approach to compensatory mitigation. They noted that use of a watershed approach would improve the sustainability of compensatory mitigation projects and ensure that they are better integrated with the needs of the watershed. However, some commenters believed that additional specificity in the requirements relating to the use of a watershed approach was needed. For example, commenters requested clarification regarding use of the watershed approach in the absence of a watershed plan, parameters needed to implement a watershed approach, and the definition of the terms "watershed," "watershed plan" and "watershed approach."

Other commenters opposed the watershed approach described in the proposed rule. Some were particularly concerned about use of the watershed approach in the absence of a detailed watershed plan, arguing that this could

lead to inappropriate compensatory mitigation decisions and the cumulative loss of wetland functions. Others were more concerned about the analytical burden on permit applicants of developing watershed plans or justifying mitigation projects in terms of wider watershed considerations. Still others thought the concept was too ambiguous to be included in a regulation.

The agencies continue to believe that the watershed approach provides the appropriate framework for making compensatory mitigation decisions, but have made a number of changes to address specific comments. The primary objective of the watershed approach included in today's rule is to maintain and improve the quantity and quality of wetlands and other aquatic resources in watersheds through strategic selection of compensatory mitigation project sites. The watershed approach accomplishes this objective by expanding the informational and analytic basis of mitigation project site selection decisions and ensuring that both authorized impacts and mitigation are considered on a watershed scale rather than only project by project. This requires a degree of flexibility so that district engineers can authorize mitigation projects that most effectively address the case-specific circumstances and needs of the watershed, while remaining practicable for the permittee. In response to the concern about additional burden on permittees, the agencies recognize that the level of data and analysis appropriate for implementing the watershed approach must be commensurate with the scale of the project, and that there will be situations, particularly for projects with small impacts, where it would not be cost-effective to utilize a watershed approach. For this reason, the regulations at § 332.3(c)(1) [§ 230.93(c)(1)], state that the watershed approach is to be used to the extent appropriate and practicable, and the regulations at § 332.3(c)(3)(iii) [§ 230.93(c)(3)(iii)] state that the level of information and analysis must be commensurate with the scope and scale of the authorized impacts and functions lost.

We recognize that there are many different types of watershed plans that have been developed for purposes other than aquatic resource restoration, establishment, enhancement, and/or preservation activities and that such plans may be of limited use in making compensatory mitigation decisions. For example, some watershed plans are conceived to guide development activities or the placement of storm

water infrastructure. Therefore, we have modified § 332.3(c)(1) [§ 230.93(c)(1)] to state that the district engineer will determine whether a given watershed plan is appropriate for use in the watershed approach for compensatory mitigation.

We further recognize that in many areas, watershed plans appropriate for use in planning compensatory mitigation activities have not been developed. Therefore, consistent with the 2001 NRC Report, the watershed approach described in this final rule does not require a formal watershed plan. Although it would always be preferable to have an appropriate watershed plan, we believe that implementing a watershed approach to the degree practicable, even without a watershed plan, can improve compensatory mitigation site selection and project implementation. For example, the use of appropriately sited mitigation banks can support a watershed approach without using watershed plans. In the absence of an appropriate watershed plan, the watershed approach should be based on a structured consideration of watershed needs and how wetlands and other types of aquatic resources in specific locations will address those needs. To implement this approach, district engineers will utilize the considerations specified in § 332.3(c)(2) [§ 230.93(c)(2)] and available information on watershed conditions and needs, as described in § 332.3(c)(3) [§ 230.93(c)(3)].

In response to public input, we have revised the definition of “watershed plan” to clarify the kinds of plans appropriate for use in making compensation decisions. We have also added definitions for the terms “watershed” and “watershed approach” at § 332.2 [§ 230.92]. The appropriate watershed scale to use for the watershed approach will vary by geographic region, as well as by the particular aquatic resources under consideration. Since using a watershed approach is not appropriate in areas without watershed boundaries, such as marine waters, we have also added a provision (§ 332.3(c)(2)(v) [§ 230.93(c)(2)(v)]) to clarify that other types of spatial scales may be more appropriate in those areas. To enhance the use of the watershed approach, we have added a sentence to § 332.3(c)(2)(iv) [§ 230.93(c)(2)(iv)] stating that the identification and prioritization of resource needs should be as specific as possible. We have also added a provision, stating that a watershed approach may include on-site compensatory mitigation, off-site compensatory mitigation, or a combination of on-site and off-site

compensatory mitigation (see § 332.3(c)(2)(iii) [§ 230.93(c)(2)(iii)]).

We have revised § 332.3(c)(3) [§ 230.93(c)(3)] to clarify that district engineers will use available information for the watershed approach. That available information will address watershed conditions and needs and include potential and/or priority sites for compensatory mitigation projects. We have also indicated potential sources of appropriate information, such as wetland maps, soil surveys, aerial photographs, local ecological reports, etc. Public input on the watershed approach and our response to this input including the above mentioned modifications are discussed in more detail in part VI of the preamble.

5. In-Lieu Fee Programs

Many commenters, including many state officials, opposed the proposed phase-out of in-lieu programs. These commenters indicated that in certain areas (especially rural and coastal regions, the West, and Alaska) there are few mitigation banks and little potential for their development, and that permittee-responsible compensatory mitigation is often impractical. In-lieu fee programs are therefore the best (or only) option for compensatory mitigation in these areas. Some commenters also argued that in-lieu fee programs provide important benefits that other types of mitigation do not, such as a more thorough consideration of the needs of a watershed and the most appropriate locations and mitigation types to sustain and enhance its long-term health. Some commenters representing in-lieu fee programs stated that if they were held to all of the same standards as mitigation banks, particularly the requirement to secure project sites before selling any credits, they would have to cease operation and these benefits would be lost.

Many of these commenters also acknowledged problems in the current administration and performance of in-lieu fee mitigation, but stated that these problems were due to existing requirements and policies (or the lack thereof) rather than the in-lieu fee concept itself. They suggested that instead of phasing out in-lieu fee programs, the final rule should include standards that address these problems and ensure that in-lieu fee programs do in fact deliver mitigation that compensates for the impacts associated with the credits they sell. Commenters noted that the NDAA does not require that these standards be exactly the same as those for mitigation banks but rather “equivalent” to the maximum extent practicable. Some standards for in-lieu

fee programs suggested by commenters included: Limiting the number of credits that in-lieu fee programs can sell before they have secured sites, limiting the types of organizations that can be in-lieu fee sponsors, and establishing financial accounting standards to improve their accountability for credit fulfillment. A number of commenters acknowledged that even with significant improvements to in-lieu fee mitigation, mitigation banks would be more likely to minimize project uncertainties and temporal losses of aquatic resource functions. They suggested that the final rule should therefore stipulate that where the service areas of an in-lieu fee program and a mitigation bank overlap, the mitigation bank should be the preferred credit provider.

Other commenters supported the phase-out of in-lieu fee programs as proposed. These commenters pointed out shortfalls associated with current administration of in-lieu fee programs noting, for example, that prices for in-lieu fee credits are often too low and fail to cover all of the costs necessary to deliver the promised mitigation, including expenses for program administration, long-term maintenance of projects, and corrective action. This may result in undercutting of mitigation bank credit prices, since banks, as commercial ventures, must charge prices based on the full cost of producing compensation credits or go out of business. Furthermore, in-lieu fee programs often require fees from multiple permitted projects before they can initiate compensation projects, resulting in substantial delays between permitted impacts and compensation. Several commenters further stated that it was not fair for in-lieu fee programs to be allowed to continue to operate with lower or looser standards than mitigation banks and permittee-responsible mitigation. Commenters also noted that because credit release schedules for mitigation banks are tied to performance, they have a financial incentive to produce timely, successful mitigation that is lacking for in-lieu fee programs.

After carefully considering all comments received, the agencies have decided to retain in-lieu fee programs in today's rule as a separate and distinct mechanism for providing compensatory mitigation for DA permits. We believe they can fulfill an important role in providing effective mitigation in circumstances where mitigation banks and permittee-responsible mitigation are not practicable. At the same time, we have included a number of new requirements for in-lieu fee programs to improve accountability and

performance, based to a large extent on existing practice at the most successful currently-operating in-lieu programs. Specifically, we have added a requirement for a compensation planning framework at § 332.8(c) [§ 230.98(c)] which details how the in-lieu fee program will select and secure project sites and implement mitigation projects in a watershed context. The framework is essentially a watershed plan designed to support resource restoration, and must include an analysis of historic aquatic resource losses and current conditions, a description of the general amounts, types and locations of aquatic resources the program will seek to provide and a prioritization strategy for selecting and implementing compensatory mitigation activities. This type of advanced planning will ensure that in-lieu fee programs are guided by a thorough understanding of the needs, opportunities, and challenges of the areas in which they operate, which will allow them to select and design more successful projects and better estimate full project costs.

The final rule also requires that the in-lieu fee program instrument establish a cap on the number of credits that the program can sell before securing a compensatory mitigation project site and conducting aquatic resource restoration, establishment, enhancement, and/or preservation at that site. These are defined as “advance credits” (see § 332.2 [§ 230.92]) and the rules for their establishment and use are provided at § 332.8(n) [§ 230.98(n)]. The rule also limits sponsorship of in-lieu fee programs specifically to governmental or non-profit natural resource management entities (see definition of “in-lieu fee program” at § 332.2 [§ 230.92]). District engineers and Interagency Review Team (IRT) members should carefully evaluate the capabilities and demonstrated performance of these natural resource management entities prior to approving them as in-lieu fee program sponsors in order to minimize the risks associated with allowing advance credit sales.

We have added a provision at § 332.8(i) [§ 230.98(i)] requiring in-lieu fee programs to establish a program account, including criteria for the management of this account. Funds collected from permittees, including interest on these funds, may only be used for the selection, design, acquisition, implementation, and management of in-lieu fee projects, with a small percentage allowed for administrative costs.

Provisions at § 332.8(d)(6)(iv)(B)–(C) [§ 230.98(d)(6)(iv)(B)–(C)] and

§ 332.8(o)(5)(ii) [§ 230.98(o)(5)(ii)] were included to improve the estimation of in-lieu fee project costs and the establishment of adequate fee schedules. Today’s rule ensures that the review, approval, and oversight of in-lieu fee programs is subject to the same level of interagency and public review as mitigation banks (see § 332.8(d) [§ 230.98(d)]). Similarly, today’s rule requires in-lieu fee projects to develop mitigation plans that meet the same standards as those applicable to mitigation banks and permittee-responsible projects (see § 332.8(j) [§ 230.98(j)]).

Properly organized in-lieu fee programs which comply with the new requirements established by today’s rule should actively support a watershed approach to compensatory mitigation, and will help advance goals for protecting and restoring aquatic resources within watersheds, especially in areas where there are no mitigation banks.

We recognize that even with these improvements to in-lieu fee programs, there will likely be less temporal loss of resources associated with mitigation provided by banks than with mitigation provided by in-lieu fee programs. We have therefore established a hierarchy in § 332.3(b) [§ 230.93(b)] for selecting the type and location of compensatory mitigation with an explicit preference for mitigation bank credits over advance credits from in-lieu fee programs when appropriate bank credits are available for use. Public input regarding in-lieu fee mitigation as well as all of these specific modifications and additions are discussed in more detail in parts III and VI of the preamble.

C. Other General Comments

Some commenters stated that the proposed rule should be revised to incorporate principles of ecological restoration and landscape ecology. Other commenters said that the proposed rule fails to recognize the dynamic nature of wetlands and provides disincentives for active management of wetland resources in ways that would benefit society. A few commenters remarked that the proposed rule does not adequately address compensatory mitigation for marine habitats or aquatic species.

We have revised the final rule to better incorporate principles of ecological restoration and landscape ecology, for example, at § 332.3(d) [§ 230.93(d)], which specifies detailed factors for the district engineer to use in determining ecological suitability for mitigation project sites. Section 404 directs the Corps to issue permits for

discharges of dredge and fill material, not to promote “active management” of wetlands. To the extent that active management may provide an alternative to permitted discharges, permit applicants should consider such approaches as part of the avoidance and minimization mitigation sequencing. Also, both permitted projects and compensatory mitigation projects may require on-going active management to protect resources, and conditions for such management may be incorporated into DA permits where appropriate. Finally, management of existing wetlands may itself involve discharges requiring DA permits, and in this case permit conditions will address issues related to the management and protection of affected resources, in accordance with applicable regulations, including this rule. We disagree that the rule does not adequately address marine habitats and species. While the specific projects needed to mitigate impacts to marine resources may be different, the procedural and analytical framework established in the final rule applies equally well to freshwater and marine resources.

Several commenters said that the proposed rule did not address concerns raised in recent reports on compensatory mitigation in the Corps Regulatory Program that were issued by the Government Accountability Office (GAO). Some commenters said that the proposed rule incorporates some of GAO’s recommendations, but expressed skepticism that the Corps has the resources to implement those provisions of this rule. These commenters asserted that the Corps needs to make compensatory mitigation compliance a high priority to ensure effective replacement of wetland acreage and function lost as a result of permitted activities.

One GAO report was issued in May 2001, and was entitled “Wetlands Protection: Assessments Needed to Determine Effectiveness of In-Lieu Fee Mitigation.” Another GAO report, “Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occurring” was issued in September 2005. We have incorporated many of the recommendations of these GAO reports into this rule, by requiring the use of enforceable permit conditions, performance standards, and third-party agreements. In addition, this rule states that it supersedes certain agency guidance on compensatory mitigation, specifically the 1995 mitigation banking guidance, the 2000 in-lieu fee guidance, and Regulatory Guidance Letter (RGL)

02–02. That RGL provides guidance on compensatory mitigation projects for aquatic resources impacted by activities authorized by DA permits. This rule also clarifies the requirements for compensatory mitigation, as recommended by GAO. We agree that taking actions to determine compensatory mitigation compliance should be a high priority, and have provided general principles for establishing ecological performance standards and criteria. Corps districts and EPA regional offices will continue to work with other federal and state resource agencies to develop and refine specific performance standards and criteria to evaluate and ensure success of compensatory mitigation projects in their geographic areas of responsibility. These performance standards and criteria will take into account regional variations in aquatic resource characteristics, functions, and services.

A number of commenters discussed *ad hoc* mitigation, which has been defined in various reports as cash donations made by a permittee to satisfy their mitigation requirements. The majority of commenters stated that *ad hoc* mitigation should not be approved unless it meets the requirements specified in the rule. One commenter said that *ad hoc* mitigation is often unsuccessful because there is no evaluation process and no oversight for the compensatory mitigation that is to be completed, and there is no way to track the compensatory mitigation that was to occur. One commenter proposed that *ad hoc* mitigation should be allowed on a one-time basis where a compensatory mitigation opportunity and need arise concurrently, but are not of such a scale as to justify going through the review process in § 332.8 [§ 230.98]. Two of these commenters discussed *ad hoc* mitigation arrangements and stated that the Corps needs to improve record-keeping for *ad hoc* mitigation activities.

The May 2001 GAO report defines *ad hoc* mitigation as involving “mitigation payments from developers to third parties that are neither mitigation banks nor considered by the Corps to be in-lieu fee organizations.” For the purposes of this rule, *ad hoc* mitigation is considered to be a form of permittee-responsible mitigation. For a mitigation bank or in-lieu fee program to be used to provide compensatory mitigation for DA permits, and to have the responsibility for providing the required compensatory mitigation transfer from the permittee to the mitigation bank sponsor or in-lieu fee sponsor, there must be a mitigation banking or in-lieu fee program instrument approved by the

district engineer in accordance with the procedures in this final rule (see § 332.8 [§ 230.98]). Any other compensatory mitigation arrangements are considered to be permittee-responsible mitigation where the permittee retains responsibility for providing the required compensatory mitigation, and this will be reflected in the terms of the DA permit. Permittee-responsible mitigation also includes any *ad hoc* payments made to governmental or non-governmental organizations that are not in accordance with the terms of an approved in-lieu fee program instrument. When a governmental or non-governmental organization accepts an *ad hoc* payment from a permittee, that organization is in essence acting as a contractor to provide the compensatory mitigation for that permittee, and the permittee retains responsibility for any long-term protection and/or management of the compensatory mitigation project.

We also recognize the importance of record-keeping for compensatory mitigation projects, and have established procedures for using permit conditions, instruments, and ledgers to track the implementation and success of those projects. The Corps will also track permitted impacts and compensatory mitigation through databases, such as the OMBIL Regulatory Module (ORM–2), which is the primary automated information system for the Corps Regulatory Program, and the Regional Internet Bank Information Tracking System (RIBITS). All 38 Corps districts are now using ORM–2, which will help standardize data collection in the Corps Regulatory Program. It will also be used to collect data to assess the performance of the Regulatory Program. RIBITS is an automated information system with an interactive Web site. It is currently designed to track the status of mitigation banks and to provide up-to-date information to mitigation bank sponsors and customers. We are also considering modifying RIBITS to track the status of in-lieu fee programs. Use of RIBITS is currently limited to several districts, but we are planning to make RIBITS the standard tool for tracking sale and production of compensatory mitigation credits by third parties.

Several commenters expressed appreciation that the agencies incorporated many of the recommendations made in the 2001 NRC Report. A few commenters acknowledged that the proposed rule prioritized the location and types of compensatory mitigation projects in accordance with the NRC’s recommendations. However, they said that they disagree with the NRC’s

recommendations and suggested that the agencies establish a preference for on-site and in-kind mitigation in the final rule. They said that a preference for on-site and in-kind compensation would better support a “no net loss” goal for aquatic resources.

We disagree that the rule should establish a preference for on-site compensatory mitigation, because the failure rate for such projects is quite high. On-site compensatory mitigation activities, especially wetland restoration or establishment, are particularly sensitive to land use changes. Land use changes often alter local hydrology. Establishing appropriate hydrology patterns (i.e., duration and frequency) to support the desired aquatic habitat type is a key factor in successfully restoring or establishing those habitats. In many cases, there are circumstances in which on-site mitigation is neither practicable nor environmentally preferable. Under the watershed approach, it may be desirable to require some on-site mitigation measures to address water quality and quantify functions, and to require off-site mitigation to compensate for habitat functions.

We do agree that, in general, in-kind mitigation is preferable to out-of-kind mitigation because it is more likely to compensate for the functions and services lost at the impact site. The rule states that the compensatory mitigation should be of a similar type (e.g., Cowardin and/or hydrogeomorphic class) to the affected aquatic resource, unless the district engineer determines using the watershed approach described in the rule (see § 332.3(c) [§ 230.93(c)]) that out-of-kind compensatory mitigation will better serve the aquatic resource needs of the watershed. The term “in-kind” in § 332.2 [§ 230.92] is defined to include similarity in structural and functional type; therefore, the focus of the in-kind preference is on classes of aquatic resources (e.g., forested wetlands, perennial streams). However, all compensatory mitigation projects should provide a high level of functional capacity, even when compensating for degraded or low-quality resources. Replacement ratios may be used to adjust for the relative quality of impact sites and mitigation projects, where appropriate. With this rule, we are moving towards greater reliance on functional and condition assessments to quantify credits and debits, instead of surrogates such as acres and linear feet. We believe that more frequent use of such assessment methods will help improve the quality of aquatic resources in the United States.

For example, in a case where a project proponent is proposing to fill a degraded three acre wetland that provides one unit of wetland function per acre (as determined by a rigorous functional assessment method), the loss of that wetland may in some cases be offset by a compensatory mitigation project that provides fewer acres of high-functioning wetlands (as determined by the same functional assessment method). Conversely, where the impact is to a high-value resource, more than one-to-one replacement on an acreage basis may be necessary just to achieve functional equivalence between the impact and mitigation sites. Note that replacement ratios may also be greater than one-to-one for other reasons, such as to address uncertainty of success or temporal losses.

One commenter said that the Corps should be the principal agency administering the 404 wetlands regulatory program. The commenter stated that the involvement of multiple agencies in wetlands regulation only hinders the overall efforts of the Corps Regulatory Program. This commenter also stated that the Corps should build a stronger, more predictable compensatory mitigation program to both enhance environmental protection and provide a measure of certainty to both regulatory staff and permit applicants.

While we agree that the section 404 regulatory program should be as streamlined and efficient as possible, we do not agree that the involvement of other agencies necessarily hinders that efficiency. Today's rule will foster greater efficiency and predictability in the interagency process by providing clear deadlines for action on all types of compensatory mitigation, particularly banking and in-lieu fee program instruments. We note that the participation of other agencies in the section 404 permit process is required by various laws, regulations, and legally-binding agreements. For example, section 404(b) of the Clean Water Act specifically authorizes EPA to develop guidelines for the identification of disposal sites for dredged or fill material (the 404(b)(1) Guidelines), which provide substantive environmental criteria for avoidance, minimization and compensatory mitigation. The EPA is authorized by section 501(a) of the Clean Water Act to conduct any rulemaking necessary to carry out their functions under that act. As another example, the Fish and Wildlife Coordination Act and other statutes require consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service for

activities that control or modify waterbodies.

Many commenters stated that the proposed rule is inconsistent with existing national regulations, and one commenter said that the proposed rule is inconsistent with regulations at 33 CFR 320.4(r), as well as the "Mitigation" general condition for the nationwide permits and other compensatory mitigation guidance documents that apply to the Corps Regulatory Program. This commenter also stated that the 404(b)(1) Guidelines provide no authority for requiring compensatory mitigation for unavoidable adverse impacts after all appropriate and practicable minimization has been required.

The agencies disagree with these comments. The Corps general mitigation policy at 33 CFR 320.4(r) describes types of mitigation, including avoiding, minimizing, rectifying, reducing, or compensating for resource losses. Since that provision was last promulgated in 1986, there have been policy changes that have resulted in the Corps requiring compensatory mitigation for more activities, not just those that result in significant resource losses. For example, when the nationwide permit regulations were revised in 1991, a provision was added (33 CFR 330.1(e)(3)) which stated that compensatory mitigation could be required by a district engineer to ensure that an NWP activity results in minimal adverse environmental effects. The final rule issued today also specifically states that it does not alter the regulations of 33 CFR 320.4(r), and that it supersedes certain guidance documents on compensatory mitigation. What is generally understood to be compensatory mitigation today (i.e., the restoration, establishment, enhancement, and/or preservation of aquatic resources) is in the 404(b)(1) Guidelines as an action to minimize adverse effects on populations of plants and animals (see 40 CFR 230.75(d)). Compensatory mitigation may also be required to satisfy other legal requirements, as a result of the public interest review process, or to compensate for other resource losses. As indicated in the preamble to this rule, today's rule does not affect the determination as to when compensatory mitigation is required, only the requirements for conducting such mitigation once the district engineer determines that it is necessary. As stated in the preamble to the March 28, 2006, proposed rule (71 FR 15524–15525), this rule does not change the threshold for determining when compensatory mitigation is required; instead it focuses on where and how compensatory

mitigation will be provided. The threshold for determining when compensatory mitigation is required for DA permits is generally addressed through 33 CFR 320.4(r) and specifically for the nationwide permits at 33 CFR 330.1(e)(3).

A number of commenters stated that the proposed rule gives preference to certain groups. One commenter said that the proposed rule promotes the interests of non-profit organizations, government agencies, and academics, instead of restoration practitioners and entrepreneurs. One commenter remarked that wetland mitigation and market-based approaches have the potential to expand land conservation practices through private investments and to provide additional economic incentives to help retain working farms and forests. Another commenter said that a market-driven approach will help small developers and allow for increased entrepreneurship in compensatory mitigation. One commenter said that the proposed rule would damage the economic viability of wetland mitigation banking and encourage losses of wetlands in floodplains, which would exacerbate property damage caused by flooding.

Under this rule, any entity, whether a non-profit group, government agency or commercial entrepreneur, has the opportunity to develop and implement compensatory mitigation projects. We believe we have complied with the statute requiring the promulgation of this rule, by maximizing available credits while raising requirements and standards to help ensure ecological performance. When evaluating compensatory mitigation options, district engineers will consider what would be environmentally preferable to offset the authorized impacts. In many instances, the environmentally preferable compensatory mitigation will be in the form of mitigation banks or in-lieu fee programs because they usually involve consolidating compensatory mitigation projects and resources, and providing financial planning and scientific expertise. They may also reduce temporal losses of functions and reduce uncertainty over project success. We have added a provision that in-lieu fee sponsors must be governmental or non-profit organizations. We believe this is appropriate in light of the fact that only in-lieu fee programs are allowed to sell advance credits, before a site has been secured or a specific mitigation project reviewed and approved.

We disagree that the rule will adversely affect the economic viability of mitigation banks and encourage

losses of wetlands in floodplains. By further clarifying the requirements and timelines for mitigation bank approval, and by establishing a preference for mitigation bank credits we believe the final rule will in fact enhance the economic viability of mitigation banks. Since the focus of this rule is on compensatory mitigation, avoidance and minimization of impacts to wetlands located in floodplains is more appropriately addressed through the application of Subpart B of the 404(b)(1) Guidelines, compliance with Executive Order 11988 (Floodplain Management), and compliance with the floodplain management requirements of the Federal Emergency Management Agency and state and local governments.

One commenter said that the rule will slow down the permitting process for new energy projects. Three commenters stated that section 1221 of the Energy Policy Act of 2005 (Pub. L. 109-58), through section 216(h) of the Federal Power Act, requires federal permit decisions associated with transmission facilities to be made in one year, unless it is not possible under other laws. These commenters said that the one-year time frame applies to DA permits.

This final rule will not have an adverse effect on processing times for DA permits that authorize the construction of transmission facilities. The rule promotes the development of mitigation banks and in-lieu fee programs, which can be used to provide compensatory mitigation for energy projects that require DA permits. Securing credits from third-party mitigation providers can help shorten permit processing times, because there is no need to review and approve site-specific mitigation plans for permittee-responsible mitigation. In cases where appropriate third-party mitigation credits are not available, the review and approval of permittee-responsible mitigation projects should be more timely, because this rule establishes clear guidelines and requirements for those compensatory mitigation projects. This rule does not change the circumstances under which compensatory mitigation is required, so additional compensatory mitigation will not be required for energy projects.

Wetland Protection

Many commenters said that the proposed rule does not adequately protect the Nation's wetlands, does not support the goal of "no net loss" of wetlands, does not support the objective of the Clean Water Act to maintain the chemical, physical, and biological integrity of wetlands, and will result in a significant loss of wetland acreage

across the country. Several commenters recommended that the final rule include provisions to make it more difficult to fill wetlands to ensure no net loss of wetland acreage and functions.

However, one commenter said that although current federal regulations could be improved, those regulations are sufficient to ensure no net loss of wetlands in Florida. One commenter stated that over 33,000 acres of wetlands have been lost last year alone, and, with this much destruction, it is obvious that the agencies are not requiring enough avoidance of wetland impacts. Two commenters said that of the three goals stated in the proposed rule (i.e., to improve quality of mitigation, improve regulatory efficiency, and ensure opportunities for federal agency participation in mitigation banks), only one goal is focused on natural resource protection. These commenters also stated that regulatory efficiency should not be pursued at the expense of wetland protection.

A primary objective of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. Through its permit program, the Corps helps protect the aquatic environment by requiring project proponents to avoid and minimize regulated impacts to wetlands and other waters of the United States to the extent practicable. This rule was specifically promulgated to address compensatory mitigation. For activities that require a section 404 permit, avoidance and minimization are addressed through application of Subparts A through H of the 404(b)(1) Guidelines at 40 CFR part 230. Prior to issuing a permit, the Corps must evaluate the proposed work and its impacts on the aquatic environment and other public interest review factors, and determine whether the proposed work is in the public interest. Compensatory mitigation may be required to ensure that the proposed work is not contrary to the public interest and, if the activity involves discharges of dredged or fill material into waters of the United States, is in compliance with the 404(b)(1) Guidelines. The rule does not change or weaken existing regulatory requirements to avoid and minimize impacts to wetlands.

In fiscal year 2005, the Corps authorized 20,754 acres of wetland impacts, and required 56,693 acres of compensatory mitigation through wetland restoration, establishment, enhancement, and preservation to offset those unavoidable impacts. From fiscal years 2001 to 2005, the mean annual wetland impacts authorized were 23,000 acres, and the mean annual wetlands

compensatory mitigation required was 50,000 acres.

This rule incorporates many of the recommendations of the 2001 NRC Report, as well as appropriate recommendations from other evaluations of wetland compensation, to provide measures to help improve the success of wetland compensatory mitigation projects. By improving the success of these projects, the Corps Regulatory Program will help support the Administration's goal of increasing wetland acreage and quality. We believe that the rule will both improve the quality and success of compensatory mitigation and increase predictability and efficiency in the regulatory program.

Three commenters recommended adding a provision to the rule from the 1990 Mitigation Memorandum of Agreement (MOA) between the Army and EPA stating that no overall net loss of wetlands may not be achieved for each and every permit action, but the Corps would achieve this goal programmatically. One commenter noted that the "no net loss" goal for wetlands is required by statute for the Corps Civil Works Program (see 33 U.S.C. 2317(a)(1)).

That specific provision of the 1990 Mitigation MOA has not been superseded by this final rule. It is important to understand that the 1990 Mitigation MOA applies only to standard permits. It is not practicable or appropriate to require compensatory mitigation for every standard permit, or for every general permit authorization. The requirements of 33 U.S.C. 2317(a)(1) are more accurately presented as achieving an interim goal of "no overall net loss" of the nation's remaining wetlands base as measured by acreage and function, with a long-term goal of increasing the quality and quantity of the nation's wetlands. That provision of the United States Code applies to water resource development projects undertaken through Corps Civil Works program, not to activities authorized by DA permits.

Two commenters stated that developers should not be able to provide wetlands compensatory mitigation through mitigation banks or in-lieu fee programs. One commenter said that wetland buffers reduce adverse impacts of human disturbance on wetland habitats. Two commenters recommended emphasizing voluntary economic incentives and balancing economic needs with those of wetlands protection.

Under this rule, developers will be able to provide compensatory mitigation through mitigation banks, in-lieu fee

programs, or permittee-responsible mitigation. In many cases, the environmentally preferable compensatory mitigation will be provided through mitigation banks or in-lieu fee programs because they typically involve consolidating compensatory mitigation projects and resources, and providing financial planning and scientific expertise. For a particular activity requiring a DA permit, the Corps may consider any appropriate form of compensatory mitigation, as long as it complies with these regulations. We agree that wetland buffers often help ensure the long term viability of wetlands, and the rule promotes the use of such buffers. There are some federal programs that provide economic incentives to protect wetlands, but those programs have limited availability. Section 404 of the Clean Water Act is not structured to provide voluntary economic incentives for avoiding regulated activities in wetlands. Instead, it relies on a regulatory approach to wetland protection.

Aquatic Resource Functions, Services, and Values

A number of commenters discussed the concepts of “functions,” “services,” and “values” that were in the proposed rule. Two commenters suggested removing “values” and “services” from the rule. One commenter said there is disagreement on the definitions of these terms, and the rule should instead require a minimum one-to-one acreage ratio. One commenter said that functional capacity appears to represent natural wetland potential better than society-driven values and services and should be emphasized more. Another commenter said that the rule should explicitly require replacement of lost “values,” because a shift from a broad concept of “function and value” to a narrow concept of function alone ignores social services and values that are important to the public interest, such as protection from natural hazards. One commenter said that the phrase “non-use values such as biodiversity” will subject the regulatory agency and the regulated community to uncertainty and litigation as opponents who object to a project challenge the details of an impact. One commenter suggested that functions, values, and services found in a given wetland can best be measured after the wetland conditions are established using biological indices, and that a framework or methodology is needed.

The terms “functions,” “services,” and “values” have been used in various documents to describe the attributes of

aquatic resources that are being replaced through compensatory mitigation. We included definitions for all three terms in the proposed rule. After considering the comments received in response to these concepts, we have eliminated the term “values” from the final rule because the term “services” is currently being used in the ecological literature to relate to the human benefits that are provided by an ecosystem. The concept of ecosystem services provides a more objective measure than “values” of the importance of the functions performed by the ecosystem to human populations. Ecosystem services is a useful concept for assessing the public interest, an important consideration in the Corps Regulatory Program. Consideration of “services” provided by aquatic resources is usually qualitative, and can be accomplished through evaluations of compensatory mitigation options, including siting those projects near human populations.

Using the concept of “services” also allows us to focus on how the general population benefits from ecological functions, instead of whether potentially affected parties may or may not “value” a particular aquatic resource and the functions it provides. The term “values” is more subjective, since a particular ecosystem service may be perceived to be valuable by some individuals but not others. The term “values” can also be read to imply monetary valuation, which is difficult for most aquatic resource functions and is not generally practical for most decisions. Therefore, we believe the regulatory program is appropriately focused on protecting “functions” (the physical, chemical and biological processes that occur in aquatic resources) and “services” (the benefits to humans that result from these functions). Accordingly, we have eliminated the term “values” from the rule, including the reference to “non-use values such as biodiversity.” However, biodiversity is a potential service that some resources may provide.

The agencies have a long-standing policy of achieving no overall net loss for wetland acreage and function. Simply requiring one-to-one acreage replacement may not adequately compensate for the aquatic resource functions and services lost. Presently, there are methods that can be used by district engineers to assess aquatic resource functions or condition, such as hydrogeomorphic assessment methods and indices of biological integrity. There are efforts being undertaken to develop methods to assess ecosystem services, such as those that use indices of

wetland function to reflect the services provided by wetlands.

A number of commenters expressed concern that offsite mitigation can lead to transfer of wetland ecosystem services from urban to rural areas. However, one commenter said that the rule should not be written for the purpose of preventing urban wetland values from migrating to rural areas because local jurisdictions have other means for preventing this (e.g., zoning ordinances, eminent domain). Another commenter stated that because of a shortage of suitable sites in populated areas, it may not be possible to establish ecologically viable mitigation banks in certain heavily urbanized areas. This commenter said that mitigation banks in urban areas should be allowed to generate more credit per unit of restored resource to make these sites financially feasible.

We recognize that aquatic resources in urban settings can provide important functions and services, and we believe it is important that urban areas not become devoid of aquatic resources simply because it is more difficult to successfully restore or establish aquatic habitat in developed areas, or to obtain suitable compensatory mitigation project sites. However, in certain situations self-sustaining and ecologically successful aquatic resource restoration or establishment projects may not be feasible in urban areas because of changes in land use and the resulting impacts to local surface hydrology and groundwater. In these types of situations, the rule allows compensatory mitigation for impacts to urban wetlands to be conducted in rural areas if the applicable requirements of the rule and the Section 404(b)(1) Guidelines are met. Under the watershed approach adopted in the final rule, district engineers may require compensatory mitigation at more than one site. For example, compensatory mitigation may be required on-site to offset losses of water quality and flood storage functions, while off-site compensation may be required to offset losses of habitat functions. The siting of mitigation banks is dependent upon potential mitigation bank sponsors securing land suitable for compensatory mitigation projects. Such land may not be available in urban areas at a price, and a rate of return on that investment, that is acceptable to the sponsor. Credit valuation must be based on the ecological functions and services provided by the compensatory mitigation project, not the difficulty or cost of siting and constructing it. However, where appropriate, district engineers may consider the relative

ecological value of scarce aquatic resources in urban areas (at both the impact and mitigation sites) in determining appropriate compensation ratios. While preservation may be the most appropriate form of compensatory mitigation in urban areas in some cases, we encourage district engineers to look for opportunities to restore or establish aquatic resources in appropriate areas.

Mitigation Effectiveness

Many commenters stated that compensatory mitigation projects do not effectively replace natural wetlands, because created wetlands do not support the variety of native biota found in natural ecosystems, and there is no guarantee that they will function as natural wetlands. A large number of commenters also said that the rule fails to address the fact that many aquatic systems cannot be created. The commenters stated that there is no scientific data showing that the functions of headwater streams, and wetlands such as bogs and fens, can be reproduced, and the proposed rule would weaken protections for these waters by sanctioning uncertain mitigation practices. Several commenters stated that the rule does not include major improvements suggested by the scientific community to improve wetlands compensatory mitigation.

We have carefully considered reviews and criticisms of compensatory mitigation projects, especially the 2001 NRC Report, during the development of this rule. We recognize that there are compensatory mitigation projects that do not fully succeed in replacing the functions and services of aquatic resources that are lost or altered as a result of permitted activities. In an effort to improve compensatory mitigation practices in the Corps Regulatory Program, we have incorporated recommendations made in the 2001 NRC Report and other reports. We believe that this final rule accomplishes that objective and will help increase the success and quality of aquatic resource restoration, establishment, and enhancement activities by focusing on effective site selection at a landscape and watershed scale, requiring enforceable permit conditions (including ecological performance standards), requiring monitoring of compensatory mitigation, and undertaking adaptive management to help ensure success. We recognize that some types of aquatic resources are difficult to replace, such as bogs, fens, vernal pools, and streams. In response to these comments, we have added § 332.3(e)(3) [§ 230.93(e)(3)], which emphasizes avoidance and

minimization of impacts to difficult-to-replace resources, and if such avoidance and minimization is not practicable, requires that compensatory mitigation be provided through in-kind preservation, rehabilitation, or enhancement to the extent practical.

Mitigation Mechanisms

Several commenters said that the rule inappropriately treats permittee-responsible mitigation, mitigation banks, and in-lieu fee programs as though they are a single vehicle. Two commenters stated that in cases where a mitigation bank is successfully established, it should be preferred over permittee-responsible mitigation, but with the caveat that movement of aquatic resources from urban areas to rural areas should be monitored and possibly prevented. One commenter recommended that consolidated mitigation be allowed for linear facilities such as transmission lines. One commenter suggested the following clarification be included in the preamble to the final rule: "This rule is not intended to inhibit market-based opportunities for trading environmental credits beyond those required for compensatory wetland mitigation." According to that commenter, this would allow private landowners to sell credits for environmental services gained beyond those required for compensatory mitigation for DA permits.

This rule establishes, to the extent practicable, equivalent standards for all types of mitigation, as required by section 314. The administrative and procedural requirements in the final rule vary, because there are fundamental differences among mitigation banks, in-lieu fee programs, and permittee-responsible mitigation. It is not possible to impose exactly the same requirements on these three sources of compensatory mitigation, and fulfill the other requirement of section 314, which is to "maximize available credits and opportunities for mitigation." To maximize available credits, it is necessary to recognize the differences among the three sources, and impose equivalent standards and requirements to the extent practicable. Where it is not practicable to impose identical requirements, the rule adopts comparable alternative requirements to help ensure the ecological success of all types of compensatory mitigation. It is also important to emphasize that the rule applies equivalent *ecological* standards to all three types of compensatory mitigation; the differences are in procedures and timing of requirements. Site selection for third-

party mitigation should focus on the ecological benefits that the mitigation banks or in-lieu fee projects will provide to the watershed. This may or may not result in migration of aquatic resources from urban to rural areas within that watershed.

For linear projects, such as roads and utility lines, district engineers may determine that consolidated compensatory mitigation projects provide appropriate compensation for the authorized impacts, and are environmentally preferable to requiring numerous small permittee-responsible compensatory mitigation projects along the linear project corridor. We do not believe it is necessary to explicitly state that this rule is not intended to inhibit market-based environmental credit trading, as the rule only applies to compensatory mitigation required for DA permits. The ability of private landowners to sell credits for environmental services gained beyond those required for compensatory mitigation for DA permits is more appropriately addressed through other applicable programs.

General Comments on Mitigation Banking

Many general comments were received regarding mitigation banking. Some commenters encouraged broader use of banks, many others criticized a perceived preference for mitigation banks in the proposed rule. Several commenters recommended providing greater incentives for Corps districts to process commercial mitigation bank requests. One commenter suggested that this rule include incentives to private landholders to participate in wetland mitigation banking. Many commenters said the rule inappropriately promoted the economic needs of the mitigation banking industry over the needs of watersheds, and that the preference for mitigation banks over other forms of compensatory mitigation is not justified.

We recognize that mitigation banking is an important tool for compensatory mitigation. In this final rule, we have established a preference for mitigation bank credits, since mitigation banks must have an approved mitigation plan and other assurances in place before credits can be provided to permittees (see § 332.3(b)(2) [§ 230.93(b)(2)]). Because of the requirements imposed on mitigation banks, they generally involve less risk and uncertainty than in-lieu fee programs and permittee-responsible mitigation. This preference is based on administrative criteria, not ecological criteria. To the best of our knowledge, there have been few studies by independent parties of the ecological

performance of mitigation banks. The studies that we have reviewed have shown that mitigation banks have experienced many of the same problems as permittee-responsible mitigation (see the environmental assessment completed for this rule for summaries of those studies). The ecological success of mitigation banks, in-lieu fee programs, and permittee-responsible mitigation is dependent on many of the same factors, such as selecting appropriate sites and establishing the proper hydrology. We are not aware of any independent studies on the ecological performance of in-lieu fee projects. As discussed below, in response to comments received as a result of the proposed rule, we are retaining in-lieu fee programs as another form of third-party mitigation, with robust requirements to help ensure that they provide effective compensatory mitigation.

The timelines in this rule for processing proposed mitigation banks and in-lieu fee programs will promote timely decisions on instruments for these third-party mitigation activities. Participation in mitigation banks is not limited to entrepreneurs; private landowners can also submit proposed mitigation banks for consideration. We recognize that mitigation banks are not currently available in many areas of the country, or will be able to provide in-kind compensation for some types of aquatic resources. Therefore, to support a watershed approach for compensatory mitigation, we are retaining in-lieu fee programs as a separate form of third-party mitigation in this final rule, because in-lieu fee programs can provide ecologically beneficial compensatory mitigation in areas not served by mitigation banks. The preference for mitigation banks can be overridden by district engineers on a case-by-case basis if, for example, an approved in-lieu fee program has released credits available, or the permittee is proposing a compensatory mitigation project that will restore an outstanding resource.

Several commenters said that references to economic factors should be removed from consideration of the mitigation service area and there should be a greater consideration of the watershed approach, in order to be more consistent with other forms of compensatory mitigation. Several commenters stated that overdependence on mitigation banks will promote less successful compensatory mitigation projects. They cited a recent study in Ohio that showed that mitigation banks have not provided successful mitigation for permitted impacts. Several other commenters noted that there are too

many areas in the country that are underserved by mitigation banks. One commenter recommended non-profit management of mitigation banking, because non-profit entities can do more work for the actual cost and their ultimate goal is stream restoration, not maximizing the amount of profit.

Mitigation banks and in-lieu fee programs must be sited in such a way as to effectively replace lost aquatic resource functions and services and address key watershed needs within their service areas. However, consideration of economic factors is also important in determining the service area, to make it possible for third-party mitigation sponsors to develop and implement these projects. If service areas are too small to support economically viable mitigation banks or in-lieu fee programs, then we would have to rely on permittee-responsible mitigation. As discussed in the environmental assessment for this rule, permittee-responsible mitigation is generally less likely to be a successful source of compensatory mitigation. However, to ensure the benefits of third-party mitigation, economic factors should not supersede ecological considerations in the final service area determination. The benefits of mitigation banks and in-lieu fee programs are discussed in § 332.3(a)(1) [§ 230.93(a)(1)].

The agencies agree that there are certain advantages to non-profit and governmental agencies as third-party mitigation sponsors. They do not need to earn a profit, and are more likely to act in the public interest. However, commercial banks also have certain advantages. They have a strong financial incentive to provide effective, timely mitigation that may be lacking for non-commercial entities. Under today's final rule, mitigation bank sponsors may be either commercial, non-profit, or governmental entities, while in-lieu fee program sponsorship is limited to governmental and non-profit entities.

Some commenters supported the mitigation banking rules, while others disagreed with the proposal to eliminate in-lieu fee programs. Several commenters said that the cost of bank credits should be established in the context of the marketplace. One commenter stated that over-promoting mitigation banks could lead to a monopolistic pricing structure. Numerous commenters asserted that the process of establishing a mitigation bank should be streamlined. Some commenters supported the termination of wetland mitigation banks that do not comply with the Clean Water Act.

In this final rule, we have established criteria and standards for both mitigation banks and in-lieu fee programs, to maximize the available credits for use in the Corps regulatory program, as well as the Corps Civil Works Program and military construction activities. Credit costs for mitigation banks will be determined by their sponsors. The rule does attempt to streamline the process for establishing both mitigation banks and in-lieu fee programs, while recognizing the need for thorough and effective IRT and public review before credit sales can begin. To accomplish these goals, the final rule establishes reasonable deadlines for each step in the review and approval process. To continue operating, approved mitigation banks and in-lieu fee programs must comply with the terms of their instruments and these regulations, and district engineers will take appropriate actions if credits are not produced in accordance with approved credit release schedules. This ensures compliance with the Clean Water Act.

Regional Issues

A number of commenters expressed concern about how the rule will be implemented at the district or regional level, or with regard to specific issues such as coal mining and port facilities. One commenter welcomed the improved consistency in Corps implementation of a federal mitigation regulation with similar standards, timelines, and laws across states, for administrative reasons rather than biological/ecological differences. One commenter expressed concern that Corps districts will develop stricter requirements than those in the rule and another commenter stated that the rule places too much authority with the district engineer and not enough with state and local officials who are more familiar with local needs. Other commenters stated that the rule could conflict with state or local programs, and if the state enacts stricter standards for mitigation, the Corps must adopt those standards into DA permits. Many commenters noted that mitigation banking is being given preference over other types of mitigation despite state agency efforts to develop rules to encourage site-specific in-kind mitigation. In this way, the proposed rule fails to account for existing state and local regulations. Numerous commenters stated that coordination between state, local, and federal administrators is necessary or the rule may undermine functioning state and local mitigation plans.

The rule provides district engineers the flexibility to address permit-specific situations, while ensuring clear and consistent national standards and requirements. While we expect district engineers to work closely with their state and local partners, particularly on Interagency Review Teams, it is essential that this rule is consistent with Congressional intent as provided by section 314. This rule must also be consistent with the other Corps regulations at 33 CFR parts 320 through 331, which govern the implementation of the Corps Regulatory Program. Of course, it would be desirable to have consistent compensatory mitigation requirements across the various levels of government that have regulatory authority over a particular project, but there are usually differences because of variability among agency authorities, missions, and objectives. State and local governments may impose different requirements to address local or regional needs or concerns. Compensatory mitigation decisions made by district engineers must address federal concerns and authority, and must focus on compliance with the Clean Water Act and other federal requirements. There are likely to be cases where the compensatory mitigation requirements imposed by the Corps are different from those imposed by state or local governments, but in most cases they are likely to be similar. All section 404 permits require section 401 water quality certification by states and tribes. Where states feel that federal requirements are not stringent enough, they may impose more protective requirements in accordance with their water quality standards.

In this final rule, preference is given to mitigation banks, if the authorized impacts occur in the service area of a mitigation bank that has the appropriate number and resource type of credits available. If permittee-responsible mitigation is required by a state or local government with regulatory authorities that are similar to the Corps under section 404 of the Clean Water Act or sections 9 or 10 of the Rivers and Harbors Act of 1899, and the mitigation project will appropriately offset the permitted impacts, then the district engineer may determine that the permittee-responsible mitigation is acceptable for the purposes of the DA permit. We encourage coordination among federal, state, and local governments to avoid duplicate or conflicting compensatory mitigation requirements, as long as those requirements are consistent with federal requirements.

Several commenters cited various successful state programs and said that these programs should not be subject to the additional administrative burden of IRT review and approval of each separate mitigation project, and that their success could be disrupted by application of the rule. A number of commenters discussed the unique regulatory scheme that applies to mining, stated that the rule does not recognize the temporary nature of coal mining impacts on streams, and that the agencies must reconsider application of some of the proposed requirements, particularly those addressing monitoring and long-term assurances, in the context of the mining industry's regulatory environment.

District engineers will continue to work with successful state programs to streamline the review process to the maximum extent possible under these regulations. Third-party mitigation projects will be reviewed by district engineers and other interested members of the IRT. That interagency review is often helpful in providing different areas of expertise to evaluate the potential that each compensatory mitigation project has for successfully offsetting functions lost as a result of impacts authorized by DA permits. Established relationships between state programs and their federal counterparts will not be disrupted by this rule. Corps oversight is necessary to ensure the continued success of these programs. To help take advantage of established relationships, we have added a provision to the final rule that allows the district engineer and any member of the IRT to enter into a memorandum of agreement to perform some or all review functions (see § 332.8(b)(5) [§ 230.98(b)(5)]). However, the district engineer cannot delegate his or her authority for final approval of instruments or other documents.

As for mining activities, this rule does not change how the Corps will evaluate permit applications or assess the need for compensatory mitigation for those activities. What constitutes a temporary impact, and the need for compensatory mitigation, is determined on a case-by-case basis, depending on the specific circumstances of the project. The district engineer will determine the appropriate time interval for distinguishing between temporary and permanent impacts. Monitoring of compensatory mitigation sites is required and monitoring reports must be submitted to the district engineer in accordance with the special conditions of the DA permit or the terms of the mitigation banking or in-lieu fee program instrument. However, the

content and level of detail of monitoring reports is commensurate with the scale, scope, and type of the compensatory mitigation project. Requirements relating to financial assurances and long-term management are determined on a case-by-case basis, depending on the specific circumstances of the project.

Need for Clarification

Several commenters stated that the proposed rule does not specifically state whether it applies to general permits. Most of these commenters argued that the rule should apply solely to individual permits, and that nationwide and regional general permits should continue to be governed by 33 CFR part 330, because the requirements of the proposed rule conflict with the more flexible standards that apply to the nationwide permits and will greatly limit their utility. Two commenters stated that the proposed rule should also apply to general permits. One commenter said that the rule should include provisions that would eliminate all general permits that do not comply with the Clean Water Act.

The rule applies to compensatory mitigation required by all DA permits, including individual and general permits. We have made changes to this rule to clarify those provisions that are applied differently to individual permits and general permits. With these modifications, this rule does not conflict with the regulations at 33 CFR part 330, or the NWP general condition governing mitigation (i.e., general condition 20 of the 2007 nationwide permits, as published in the March 12, 2007, issue of the **Federal Register** (72 FR 11193)). District engineers will determine specific compensatory mitigation requirements for each permitted activity based on case-specific considerations, including whether the activity is being authorized under a general or individual permit. This rule does not alter the circumstances under which the district engineers require compensatory mitigation or the threshold for determining when compensatory mitigation is required for a particular activity. The compliance of general permits with section 404(e) of the Clean Water Act is addressed through application of the Corps regulations governing the issuance of general permits, as well as the criteria in the 404(b)(1) Guidelines for issuing general permits (40 CFR 230.7) and concerns about those permits that do not relate to compensatory mitigation are outside the scope of this rule.

One commenter recommended that the rule specify when the term "project"

refers to an authorized or permitted activity. One commenter recommended that the agencies reconsider use of the term “ecological.” Many readers may view this only in terms of species habitat, while in some cases other functions, such as flood control or water quality improvement, may be as or more important than habitat.

To provide clarity in the final rule, we have used the term “project” to refer to compensatory mitigation projects, and used the terms “permitted impacts” and “authorized impacts” when referring to the activities that adversely affect waters of the United States and may require compensatory mitigation. The term “ecological,” as used in this rule, is intended to be interpreted broadly as dealing with interrelationships of organisms (including humans) and their environment. The term “ecological” can refer to other features and functions of aquatic systems besides species habitat. For example, ecological functions provided by aquatic resources also include biogeochemical functions, which can help improve water quality. The agencies agree that water quality and flood control are important ecological services that should be compensated for when adversely impacted by permitted activities.

One commenter stated that the proposed rule has implications for USDA program participants who perform conservation or other activities in wetlands and for wetland activities conducted on National Forest System (NFS) lands. The USDA is exploring how it may facilitate its constituents’ involvement in wetland mitigation activities.

This rule specifies compensatory mitigation requirements for DA permits. Compensatory mitigation projects may be conducted on agricultural lands and NFS lands. District engineers will consider the number and type of compensatory mitigation credits that may be provided through aquatic resource restoration, establishment, enhancement, and/or preservation activities on these lands, over and above any environmental improvements that result from USDA programs (see § 332.3(j) [§ 230.93(j)]). Resources that are restored, established, enhanced or preserved to satisfy the requirements of other federal programs may not also be used for compensatory mitigation for DA permits, although district engineers may evaluate and approve on a case-by-case basis situations where a consolidated project is used to satisfy more than one set of requirements, provided the same resource is not “double counted.” For example, if 10 acres of wetlands were needed as

compensatory mitigation for a DA permit, and 10 acres were needed for some other federal program, a 20 acre project could be authorized to fulfill the requirements of both, but the same 10-acre project could not.

One commenter said that the agencies should use “District Commander” instead of “district engineer” when referring to the person that will implement this rule. The term “District Commander” refers to the person in charge of a particular Corps district. The term “district engineer” refers to the District Commander and any of his or her designees (i.e., persons who are authorized to take actions on his or her behalf). This rule uses the term “district engineer” because most day-to-day regulatory decisions are made by the District Commander’s designees.

One commenter stated that subsurface impacts are not addressed, including subsurface extraction (mining) of oil, gas, ground water, and the aquifer matrix (e.g., rock, sand, shell). The commenter cited an example where a Corps permit involved the removal of thousands of acres (surface area) of aquifer matrix (in that case, limestone), resulting in greatly increased groundwater flow occurring in the vicinity of these mine pits despite erroneous assumptions of low flow by the regulatory agencies.

It is not possible in this preamble to address the details of the particular case the commenter cites. To the extent that DA authorization is required for subsurface extraction activities, district engineers will determine the need for compensatory mitigation on a case-by-case basis.

Transition to the New Rule

Several commenters recommended that the agencies clarify that the new regulations apply only to applications submitted after the effective date of the rules. One commenter added that the rule should recognize that applicants in the permitting process have expended substantial resources needed to obtain permits under the current rules, and those resources have been committed in reliance on the current rules governing compensatory mitigation. Therefore, the new requirements should not be applied retroactively to permit applicants who have invested substantial effort in developing data and plans under the previous rules and guidance. One commenter requested a clear statement that the rule does not apply to existing compensatory mitigation projects under Corps permits.

This final rule will apply to permit applications received after the effective date of this rule, unless the district

engineer has made a written determination that applying these new rules to a particular project would result in a substantial hardship to a permit applicant. In such cases, the district engineer will consider whether the applicant can fully demonstrate that substantial resources have been expended or committed in reliance on previous guidance governing compensatory mitigation for DA permits. Final engineering design work, contractual commitments for construction, or purchase or long-term leasing of property will, in most cases, be considered a substantial commitment of resources. Permit applications received prior to the effective date will be processed in accordance with the previous compensatory mitigation guidance.

Need for Additional Guidance

Four commenters requested more detailed guidance on how and when riparian areas and upland buffers can be used as compensatory mitigation. Several commenters requested further guidance from agencies to implement the watershed approach consistently across the nation, on issues such as determination of watershed boundaries, information needed in watershed plans, and how to identify the needs of a particular watershed. Other commenters recommended that the agencies develop guidance on compensatory mitigation for open and navigable waters, performance standards, mitigation ratios, financial assurances, the implementation of adaptive management, and credit determination methods. Another commenter suggested that the agencies prepare regional reference manuals that provide guidance on how to best design compensatory projects appropriate to meet the needs of watershed units in that region.

Many of these questions, such as how to determine watershed scale and boundaries, must be answered by district engineers at a regional or local level, to address landscape variability and other factors. Other questions must be answered on a case-by-case basis, after considering the impacts and the compensatory mitigation that may be necessary to offset those impacts. However, we recognize the need to provide more information to the public and agency personnel, and we will continue to develop guidance, as necessary, outside of this rulemaking.

Economic Issues

Two commenters expressed concern over the increase in mitigation costs that will result from more stringent

performance standards and the delay of credit releases until performance is achieved. One commenter stated that the requirements of the rule will overly complicate the permitting process and ultimately impact the availability of affordable housing. If the costs of purchasing credits from a mitigation bank are too high, the district engineer should take that into account and allow other off-site or out-of-kind mitigation.

In some cases, the cost of performing compensatory mitigation may increase as a result of implementation of this rule. Since this rule is generally based on existing practice, with improvements to enhance performance and efficiency, we do not believe that it will cause a substantial increase in compliance costs. We believe that ecological performance standards and other aspects of this rule are necessary to improve the success of compensatory mitigation in the Corps Regulatory Program. District engineers will take costs into account when evaluating compensatory mitigation options, since practicability is one consideration when determining compensatory mitigation requirements for DA permits.

One commenter strongly objected to adding any provision in the final rule that would require the Corps to “determine what an adequate price might be” of compensatory mitigation credits as suggested in the discussion section of the proposed regulation.

The Corps will not determine the price of compensatory mitigation credits. The rule states that the cost of compensatory mitigation credits is determined by the sponsor of a mitigation bank or in-lieu fee program. However, the district engineer may evaluate fee schedules for in-lieu fee programs to determine whether those fees satisfy the criteria in § 332.8(n)(5)(ii) [§ 230.98(n)(5)(ii)], and are sufficient for providing the required compensatory mitigation.

Implementation Issues

A number of commenters stated that the requirements of the proposed rule will place an enormous burden on the Corps’ staff and resources and may further delay implementation of projects. Numerous commenters asserted that additional resources must be allocated to reviewing monitoring reports, conducting site visits, and taking enforcement action when permittees and mitigation banks do not perform their prescribed mitigation requirements. Other commenters stressed the need to educate potential sponsors on how to operate wetland mitigation banks. Commenters also stated that the rule would place a

disproportionate burden on permittees. However, another commenter stated that project proponents must consider mitigation requirements early in the project planning cycle to implement mitigation in advance of, or concurrent with, a project.

This rule will not place a large incremental burden on Corps staff and other resources because it builds on existing requirements and practices and promotes those that have been successful in the past. To develop this rule, we have considered the recommendations from the 2001 NRC Report and the 2001 and 2005 GAO reports, as well as other studies of compensatory mitigation projects, to establish regulations that will help ensure that compensatory mitigation successfully replaces functions that are lost as a result of permitted activities. Monitoring, site visits, and compliance activities are essential actions for ensuring compensatory mitigation success but they are not new. What is new is the greater clarity and consistency of requirements in these areas that the rule provides. The Corps already conducts compliance inspections on compensatory mitigation projects, including mitigation banks and in-lieu fee programs, as its resources allow and will continue to do so.

We believe that the rule will increase regulatory efficiency by providing clear, consistent requirements, improving the third-party mitigation review process, and encouraging compensatory mitigation planning to be performed in advance of permitted activities through the use of mitigation banks and in-lieu fee programs. We do not believe that this rule will place a substantial burden on permittees. As more credits are generated by third-party mitigation providers, burdens on permittees should be reduced. This rule does not change the circumstances under which compensatory mitigation is required. As in the past, the district engineer will require compensatory mitigation to the extent appropriate and practicable. This rule appropriately balances the need for consistency with the need for flexibility, including its requirements for permittee-responsible mitigation. District engineers will continue to determine on a case-by-case basis what is required to satisfy the requirements of the 404(b)(1) Guidelines and other aspects of the Corps Regulatory Program.

One commenter recommended that permit review staff go to each site before making a decision. Another commenter recommended that the agencies clearly define their roles ahead of time to reduce interagency conflicts, and that if

such conflicts should occur, the Corps should work to resolve them rather than the applicant.

Because of resource constraints, site visits cannot be conducted for each permit application. Districts must prioritize their site visits to determine which sites require on-site evaluations. The Corps is the decision-maker for activities that require DA authorization. The Corps fully considers agency views when making its decisions regarding whether to issue or deny permits. This rule further clarifies the roles and responsibilities of the Corps and other agencies, including the Interagency Review Team, in the review and approval of compensatory mitigation, and provides realistic deadlines for each step in the process. The rule also contains a dispute resolution procedure through which disagreements among Federal agencies regarding third-party mitigation proposals will be addressed expeditiously.

A number of commenters discussed enforcement and compliance with mitigation permit conditions and claimed that there are insufficient staffing levels for these activities. Several commenters recommended that the Corps and state agencies place a stronger emphasis on staffing in order to increase permit compliance and enforcement of mitigation requirements. Several commenters cited the 2005 GAO report’s finding that compliance with mitigation performance standards has been inadequate, which provides a disincentive for parties to comply with mitigation requirements. They stated that third-party mitigation instruments and/or permit conditions often do not adequately specify the mitigation activities to be performed, the standards to be achieved, and the time frames for performance. Several commenters requested clarification of the Corps’ compliance authorities related to mitigation requirements.

The agencies agree that vigorous enforcement and compliance activities are necessary for the success of the regulatory program, including compensatory mitigation. The Corps believes that it has adequate resources in these areas. In the Corps Regulatory Program’s performance measures required by the Administration’s Program Assessment Rating Tool (PART), enforcement and compliance metrics comprise six of the eight performance measures. These performance measures relate to compliance inspections on activities authorized by individual permits and general permits, field inspections of active mitigation sites, compliance inspections or audits on active

mitigation banks and in-lieu fee programs, resolution of non-compliance issues, and resolution of enforcement actions. The inclusion of so many metrics in the PART reflects the high priority placed on enforcement and compliance activities by the Corps regulatory program, which will help address the concerns raised in the two GAO reports. This rule will also address compliance and enforcement issues by more clearly specifying the required information for both permittee-responsible mitigation and third-party mitigation instruments plans. This rule also includes new requirements related to ecological performance standards, monitoring and credit release schedules.

We have clarified the language in the rule that addresses non-compliance with compensatory mitigation permit conditions or third-party mitigation instruments and plans. Permittees responsible for mitigation as a permit condition will be subject to the compliance and enforcement provisions at 33 CFR part 326. If the district engineer determines that a mitigation bank or in-lieu fee program is not meeting performance standards or complying with the terms of the instrument, appropriate actions will be taken, such as requiring adaptive management, decreasing available credits, suspending credit sales altogether, and/or directing that financial assurance resources (e.g., escrow monies) be used to perform remediation or alternative mitigation. As a last resort, if a sponsor does not comply with the terms of its instrument, the district engineer can take appropriate legal action to compel compliance.

Three commenters suggested emphasizing that compliance with new mitigation requirements fully meets requirements of section 404 of Clean Water Act, therefore, there is no need for supplemental mitigation to address the uncertainty of mitigation outcomes.

Although this rule provides standards and requirements for compensatory mitigation for DA permits, there are provisions that allow district engineers to require additional compensatory mitigation when necessary to address the risk and uncertainty associated with compensatory mitigation projects. For example, adaptive management may involve requiring additional compensation if the original compensatory mitigation project does not perform as well as expected. As another example, higher amounts of compensatory mitigation may be required if the aquatic resource restoration, establishment, enhancement, and/or preservation

activity is conducted after the permitted activity, to account for both temporal losses and the risk of failure associated with the prospective mitigation.

A few commenters expressed concern that if developers are responsible for developing watershed plans, and those plans are used by others to implement a watershed approach, this might create an incentive to develop a plan that meets future development expansion needs rather than watershed needs.

This rule does not require prospective permittees to develop watershed plans. District engineers will determine whether an existing watershed plan is appropriate for use in determining compensatory mitigation requirements (see § 332.3(c)(1) [§ 230.93(c)(1)]). In general, watershed plans will be developed by governmental and/or non-profit resource planners, in consultation with watershed stakeholders. The purpose of a watershed plan is to maintain and improve the quality and quantity of aquatic resources within a watershed, not to facilitate development. District engineers will ensure that watershed plans used to determine compensatory mitigation requirements for DA permits have been developed through appropriate processes to satisfy this purpose.

Transfer of Responsibility

In the proposal, we requested comments on the appropriate legal mechanism for transferring the responsibility for providing compensatory mitigation from the permittee to a mitigation bank or an in-lieu fee program. We proposed an option of using parallel permit conditions and instrument provisions, that would acknowledge the transfer of responsibility from the permittee to the sponsor. Another option we solicited comments on was co-permitting, where the sponsor would sign the DA permit and assume responsibility for providing compensatory mitigation credits.

Two commenters expressed support for co-permitting, but several other commenters said that co-permitting is not an appropriate mechanism for transferring responsibility. Some commenters said that a sponsor should only sign documents that deal exclusively with the credits, debits, and use of a mitigation bank for compensatory mitigation. Two commenters stated that transfer of responsibility from the permittee to a mitigation bank is an incentive for using mitigation banks. Several commenters supported the use of the suggested permit conditions and instrument provisions provided in the preamble to

the proposed rule, when credits are to be secured from a mitigation bank.

After evaluating these comments, we have determined that the most effective approach for transferring compensatory mitigation responsibilities from a permittee to a mitigation bank or in-lieu fee program sponsor is through the use of permit conditions and instrument provisions. The rules governing this transfer are provided at § 332.3(l) [§ 230.93(l)]. This process requires submittal of appropriate documentation after the permittee has secured the appropriate number and resource type of credits from the sponsor. These requirements are discussed in greater detail in the preamble discussion of § 332.3(l) [§ 230.93(l)].

Other Issues

A couple of commenters submitted questions about the Corps permit application, other publications, and record-keeping. Commenters requested better guidance on the information required for permit applications, such as sample drawings and checklists, and recommended electronic filing of permit applications.

Many Corps districts have posted information on their web sites to assist permit applicants. Such information includes tips on providing complete permit applications, as well as sample drawings and checklists. The Corps regulations at 33 CFR 325.1(d) discuss what is required for a complete application for an individual permit. Project proponents should also review the general conditions for the nationwide permits and regional general permits to determine what is necessary for a complete general permit verification request. The Corps is developing an electronic permit application, which will allow its districts to accept permit applications through the Internet. As discussed above, the Corps is implementing a new automated information system to better track impacts authorized by authorized activities, and any required compensatory mitigation.

One commenter said that poor record-keeping has made it difficult to evaluate the successes and failures of individual projects and the regional and national impacts of the program. Commenters also asked that the public have easy access to all relevant planning documents during the public comment period on permits. One commenter recommended creating a clearinghouse for wetlands funding or information needs with a single person to track follow-up and successes. This could provide information to support a watershed approach in specific areas

and possibly to support in-lieu fee programs. One commenter said the rule should not apply to ephemeral washes.

Archiving of monitoring reports for compensatory mitigation projects is done in accordance with district-specific practices and resources. Monitoring reports are part of the administrative record for a permit action or third-party mitigation instrument, and are public information. However, a Corps district may charge reasonable fees for duplication to provide those reports to interested parties. It is impractical to make all planning documents available during public notice comment periods. Typically, not all of this information is provided to the Corps prior to the public comment period. However, the rule requires that public notice for DA permits include a discussion of mitigation plans, including any compensatory mitigation. Public comment can then help inform the development of detailed planning documents. The Corps does not intend at this time to create a clearinghouse for wetlands funding and wetlands-related information; however, the Corps will provide information to the public on mitigation required and fulfilled under the section 404 program. This rule only applies to compensatory mitigation for activities in waters of the United States authorized by DA permits. It does not alter the definition of "waters of the United States" at 33 CFR part 328 or 40 CFR 230.2(s). Discharges of dredged or fill material into features that are not waters of the United States do not require permits under section 404 of the Clean Water Act, and therefore would not require compensatory mitigation that would be subject to this rule. In cases where ephemeral washes are determined to be waters of the U.S., this rule applies; there are no technical reasons for addressing them differently from other waters of the U.S.

Several commenters highlighted general concerns regarding climate change. Some of these commenters cited important ecosystem services provided by wetlands, streams and other aquatic resources such as absorbing storm surges, providing drinking water, and sequestering carbon and noted that these ecosystem services will be of increasing importance as climate patterns shift. A few commenters wanted to know how concerns about climate change were considered in the development of today's rule.

We agree that protecting our Nation's existing aquatic resource base is an important way to help foster ecological and economic resilience as climatic patterns shift. Today's rule reaffirms the existing requirement to avoid and

minimize impacts to the nation's aquatic resources and to require, in cases where it is appropriate and practicable to do so, compensatory mitigation for impacts that cannot be avoided or minimized. Compensatory mitigation projects planned and designed using the watershed approach and the standards provided by today's rule are likely to provide ecosystem functions and services that, in addition to offsetting losses resulting from activities authorized by DA permits, also provide the ecological and economic resilience needed to address climate change. For example, the reestablishment of a forested wetland may also provide carbon sequestration benefits, over the long term, through the growth of trees. As another example, coastal wetland restoration projects could be designed to take into account reasonably foreseeable rises in sea level.

III. In-Lieu Fee Programs

In the proposed rule we proposed to phase out in-lieu fee programs and require existing in-lieu fee programs to comply with the same standards and requirements as mitigation banks. In the preamble to the proposed rule, we also explained the differences between mitigation banks and in-lieu fee programs, and the agencies expressed concern that providing less stringent oversight or up-front requirements for in-lieu fee programs might not ensure that the compensatory mitigation is performed. Another concern was compliance with section 314 of NDAA, which directs us to apply equivalent standards and criteria to each type of compensatory mitigation to the maximum extent practicable. At the time, the agencies could not find strong grounds for concluding that meeting the same requirements as mitigation banks is not appropriate or practicable for in-lieu fee programs. The agencies also acknowledged that phasing out in-lieu fee programs would pose some challenges for the ability of the Corps Regulatory Program to support the objectives of the Clean Water Act and ensure high-quality mitigation in all parts of the country.

In response to the proposed rule, many commenters, including 29 states, as well as industry groups and environmental organizations, supported retaining in-lieu fee programs as a separate mechanism for providing compensatory mitigation for DA permits. These commenters said that an alternative form of third-party mitigation is needed in areas not serviced by mitigation banks. Many of these commenters also stated that the desired performance of in-lieu fee

programs can be achieved by imposing appropriate rules and standards, with Corps oversight. Some commenters indicated that the proposal to phase out in-lieu fee programs is contrary to section 314, because it wouldn't comply with the statutory requirement for the rule to "maximize available credits." Over 30 commenters described successful in-lieu fee programs.

After carefully considering all comments, for and against, we have decided to retain in-lieu fee programs as a distinct third-party compensation option, subject to equivalent ecological standards as the other types of compensatory mitigation (mitigation banks and permittee-responsible mitigation) but somewhat different administrative and procedural requirements. We agree that in-lieu fee programs are important sources of compensatory mitigation in areas that do not have mitigation banks, because they can provide consolidated compensatory mitigation projects that have greater ecological benefits than small, geographically separated, permittee-responsible mitigation. We also agree that in-lieu fee programs can provide important ecological and societal benefits by focusing primarily on the watershed needs and by siting multiple compensatory mitigation projects in strategic locations in a watershed. We believe that this final rule achieves the statutory mandate of section 314 in that it establishes, to the maximum extent practicable, equivalent standards for all three types of compensatory mitigation.

Commenters suggested various approaches to in-lieu fee programs. One commenter suggested that the agencies delay the effective date of the final rule until more conclusive data are available to support the decision of whether to retain or eliminate in-lieu fee programs. One commenter recommended forming a technical working group to evaluate the effectiveness of in-lieu fee programs and their role in compensatory mitigation. Another commenter recommended comparing poorly performing in-lieu fee programs to more successful programs, to evaluate the differences in organization, oversight, mitigation approach and quality of mitigation, and to develop appropriate standards and requirements. Many commenters proposed rule language to provide accountability and ensure ecological success for in-lieu fee programs.

We do not believe it is necessary to delay issuing a final rule until further studies can be done on in-lieu fee programs. We structured the proposed rule to solicit comment on appropriate

standards and criteria that could be established to ensure that in-lieu fee programs provide successful compensatory mitigation in a timely manner. Many of the requirements that apply to mitigation banks are applied to in-lieu fee programs, although some requirements will not be exactly the same, because of the fundamental differences between mitigation banks and in-lieu fee programs. Where it is necessary to promulgate different requirements for in-lieu fee programs, we believe those requirements will ensure the same level of success for in-lieu fee programs as for the other types of mitigation, and produce mitigation that meets the same high ecological standards. We have examined several successful in-lieu fee programs to establish effective standards and requirements.

In the preamble to the proposed rule, we posed a set of questions on the proposed phase-out of in-lieu fee programs, and solicited public comment on retaining in-lieu fee programs as a distinct regulatory entity. We asked for public comment on 7 specific areas in which requirements for in-lieu fee programs might differ from mitigation banks if they were retained: (1) The degree of up-front planning required before credits could be sold (e.g., in-lieu fee programs might not be required to identify and secure a site and provide detailed site plans for the compensatory mitigation project); (2) the level and types of financial assurances that would be required; (3) the types of projects for which they could be used (e.g., in-lieu fee programs might be limited to providing compensatory mitigation only for nationwide permits and other general permits, or for projects below a specified acreage cutoff, such as 1 acre); (4) the required compensation ratios (e.g., these could be higher for in-lieu fee programs than for mitigation banks); (5) the credit release schedule (e.g., in-lieu fee programs might be permitted to sell more credits at an earlier point in the planning process); (6) the specific types of aquatic resources for which they could be used to compensate (e.g., not allowing in-lieu fee programs for tidal wetlands or in coastal areas); and (7) the types of permitted sponsoring entities (i.e., in-lieu fee programs might be limited to government agencies and/or non-profit land stewardship entities with proven track records). Comments received in response to these questions are provided below. We also solicited comments on other ways in which the requirements for mitigation banks and in-lieu fee programs might differ.

Degree of up-front planning required before credits can be sold. Several

commenters stated that in-lieu fee programs should be subject to the same amount of up-front planning as mitigation banks. Other commenters suggested that instead of identifying a specific site (which is required for proposed mitigation banks, except for umbrella banks), in-lieu fee programs should identify specific types of sites (e.g., impounded salt marshes) that their program would target. Another commenter suggested that in-lieu fee programs should submit a full mitigation plan to the district engineer for approval before the start of each project. Commenters representing in-lieu fee programs said that it would be challenging in some cases to identify sites and provide detailed plans before selling credits, and that such a requirement might make it impossible for them to operate.

In recognition of these challenges, the final rule does not require the same level of up-front planning by in-lieu fee programs as it does for banks before credit sales can occur. However, it does require that a comprehensive program instrument be submitted to the Corps, reviewed by the IRT, and approved by the district engineer before any credit sales take place. Several new requirements have been added to the provisions for in-lieu fee program instruments, designed to ensure greater accountability and success in providing mitigation to fulfill credit sales in a timely manner. First, we have added a requirement in the rule for in-lieu programs fees to develop a compensation planning framework that will be used to select, secure, and implement aquatic resource restoration, establishment, enhancement, and/or preservation activities within the service area(s) for the in-lieu fee program. Specific sites may or may not be identified, but selection of the sites must be consistent with the compensation planning framework. The comprehensive planning framework is essentially a watershed plan for the service area of the in-lieu fee program. A mitigation plan that meets the requirements of § 332.4(c) [§ 230.94(c)] and is consistent with the comprehensive planning framework must subsequently be submitted and approved by the district engineer, in consultation with the IRT, for each in-lieu fee project site prior to commencing work. Second, the instrument will specify a limited number of advance credit sales that can occur before specific sites are secured and mitigation plans approved. Once that number of credits is sold, no more advance credits can be sold until an equivalent number

of credits, tied to a specific site and mitigation plan, has been released in accordance with an approved credit release schedule. Third, the instrument must provide for the establishment of an account that will segregate funds received from credit sales and ensure that these funds, including interest earned, are used only to provide the required mitigation, minus a small allowance for administrative costs.

Required level of financial assurances. A number of commenters stated that in-lieu fee programs should be required to provide the same level of financial assurances as mitigation banks. Two commenters asserted that these financial assurances would ensure a more successful completion of mitigation projects. Other commenters indicated that providing the same level of financial assurances as banks prior to beginning credit sales would be challenging for in-lieu fee programs, which usually do not have up-front investors, and might prevent them from operating. In addition, government agencies often face legal or procedural restrictions that prevent them from providing the same types of financial assurances that are generally required of banks.

The agencies believe that financial assurances are important to ensure successful initiation and completion of compensatory mitigation projects, but also recognize the challenges faced by in-lieu fee programs in this regard. Therefore, the rule states that the district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. There may be cases where financial assurances are not necessary because an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority). Consideration of the sponsor's past performance in providing ecologically successful mitigation projects would also influence the district engineer's determination regarding the level of financial assurances necessary to ensure a high level of confidence in successful project completion—this is true for banks as well as in-lieu fee programs.

Types of projects for which in-lieu fee program credits could be used. Several commenters stated that in-lieu fee programs should be limited to certain types of projects, such as those resulting in minor impacts. One commenter suggested limiting in-lieu fee programs

to activities that have less than 0.25 acre of impacts, and another commenter recommended restricting in-lieu fee programs to general permit activities resulting in less than one acre of impacts. Another commenter suggested that in-lieu fee programs should be available to provide compensation for impacts from linear transportation projects because those activities undergo environmental reviews and the compensatory mitigation is usually identified in advance of the proposed impacts. One commenter stated that in-lieu fee programs should not be restricted to a specific type or impact size. Two commenters said that in-lieu fee programs should only be used for activities authorized by general permit. A number of commenters stated that use of in-lieu fee programs should not be limited to a specific project size or permit type.

In most cases, in-lieu fee programs implement compensatory mitigation projects after the impacts authorized by DA permits have occurred. Therefore, the timing of compensatory mitigation projects provided by in-lieu fee programs results in some risk and uncertainty. To address that risk and uncertainty, and to reduce temporal losses of aquatic resource functions, we have established a preference hierarchy for mitigation options at § 332.3(b) [§ 230.93(b)]. This hierarchy, which is discussed in greater detail elsewhere in this preamble, generally provides a preference for mitigation bank credits, when the permitted activity is in the service area of an approved bank with the appropriate types of credits available. In the absence of an approved bank, in-lieu fee programs have certain advantages over permittee-responsible mitigation. They generally involve larger parcels, have access to appropriate scientific and technical expertise, may have a proven track record in establishing successful mitigation in the past, and will generally have a more fully developed watershed approach, developed through their required comprehensive planning framework. For these reasons, we do not believe it is appropriate to limit the use of lieu fee programs to any particular impact type or size. Rather, we believe the preference hierarchy described above will ensure that a mitigation option is selected with the highest probability of delivering successful, high-quality mitigation among the available choices in a given case.

Required compensation ratios. A number of commenters stated that in-lieu fee programs should be required to mitigate at a certain ratio that should take into account temporal loss of

wetland functions when compensatory mitigation is not fully functional at the time the permitted impacts occur. One commenter asserted that increasing the required mitigation ratios for in-lieu fee programs unfairly penalizes applicants in areas that do not have operating mitigation banks. Two commenters recommended higher mitigation ratios where in-lieu fee programs funds are used for preservation.

We have added § 332.3(f)(3) [§ 230.93(f)(3)] to allow district engineers to require additional compensatory mitigation in cases where released credits are not available to provide the appropriate type of compensatory mitigation. This additional compensatory mitigation is to account for the higher risk and uncertainty associated with compensatory mitigation projects that will be implemented after the permitted impacts have occurred. For all sources of compensatory mitigation, the amount of required compensation must be sufficient to replace lost aquatic resource functions. Other factors to be considered when determining the appropriate amount of compensatory mitigation to offset permitted impacts are: The method of compensatory mitigation (i.e., restoration, establishment, enhancement, preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site. The preference for released credits does not unfairly penalize permittees, since it is appropriate to require higher amounts of compensatory mitigation to account for risk and uncertainty. The rationale for the required compensation ratio must be documented in the administrative record for the permit action. In cases where preservation is used to provide compensatory mitigation, district engineers will generally require higher compensation ratios. While the rule does not explicitly differentiate between mitigation banks and in-lieu fee programs in the determination of ratios, the factors to be considered will generally result in higher ratios for in-lieu fee programs.

Credit release schedule. One commenter stated that fewer credits should be released to in-lieu fee programs than to mitigation banks. In contrast, other commenters said that in-lieu fee programs should have 100

percent of their credits released in advance, and/or that they should have no limit on advance credit sales.

We do not agree that in-lieu fee programs should be allowed unlimited credit sales prior to providing any mitigation; this would not provide adequate assurance that credits will be fulfilled in a timely manner. However, in recognition of the fundamental differences between mitigation banks and in-lieu fee programs, the final rule does allow an in-lieu fee program to sell a limited number of credits before securing a compensatory mitigation project site and conducting aquatic resource restoration, establishment, enhancement, and/or preservation at that site. Those credits are called “advance credits” and the sponsor can only sell such credits up to the limit specified in its approved instrument—under no circumstances may credits be sold prior to approval of an instrument meeting the requirements of § 332.8 [§ 230.98]. The number of advance credits will be determined by the district engineer, in consultation with the IRT, and will be specified in the instrument by service area. The amount of available advance credits will be based on an evaluation of the compensation planning framework, the size of the service area(s), the resources available to the program (e.g., an independent funding stream for government sponsored in-lieu fee programs) and other considerations identified by the district engineer during consultation with the IRT. If the in-lieu fee program instrument covers more than one service area, the advance credit limit will be specified for each service area. In addition, as each in-lieu fee project is approved by the district engineer (in consultation with the IRT), it will have an associated credit release schedule. As in-lieu fee projects are implemented and credits released, advance credits are converted to released credits and the sponsor can sell additional advance credits in that service area. In certain limited cases, such as when there is insufficient permitted activity in a given service area to support a viable mitigation project within a reasonable time frame, the district engineer may authorize the use of released credits from a different service area to fulfill advance credits sales. This might occur, for example, with a state-wide program managed by a government agency. In such cases, the district engineer should ensure that the approved mitigation compensates for the lost resources to the extent feasible, even though it may be some distance away, or in a different watershed.

Limiting the establishment and use of in-lieu fee programs to specific types of aquatic resources or geographic regions. Three commenters stated that in-lieu fee programs should be used only to provide compensatory mitigation for specific aquatic resource types. One commenter suggested that in-lieu fee programs should be retained solely for rapidly developing urban watersheds and coastal watersheds, and two commenters suggested that these programs be used specifically for stream compensatory mitigation. Two commenters said that use of in-lieu fee programs should not be restricted by resource type, but credits from in-lieu fee programs should be accepted only when those credits are different from the credits provided by a mitigation bank operating in the same service area.

In this final rule, we have not limited in-lieu fee programs to providing compensatory mitigation for specific types of aquatic resources or geographic regions, for much the same reasons that we have not limited them to specific project types or sizes. Instead, as discussed above, we have established a preference hierarchy in § 332.3(b) [§ 230.93(b)] that will ensure that mitigation options with the highest likelihood of success and greatest value to the watershed will be selected from the available choices. This flexibility is needed because there is great regional variation in aquatic resource types and watershed needs, and there is also much variability in the types of credits produced by both mitigation banks and in-lieu fee programs. We do not agree that in-lieu fee programs should be limited to certain types of aquatic resources, because in some cases they may provide the greatest assurance of delivering successful, high-quality mitigation for the resource in question, especially in areas where there are no mitigation banks.

Types of sponsoring entities. Several commenters suggested that only federal or state governmental entities or non-profit land stewardship organizations be allowed to be in-lieu fee program sponsors, because they have the capacity to provide permanent stewardship of compensatory mitigation project sites. However, one commenter stated that there is no evidence that government agencies or non-profit organizations provide compensatory mitigation that is superior to that provided by for-profit entities.

Through the definition of “in-lieu fee program” provided in § 332.2 [§ 230.92], we have limited sponsorship of in-lieu fee programs to governmental or non-profit natural resources management entities. In this rule, we have

established different requirements for mitigation banks and in-lieu fee programs that reflect basic differences in how those types of compensatory mitigation are provided and managed. In general, mitigation banks are established at single sites, to provide compensatory mitigation for pre-determined types of aquatic resource losses in a single or several neighboring watersheds. In contrast, in-lieu fee programs often provide compensatory mitigation at multiple sites within multiple service areas, and may serve areas where a mitigation bank is not economically viable because there is not sufficient development activity to ensure that enough credits can be sold within a reasonable time frame. For these reasons, in-lieu fee programs have fewer up-front planning requirements than mitigation banks, and are not expected to be operated as commercial ventures. The agencies thus believe it is appropriate to limit sponsorship of in-lieu fee programs to governmental or non-profit land management entities that operate explicitly in the public interest, rather than to serve the needs of investors. We are not aware of any independent studies that have examined the quality and ecological success of compensatory mitigation projects provided by for-profit entities versus governmental or non-profit entities, however we believe the rule provides appropriate safeguards and incentives to ensure that both types of entities (commercial and non-commercial) will provide successful compensatory mitigation given their differing organization, purposes, and constraints.

Preference for “in-place” compensatory mitigation. Five commenters stated that in-lieu fee programs should be retained but that the rule should contain a preference for in-place compensatory mitigation. One commenter indicated that in-lieu fee programs and in-place mitigation should have the same level of preference. One commenter said that adding such a provision would promote poor environmental stewardship because in-lieu fee programs would be excluded from areas where there are high credit demands. Another commenter said that a preference for in-place compensation would not be desirable if it led to approved mitigation banks having large service areas, because the compensatory mitigation could be a substantial distance from the location of the permitted impacts. This commenter stated that in-lieu fee programs should be retained in the final rule to provide ecologically appropriate

compensatory mitigation in areas with thin markets for mitigation bank credits.

In § 332.3(b) [§ 230.93(b)] we have established a preference hierarchy for compensatory mitigation options (i.e., mitigation banks, in-lieu fee programs, and permittee-responsible mitigation). We have established a preference for mitigation bank credits, because a secured site, an approved mitigation plan and other assurances must be in place before an initial allocation of credits can be sold or transferred to permittees. Before additional credits can be sold, the mitigation bank must achieve appropriate ecological milestones set out in its credit release schedule. Therefore, mitigation bank credits are generally more likely to be fulfilled sooner (or to be already fulfilled), than in-lieu fee program credits. We recognize, however, that this is not always the case. Some in-lieu fee programs may have the appropriate number and resource type of released credits available, and the final rule allows the district engineer to modify the hierarchy in cases where the reasons underlying it do not apply (e.g., an in-lieu fee program has available released credits that are just as certain and close to fulfillment as credits from a bank). When considering the options in § 332.3(b)(2)–(6) [§ 230.93(b)(2)–(6)], district engineers have the discretion to modify the hierarchy in order to approve the use of the environmentally preferable compensatory mitigation. Another example is when a permittee with a proven track record and access to appropriate scientific expertise proposes a high-value mitigation project, even though credits from an approved in-lieu fee program or mitigation bank are available.

Differences between the standards for mitigation banks and in-lieu fee programs. Several commenters noted that the fundamental difference between in-lieu fee programs and mitigation banks is timing. Two of these commenters pointed out that mitigation banks, like in-lieu fee programs, receive credit before compensatory mitigation projects are implemented. Another commenter suggested that in-lieu fee programs should adhere to the same standards as mitigation banks for the implementation of compensatory mitigation projects, but should be allowed to collect funds before acquiring a compensatory mitigation project site. Two commenters stated that the rule should recognize the inherent differences between mitigation banks and in-lieu fee programs but that all sources of compensatory mitigation should be held to standards that assure successful performance. Another

commenter said that if the standards were the same for mitigation banks and in-lieu fee programs, private mitigation banks would dominate the process, resulting in poor geographic distribution of compensatory mitigation, significantly reduced ecological diversity, and less protection and restoration of important aquatic resources.

According to the 2001 NRC Report, the principal difference between mitigation banks and in-lieu fee programs is timing. Mitigation banks and in-lieu fee programs are financed and planned differently, which creates the timing difference observed by the NRC. Since commercial mitigation banks sponsors have up-front financing, they can acquire and plan their mitigation bank sites before submitting their proposals to district engineers for consideration. In contrast, in-lieu fee programs do not generally have this up-front financing available, so they must obtain funds from permittees (under an in-lieu fee program instrument or agreement) before they can acquire and plan in-lieu fee project sites, and implement those projects.

We agree that mitigation banks and in-lieu fee programs should be held to the same standards, to the maximum extent practicable, as required by NDAA section 314. We believe the final rule accomplishes this goal. The standards provided in this rule will help ensure that the compensatory mitigation provided by mitigation banks and in-lieu fee programs both offset the impacts incurred by permittees who secure credits from these third-party mitigation providers. To maximize compensatory mitigation options, the inherent differences between mitigation banks and in-lieu fee programs warrant somewhat different procedural requirements. The most substantial differences relate to timing and financing. We recognize that in-lieu fee programs are usually not able to capitalize compensatory mitigation projects up-front. Instead, they must collect funds from permittees before they can secure a suitable site and develop and implement a compensatory mitigation project. For this reason, in-lieu fee programs, but not banks, are allowed to sell advance credits. Unless an in-lieu fee program has a surplus of credits available in a service area (i.e., released credits), the compensatory mitigation will take place after the permitted impacts have occurred. To help ensure that the collected funds are used in a timely manner to initiate compensatory mitigation projects, we are including a time limit of three growing seasons for fulfillment of

advance credits (see § 332.8(n)(4) [§ 230.98(n)(4)]) and requiring in-lieu fee programs to establish accounts to retain the collected funds. Those funds can only be used for the selection, design, acquisition, implementation, and management of in-lieu fee projects, with a small percentage allowed for administrative costs.

However, the substantive mitigation requirements, as well as many of the procedural requirements are the same for both banks and in-lieu fee programs. Both are subject to the same requirements for plan approval, performance standards, monitoring, adaptive management and long-term stewardship. Proposed mitigation banks and in-lieu fee programs will both be required to undergo review by Interagency Review Teams, both for their instruments and for their specific mitigation project plans, though in the case of mitigation banks these two steps are usually accomplished simultaneously, while for in-lieu fee programs instrument review and approval will usually take place prior to development of a particular project. Public involvement is required in the same way for both types of third-party providers as well. By including equivalent substantive ecological standards while recognizing certain administrative and procedural differences, the rule will also help maximize available credits from sponsors willing to provide third-party mitigation in a range of service areas, from high-development areas that can support economically-viable banks to remote areas that cannot, but that still have occasional mitigation needs. We recognize that in-lieu fee programs have sometimes provided compensatory mitigation for different types of aquatic resources than mitigation banks, and this rule does not interfere with that practice.

Proposed in-lieu fee regulatory text. A few commenters proposed in-lieu fee regulatory text. One commenter suggested that the district commander may only consider in-lieu fee preservation as the primary mitigation if no other form of mitigation is available, feasible or practicable. Another commenter proposed that each in-lieu fee program should draft a program agreement that is submitted for public review and comment and the review of the district engineer and the Interagency Review Team (IRT). Under that agreement, fees paid to each in-lieu fee program would be determined by the market rate of mitigation bank credits within a watershed and would be reviewed periodically by the IRT. One commenter suggested that all in-lieu fee

programs should be required to have an approved operating agreement or instrument. This commenter said that an in-lieu fee program should have to project the type and location of impacts and receive advance payments so that the compensatory mitigation would be implemented in advance of permitted impacts. Another commenter suggested that each in-lieu fee program be required to have an approved Memorandum of Understanding and a program manager responsible for administering the program. This commenter also said that district engineers should determine acceptable fee amounts for the required compensatory mitigation and should be the final approval authority for all proposed expenditures of funds collected for compensatory mitigation for DA permits.

We have considered the regulatory text proposed by these commenters. The final rule requires a prospectus, public notice and comment period, and IRT review of proposed in-lieu fee program instruments. The use of preservation as compensatory mitigation will be determined by district engineers on a case-by-case basis in accordance with § 332.3(h) [§ 230.93(h)]. In-lieu fee programs must have approved instruments before they can be used to provide compensatory mitigation for DA permits. We do not believe it is practical to require in-lieu fee programs to receive advance payments so that they could do compensatory mitigation in advance of permitted impacts. If it were possible for in-lieu fee programs to fulfill such a requirement, they could operate as mitigation banks. We do not believe it is appropriate for district engineers to determine credit costs for in-lieu fee programs, but they will review the fees set by sponsors to determine whether they comply with the requirement for full cost accounting to ensure that the required compensatory mitigation is provided and maintained.

IV. Compliance With Section 314 of the NDAA

Section 314 of the NDAA requires the issuance of standards and criteria for compensatory mitigation that, to the maximum extent practicable, (1) maximize available credits and opportunities for mitigation, (2) provide flexibility for regional variations in wetland conditions, functions and values, and (3) apply equivalent standards and criteria to each type of compensatory mitigation.

With respect to maximizing available credits and opportunities for mitigation, the preference established in today's rule for the use of credits provided by

mitigation banks (see § 332.3(b) [§ 230.93(b)]) should stimulate an increase in the number of mitigation banks and correspondingly the number of bank credits available for use. Also, today's rule provides greater efficiency and predictability to the process of authorizing new mitigation banks and in-lieu fee programs and associated projects by establishing clear standards and criteria for instruments and mitigation plans, and setting reasonable timelines for review and decision-making. These improvements in regulatory efficiency and predictability should serve to stimulate an increase in the number of mitigation banks and in-lieu fee programs, and therefore an overall increase in the number of third-party compensatory mitigation credits available to offset permitted impacts. Additionally, our decision to retain and reform in-lieu fee mitigation, rather than eliminate it, will provide a range of compensation options for permit applicants, and help to ensure that viable options are available in areas not served by banks. Thus, consistent with the NDAA, today's rule maximizes available credits and opportunities for mitigation to the maximum extent practicable.

With respect to providing flexibility for regional variations in wetland conditions, functions and values, as previously noted, we believe that today's rule achieves the proper balance of binding requirements and flexibility necessary to ensure that compensatory mitigation decisions are reasonable and based on case-specific circumstances. An adequate degree of flexibility is necessary for this rule because practices for restoring, establishing, and enhancing aquatic resources vary by resource type and by geographic region. For example, today's rule does not proscribe a one-size-fits-all set of ecological performance standards to evaluate the success of all compensation projects. Instead, the rule recognizes that ecological performance standards will vary depending upon aquatic resource type, geographic region, and compensation method but requires that they be based the best available science that can be measured or assessed in a practicable manner. Thus, consistent with the NDAA, today's rule provides flexibility for regional variations in wetland and aquatic resource conditions, functions and values to the maximum extent practicable.

Additionally, today's rule requires "equivalent" standards, to the maximum extent practicable, for all three mechanisms for providing compensatory mitigation: permittee-responsible compensatory mitigation,

mitigation banks, and in-lieu fee mitigation. Because there are fundamental differences in how these three types of compensatory mitigation are structured and conducted, we do not believe that Congress intended to require the promulgation of identical standards for all three methods of compensation. Instead, we interpret "equivalent" standards to mean standards which are equal in value, force, or meaning (See, e.g., *The American Heritage Dictionary of the English Language, Fourth Edition*). With that goal in mind, today's rule requires that compensation projects provided by all three compensation mechanisms have mitigation plans which include the same 12 fundamental components: objectives; site selection criteria; site protection instruments (e.g., conservation easements); baseline information (for impact and compensation sites); credit determination methodology; mitigation work plan; maintenance plan; ecological performance standards; monitoring requirements; long-term management plan; adaptive management plan; and financial assurances (see 33 CFR 332.4(c) [40 CFR 230.94(c)]). There are minor differences in the specific requirements for these components in order to accommodate the different nature of the three mitigation approaches. There are also procedural and timing differences among the requirements for the three types of mitigation. For example, in-lieu fee programs are allowed to sell a limited number of credits before having an approved site and mitigation plan, while banks are not. However, to compensate for this difference and ensure that the standards are "equivalent" to the maximum extent practicable, in-lieu fee programs are required to develop a compensation planning framework and adhere to strict accountability requirements for all fees collected, requirements which go beyond those applied to banks. We have also included a preference for bank credits over advanced credits from in-lieu fee programs, and limited in-lieu fee program sponsorship to qualified governmental and non-profit resource management agencies. We thus believe that the final rule fulfills the statutory directive to provide "equivalent" standards for the three types of mitigation to the maximum extent practicable. Specific rule provisions that apply to each of the types of compensatory mitigation, and the reasons for their differences, are discussed throughout today's preamble.

V. Organization of the Final Rule

The proposed compensatory mitigation regulation in 33 CFR part 332 [40 CFR part 230], is organized into the following sections:

Section 332.1 [230.91], *Purpose and general considerations*, describes the basic purpose of the proposed rule and general principles concerning compensatory mitigation.

Section 332.2 [230.92], *Definitions*, provides definitions of important terms relating to compensatory mitigation and the Corps Regulatory Program.

Section 332.3 [230.93], *General compensatory mitigation requirements*, describes general compensatory mitigation requirements for DA permits, including permit conditions and financial assurances. This section also describes the watershed approach to compensatory mitigation.

Section 332.4 [230.94], *Planning and documentation*, describes the review of proposed compensatory mitigation activities, as well as requirements for mitigation plans.

Section 332.5 [230.95], *Ecological performance standards*, describes principles for establishing ecological performance standards for compensatory mitigation projects.

Section 332.6 [230.96], *Monitoring*, describes general requirements for monitoring compensatory mitigation projects.

Section 332.7 [230.97], *Management*, describes general requirements for site protection, sustainability, adaptive management, and long-term management of compensatory mitigation projects.

Section 332.8 [230.98], *Mitigation banks and in-lieu fee programs*, provides requirements that are specifically applicable to mitigation banks and in-lieu fee programs.

VI. Discussion of Specific Sections of the Final Rule

The final rule is presented in two parallel sections: Changes to Corps regulation in 33 CFR and changes to EPA regulation in 40 CFR. The two sections are almost entirely the same, with minor exceptions. These include: (1) Corps changes to permit application requirements at 33 CFR 325.1; (2) Conforming changes to EPA's existing mitigation regulations at 40 CFR part 230, making appropriate citations for the addition of new §§ 230.91 through 230.98; and (3) References to the Rivers and Harbors Act of 1899, in which the EPA does not have a regulatory role, have been omitted from the text in 40 CFR part 230.

33 CFR 325.1 Application for Permits

In the proposed rule, the Corps proposed to modify § 325.1(d) by adding a new paragraph requiring a mitigation statement for section 404 permit applications. Several commenters supported the proposed requirement. One commenter said that geographic coordinates and monitoring data should also be required for this mitigation statement. A number of commenters objected to the proposed requirement. One commenter believed requiring this statement is unnecessary because some impacts to waters of the United States are unavoidable. Another commenter said that determining whether the proposed avoidance and minimization is sufficient, appropriate, or practicable is highly subjective and may invite litigation. This commenter remarked that it is the Corps' responsibility to determine whether appropriate and practicable avoidance, minimization, and compensation has been provided prior to making a decision on a section 404 permit. Several commenters said that this provision should be modified, to clarify that the mitigation statement is to be brief, since it is provided at the beginning of the permit application process and is likely to change as a result of the evaluation process. One commenter stated that this paragraph should be modified to allow the permit applicant to explain why compensatory mitigation should not be required, since many individual permits are issued under section 404 that do not require compensatory mitigation.

This requirement has been adopted in the final rule because it will provide useful information for the permit evaluation process. Section 325.1(d)(7) has been changed to allow permit applicants to explain why they believe compensatory mitigation should not be required for particular activities. The mitigation statement should be brief, because the permit evaluation process is an iterative process, and district engineers often require additional avoidance and minimization as they evaluate permit applications. The Corps does not agree that it would be appropriate to require geographic coordinates or monitoring data with the mitigation statement. The permit application will indicate the location of the proposed work. Monitoring data may be required at a later time, depending on the conditions of the issued permit. See the discussion of section 332.4(b)(1) below for a description of public notice requirements for the mitigation statement.

33 CFR 332.1 and 40 CFR 230.91 Purpose and General Considerations

(a) *Purpose.* Many commenters stated that the proposed rule restricts flexibility for mitigation options for both the permit applicant and the Corps, and therefore it is inconsistent with section 314. Many commenters declared that the proposed elimination of in-lieu fee programs conflicts with this statute, because it reduces mitigation opportunities available to permittees as well as the quality and success of compensatory mitigation projects. One commenter said that to comply with the statutory mandate to maximize available credits and opportunities for mitigation, the rule should specify that mitigation banks are the preferred choice when available. A number of commenters believe that the proposed rule unfairly promotes mitigation banking and restricts other compensatory mitigation opportunities.

In response to the comments, we have made substantial changes to this rule to better comply with the statutory mandate. We have retained in-lieu fee programs as a separate mechanism for providing compensatory mitigation, with clear and stringent standards to help ensure performance in replacing aquatic resource functions and services lost as a result of activities authorized by DA permits. We have also established a preference for mitigation bank credits, because of the lower risks associated with mitigation banks. This preference is discussed in greater detail below. In this final rule, we have applied equivalent standards to all sources of compensatory mitigation, to the extent it is practicable to do so, given the fundamental differences among permittee-responsible mitigation, mitigation banks, and in-lieu fee programs.

Many commenters said that the rule should apply equivalent standards and criteria to each type of compensatory mitigation. A number of commenters expressed concern that the proposed rule does not accomplish that objective. One commenter suggested establishing equivalent levels of interagency review for proposed compensatory mitigation projects. Several commenters said that the statute should be interpreted as requiring the establishment of similar levels of accountability for mitigation banks, in-lieu fee programs, and permittee-responsible mitigation. This would allow the retention of in-lieu fee programs as a separate mechanism for providing compensatory mitigation for DA permits. One commenter remarked that the proposed rule goes much further than establishing equivalent

standards and criteria by providing a strong preference for the use of mitigation banks. This commenter said that the proposed rule incorrectly asserts that mitigation banks are always successful and therefore other forms of compensatory mitigation should be held to the same standards as mitigation banks in order to achieve success. One commenter stated that the objective of this rule should be to effectively mitigate for losses of aquatic resources, not to level the playing field between mitigation banks and in-lieu fee programs. Three commenters said that the proposed rule provides equivalent standards for different types of compensatory mitigation, but it needs to focus on improving success, regardless of whether permittee-responsible mitigation, mitigation banks, or in-lieu fee programs are used.

This final rule applies equivalent standards and criteria to all sources of compensatory mitigation, to the maximum extent practicable. It is not practicable to apply exactly the same standards and criteria to mitigation banks, in-lieu fee programs, and permittee-responsible mitigation, nor are the agencies required to do so, as discussed above. There are inherent differences among these sources of compensatory mitigation. As many commenters pointed out, there are many areas of the country where there are no mitigation banks or in-lieu fee programs. Flexibility in compensatory mitigation requirements is needed to account for regional variations in aquatic resources, as well as state and local laws and regulations. There also needs to be flexibility regarding the requirements for permittee-responsible mitigation. Practicability is an important consideration when determining compensatory mitigation requirements. We agree that the final rule should provide similar levels of accountability among the three sources of compensatory mitigation. We strongly agree that the focus should be on ecological success of compensatory mitigation projects, not the source of the compensatory mitigation. The preferences provided in § 332.3(b) [§ 230.93(b)] are based primarily on administrative criteria that take into account risk and uncertainty in providing the required compensatory mitigation. This rule provides tools to help improve ecological success of compensatory mitigation projects, but the rule itself cannot guarantee that success. Ecological success is dependent upon effective project planning, site selection, and implementation.

One commenter said that the agencies should clarify that they may conduct

rulemaking without public notice and comment and still comply with the Administrative Procedure Act.

We acknowledge that, in limited circumstances, agencies can conduct rulemaking without a public notice and comment process. For example, an agency may issue a direct final rule for routine and non-controversial regulations, if the agency believes the rule would not result in adverse comments. It is unlikely that any rulemaking related to compensatory mitigation would result in no adverse comments. In the interest of transparency, the agencies have agreed that any future changes to this rule will involve notice and comment rulemaking.

Many commenters said that stream compensatory mitigation should not be included in this rule. A number of commenters stated that there is no scientific evidence that streams can be created or replaced, or that other approaches taken in this rule can compensate for stream losses. Many of these commenters asserted that the agencies should conduct further research on stream mitigation and demonstrate its success before including standards for stream mitigation in the rule. Some commenters noted that the statute requiring the promulgation of this rule refers only to wetlands. Several commenters expressed support for applying the rule to streams and other open waters. One commenter said that physical alteration of the nation's waters should be mitigated to the extent possible to support the objective of the Clean Water Act. Since section 404 of the Clean Water Act authorizes discharges of dredged or fill material into lakes, streams, and wetlands, mitigation for those impacts should be provided.

We believe that is appropriate to apply this rule to all types of aquatic resources, not just wetlands. This rule addresses the basic requirements of compensatory mitigation projects: planning and documentation, performance standards, monitoring, and management. Stream compensatory mitigation projects also require these basic elements. The final rule recognizes the challenges associated with stream restoration and provides in § 332.3(e)(3) [§ 230.93(e)(3)] that compensation for difficult to replace resources, such as streams, should be provided through in-kind rehabilitation, enhancement or preservation if practicable. The feasibility and appropriateness of compensatory mitigation for a particular aquatic resource type is to be addressed on a case-by-case basis by district engineers. Effective implementation of

this rule, including the ecological performance of compensatory mitigation projects, is dependent upon critical thinking by decision-makers to determine whether a particular compensatory mitigation proposal at a specific site is technically feasible and capable of providing the desired aquatic resource functions and services. Stream restoration and rehabilitation activities have been conducted all across the country, with varying levels of success. There are areas of the country, such as the southeastern coastal plain, where it may be possible to rehabilitate functioning streams if appropriate geologic and hydrologic conditions are present. Compensatory mitigation required by the Corps helps support the objective of the Clean Water Act, by offsetting losses of aquatic resource functions that result from activities authorized by DA permits.

(b) *Applicability.* One commenter said that the proposed rule is inconsistent with 33 CFR 320.4(r), which limits requirements for compensatory mitigation to "significant resource losses."

This final rule does not alter the circumstances when compensatory mitigation is required. The Corps has required compensatory mitigation for minor activities, such as activities authorized by nationwide permits, for many years to ensure that those activities result in minimal individual and cumulative adverse effects on the aquatic environment and are in the public interest. Prior to issuing an individual permit, the Corps determines on a case-by-case basis whether compensatory mitigation is necessary to ensure that the authorized activity is in the public interest and, if it involves a discharge of dredged or fill material, complies with the 404(b)(1) Guidelines.

Several commenters supported the use of areas not subject to regulatory jurisdiction under the Clean Water Act and/or sections 9 and 10 of the Rivers and Harbors Act of 1899 to provide compensatory mitigation for DA permits. One commenter said that using non-jurisdictional areas as compensatory mitigation can support a watershed approach.

We agree with these comments, and have retained this provision in the final rule.

A number of commenters believe that the rule should clarify the Corps' authority to require mitigation in light of the U.S. Supreme Court Decisions in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (2001) and *Rapanos et ux., et al. v. United States* (2006) (Rapanos). Some commenters noted that if the Corps

cannot directly regulate discharges of dredged or fill material into a non-jurisdictional wetland, then the Corps cannot require that particular wetland to be used to mitigate impacts to other wetlands. Such an approach would allow the Corps to indirectly regulate non-jurisdictional wetlands. One commenter stated that the Rapanos decision should apply not only to determining whether a particular water body or wetland is jurisdictional under the Clean Water Act, but it should also guide the development of criteria and standards that inform mitigation decisions.

This rule is not the appropriate venue for addressing Clean Water Act jurisdiction. The Corps does not generally require that any particular wetland or resource be used to provide compensatory mitigation. Rather, the project sponsor proposes a mitigation option and the Corps determines whether the proposed option is adequate to compensate for resource functions and services lost at the impact site. We believe that non-jurisdictional waters can be used to provide compensatory mitigation for activities authorized by DA permits, if the rehabilitation, enhancement, and/or preservation of those waters is determined to be appropriate compensation for authorized impacts. The Rapanos decision is limited to the question of Clean Water Act jurisdiction, not decision-making for compensatory mitigation.

(c) *Sequencing.* Many commenters stated that the rule should emphasize avoidance and minimization, not just compensatory mitigation. They said that compensatory mitigation should not be considered until all efforts have been made to first avoid and then minimize unavoidable impacts to waters of the United States. Many commenters believe that the proposed rule grants district engineers too much discretion to determine that permit applicants have avoided and minimized impacts to aquatic resources. Two commenters said that the rule needs to be rewritten to treat compensatory mitigation as a last resort to ensure protection and enhancement of the nation's streams and wetlands.

This rule addresses only the compensation component of the section 404 mitigation sequence. Avoidance and minimization are addressed through other regulations, such as the Section 404(b)(1) Guidelines for activities involving discharges of dredged or fill material into waters of the United States. Activities involving discharges of dredged or fill material into waters of the United States must comply with all

applicable provisions of the 404(b)(1) Guidelines before a section 404 permit can be issued. For activities that require DA permits pursuant to sections 9 or 10 of the Rivers and Harbors Act of 1899, avoidance and minimization requirements are provided through application of the Corps Regulatory Program's mitigation policy at 33 CFR 320.4(r).

A number of commenters said that the proposed rule is inconsistent with the 404(b)(1) Guidelines as they relate to the consideration of practicable alternatives. They indicated that allowing permit applicants to use compensatory mitigation instead of using practicable alternatives will result in significant adverse impacts to the environment. Two commenters recommended that the rule include measures to be used to avoid impacts to wetlands, and limit permit issuance to those impacts that were truly unavoidable. Several commenters said that the sequencing provision in the proposed rule fails to recognize changes that occur to wetlands over time, and it does not take into account innovative steps in wetland management that can be used to benefit society.

Consideration of practicable alternatives is provided through application of the 404(b)(1) Guidelines for activities that involve discharges of dredged or fill material into waters of the United States. Using compensatory mitigation to minimize adverse effects to the aquatic environment is consistent with the 404(b)(1) Guidelines (see 40 CFR 230.75). Avoidance and minimization are achieved through application of the 404(b)(1) Guidelines for activities that require section 404 permits. We have added a new paragraph (c)(1) to this section to clarify that nothing in this rule affects the requirement that all section 404 permits comply with applicable provisions of the 404(b)(1) Guidelines. Paragraph (c)(2) of this section has been modified to clarify that individual section 404 permits will be issued only when compliance with applicable provisions of the 404(b)(1) Guidelines has been achieved, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to aquatic resources. For general permits, compliance with the 404(b)(1) Guidelines is addressed through application of 40 CFR 230.7. There are many reasons why wetlands change over time, most of which are not under the control of the Corps. Paragraph (c) of this section can only address those changes that result from discharges of dredged or fill material into waters of

the United States, including jurisdictional wetlands.

Several commenters said that the final rule should include exemptions to the mitigation sequencing requirements when the discharge is necessary to avoid environmental harm or can be reasonably expected to result in environmental gains or insignificant impacts. Other commenters expressed concern that strict adherence to mitigation sequencing will prevent the implementation of large scale compensatory mitigation projects. Some commenters asserted that rigid rules for on-site avoidance often result in small areas for compensatory mitigation projects, which are unlikely to function properly.

Potential exemptions to the mitigation sequence are beyond the scope of today's rulemaking. However, we do note that these exemptions to the mitigation sequence are addressed through specific provisions of the 1990 Mitigation Memorandum of Agreement (MOA) between the U.S. EPA and the Department of the Army. Those provisions of the 1990 Mitigation MOA are not affected by this final rule. The 404(b)(1) Guidelines and the provisions of the 1990 Mitigation MOA that are retained after this final rule goes into effect provide sufficient flexibility to allow the development of large scale compensatory mitigation projects. Avoiding waters of the United States to the maximum extent practicable on the project site does not result in small areas for compensatory mitigation that may be required by the district engineer, since this rule does not require on-site compensatory mitigation. This rule takes a watershed approach to compensatory mitigation, and emphasizes that compensatory mitigation projects should be placed in appropriate locations within a watershed.

One commenter stated that the definition of "practicable" should take into account public safety and maintenance. Another commenter suggested that the rule should require the district engineer to consider whether the wetland functions lost as a result of a permitted activity can be practicably replaced.

The definition of "practicable" provides sufficient flexibility to take into account public safety and maintenance when making decisions on applications for DA permits. In § 332.3 [§ 230.93], there are several provisions that require the district engineer to consider the likelihood of success when determining appropriate and practicable compensatory mitigation.

We have also added a new provision at § 332.1(c)(3) [§ 230.91(c)(3)] reminding the public that in some cases that district engineer may determine that a proposed permit cannot be issued because of the lack of appropriate and practicable mitigation options. While the Corps envisions that this will be an unusual situation, it is possible that the impacts at a particular site would be so significant, and the avoidance, minimization and compensation options are so limited, that it is simply not possible to adequately mitigate the project impacts.

(d) *Public interest.* We received no comments on this provision. In the proposed rule, this provision was in paragraph (c) of this section, which discusses the mitigation sequence under the Clean Water Act Section 404(b)(1) Guidelines. Since the public interest review is a different process than mitigation sequencing, we have moved this sentence to a separate paragraph.

(e) *Accounting for regional variations.* Many commenters said that the rule should provide flexibility to address regional issues relating to compensatory mitigation. For example, a number of commenters discussed implementation of section 404 of the Clean Water Act in the State of Alaska, where there is a clear understanding that compensatory mitigation is not always warranted or practicable. Some of these commenters cited the May 13, 1994, "Statements on the Mitigation Sequence and No Net Loss of Wetlands in Alaska" issued by the U.S. EPA and the Department of the Army. These commenters said that the final rule should identify Alaska as a special case in which local flexibility is needed and will be applied. In Alaska, there are limited opportunities to create or restore wetlands because of its environmental conditions.

As discussed elsewhere in this preamble, this rule does not change the circumstances under which compensatory mitigation is required for DA permits. Therefore, it does not change the May 13, 1994, Alaska mitigation statement cited above. We have modified appropriate provisions of this rule to clarify the flexibility and discretion available to district engineers when determining compensatory mitigation requirements for DA permits.

Some commenters cited examples where regional flexibility is needed to maximize available mitigation credits. An important tool for regional flexibility is to be able to use all three mechanisms (permittee-responsible mitigation, mitigation banks, and in-lieu fee programs) for providing compensatory mitigation. One commenter said that there is only one small mitigation bank

in Alaska because of its climate, geography, and limited opportunities for wetland establishment or restoration. Other commenters stated that opportunities to develop mitigation banks in southern Nevada and other areas of the southwest are extremely limited because of the low availability of water. Another commenter noted that in areas where most of the land is owned by the federal government, opportunities to develop mitigation banks are substantially limited.

This rule supports all three mitigation sources used in the Corps Regulatory Program: permittee-responsible mitigation, mitigation banks, and in-lieu fee programs. We acknowledge that there are areas where mitigation banks are unlikely to be established. In such areas, in-lieu fee programs may be established. Permittee-responsible mitigation may also be required if there are no third-party mitigation options and the district engineer determines that compensatory mitigation is necessary to offset losses of aquatic resource functions.

One commenter suggested that each Corps district establish region-specific methodologies for calculating compensatory mitigation needs. According to this commenter, this would allow regional experts to set regional strategies for compensatory mitigation. One commenter said that this rule should provide district engineers with operational standards for regional variations, but only to the extent necessary to promote ecologically sound and successful restoration of wetland functions.

Regional methods for determining compensatory mitigation requirements can be developed by Corps districts and other entities. District engineers are also encouraged to establish regional strategies for compensatory mitigation, through watershed planning or other means. The development of regional methods and watershed plans is a resource-intensive enterprise, and any Corps district efforts towards developing such products are dependent on available resources. We do not believe it would be appropriate to provide operational standards in a national rule, because regional standards are more effectively developed at the local level.

(f) Relationship to other guidance documents. Many commenters recommended adding a provision to the rule that clarifies whether previously issued guidance documents relating to compensatory mitigation in the Corps Regulatory Program are superseded by this final rule. These commenters cited the 1995 Mitigation Banking Guidance,

the 2000 In-Lieu Fee Guidance, and the 1990 Mitigation Memorandum of Agreement between the U.S. EPA and the Department of the Army as documents about which such clarification is needed.

We agree that such a provision is appropriate to provide clarity for the regulated public and government agencies. We have added paragraph (f)(1) to this section, which states that this rule replaces the mitigation banking guidance issued on November 28, 1995, the in-lieu fee guidance issued on November 7, 2000, and Regulatory Guidance Letter 02-02 which was issued on December 24, 2002. Since this rule does not address all provisions of the 1990 Mitigation MOA that relate to compensatory mitigation, paragraph (f)(2) discusses which provisions of this MOA are superseded by the rule. This rule supersedes only those provisions of the MOA relating to the amount, type, and location of compensatory mitigation, and the use of preservation as a mitigation component.

Other Corps guidance documents that relate to compensatory mitigation for DA permits, such as local guidance issued by Corps districts, should be revised as necessary so that they are consistent with this final rule.

33 CFR 332.2 and 40 CFR 230.92 Definitions

Adaptive management. Two commenters supported the proposed definition of adaptive management. Two commenters suggested that the definition should require consideration of likely risks to compensatory mitigation project sites. Other commenters stated that the definition should clarify that adaptive management involves a strategy that addresses challenges faced in the restoration of dynamic systems. Two commenters said that there is potential to use this definition to relax or modify project-specific performance criteria to account for poor design or unexpected as-built conditions to achieve project goals.

We have modified this definition to account for two aspects of adaptive management: (1) Addressing challenges that are likely to occur with compensatory mitigation projects, and (2) addressing unforeseen changes to those projects. The likely challenges are those that are reasonably foreseeable, which may typically occur for the restoration, establishment, or enhancement of a particular aquatic habitat type in a specific area. For the purposes of this rule, adaptive management does not require anticipation of all potential challenges,

since that would be impossible to accomplish. We have also changed this definition to state that adaptive management requires consideration of the risk, uncertainty, and dynamic nature of compensatory mitigation projects. Consideration of those factors can help proponents optimize the ecological performance of compensatory mitigation projects. The last sentence of this definition has been modified to clarify that the adaptive management process involves the selection of appropriate measures that will provide aquatic resource functions. Another change to the last sentence acknowledges that analysis of monitoring results will be used to identify and implement measures to rectify problems.

Advance credits. We have adopted this new definition to define one of the two types of credits that can be provided by in-lieu fee programs. Advance credits are compensatory mitigation credits available for sale by an in-lieu fee program sponsor prior to being fulfilled through implementation of an approved mitigation plan for an in-lieu fee project. An approved in-lieu fee project will have a credit release schedule, and as the milestones in the credit release schedule are achieved, the credits that are produced will be released to fulfill the sponsor's obligation for credit production on behalf of the permittees who secured credits from that sponsor. The number of advance credits that a sponsor may make available to permittees is specified by service area in the in-lieu fee program instrument. In-lieu fee programs cannot sell advance credits until they have an approved instrument specifying the maximum allowable number of advance credits and a schedule for fulfilling any advance credit sales. Considerations for determining the appropriate number of advance credits for a given service area are discussed elsewhere in this preamble.

Buffer. Two commenters recommended modifying this definition to include areas providing upland habitat next to aquatic resources, in addition to protecting those resources from disturbance. Another commenter said that this definition should include buffers associated with ephemeral channels. One commenter noted that there is inconsistency in the proposed rule: in one section the term "buffer" includes upland areas, but in another section of the proposed rule it implies that buffers do not include uplands. This commenter recommended using this term consistently throughout the rule to eliminate confusion. One

commenter said that buffers may include wetlands.

Although upland buffers usually provide habitat next to aquatic resources, we do not believe it is necessary to explicitly state that in this definition. Upland buffers can be established and maintained next to ephemeral channels, but we do not believe such clarification is needed. We have modified this definition by adding the word "wetland" since buffers may be comprised of uplands, wetlands, and/or riparian areas. Riparian areas may or may not be wetlands.

Compensatory mitigation. Two commenters suggested that this definition should not be limited to aquatic resources. It should also acknowledge ecological improvements in uplands. Another commenter said that the definition should clarify that preservation is always a required component of compensatory mitigation, and in certain circumstances it may be the sole component. One commenter stated that this definition should be expanded to include functional surrogates for hydrology, such as integrated storm water management facilities.

This rule is limited to compensatory mitigation for impacts to aquatic resources, since the Corps regulates activities in waters of the United States, including navigable waters. Mitigation required by district engineers to address impacts to other resources, such as endangered species or historic properties, is governed by other provisions in the Corps regulations. Preservation is not always a required component of compensatory mitigation, although long-term protection through real estate instruments or other mechanisms is usually required for compensatory mitigation project sites. Preservation is one means of providing compensatory mitigation; compensation may also be provided through restoration, enhancement, or establishment, or any combination of those four methods. Preservation is rarely the sole source of compensatory mitigation for a DA permit; in most cases, aquatic resource restoration, establishment, and/or enhancement is required to achieve a minimum of one-to-one replacement of lost aquatic resources and any required preservation augments that replacement. Use of various techniques to offset losses of hydrologic functions, such as integrated storm water management facilities, is considered to be an action to minimize effects in accordance with 40 CFR part 230, Subpart H. District engineer can consider the use of such features when determining the appropriate amount of

compensatory mitigation required for DA permits.

Compensatory mitigation project. Two commenters recommended expanding this definition to include ecological improvements in uplands, where appropriate. One commenter said it was unclear whether forms of third-party mitigation other than mitigation banks are considered to be compensatory mitigation projects. One commenter suggested adding in-lieu fee programs to this definition.

This definition has been simplified by replacing the phrase "a restoration, establishment, enhancement, and/or preservation activity" with "compensatory mitigation." In this rule, district engineers have the discretion to include uplands, such as non-wetland riparian areas and buffers, as part of the overall compensatory mitigation project if those features are essential to maintaining the ecological viability of adjoining aquatic resources. We do not believe it is necessary to state this concept in the definition, since it is addressed in § 332.3(i) [§ 230.93(i)]. We have removed the term "third-party" from this definition, and added the phrase "or an in-lieu fee program" to clarify that compensatory mitigation projects include mitigation banks and in-lieu fee programs.

Condition. We have adopted this new definition since methods other than functional assessments can be used to evaluate permitted impacts and compensatory mitigation projects. This definition is based on concepts provided in the 2004 report entitled "Review of Rapid Assessment Methods for Assessing Wetland Condition" which was published by the U.S. EPA (EPA/620/R-04/009).

Credit. One commenter noted that the proposed definition is based on measures of function. This commenter said that if there are no units of measure included, measures of function cannot be used to calculate credits. Another commenter stated that units of measure are needed to calculate numbers of credits.

We have modified this definition by adding the phrase "or other suitable metric" to the list of examples of potential measures. There are a variety of methods that can be used to determine the number of credits provided by a compensatory mitigation project. In some cases, condition assessments may be used to determine available credits. The units of measure will depend on the method of determining credits. We have also inserted the word "aquatic" before "functions" in the last sentence, to clarify that credits are to be based on

aquatic functions provided by resource restoration, establishment, enhancement, or preservation.

For the purposes of this rule, credits from a mitigation bank or an in-lieu fee project are produced in accordance with a credit release schedule associated with an approved mitigation plan. For permittee responsible mitigation, credits are produced when a compensatory mitigation project is implemented in accordance with the approved mitigation plan.

DA. There were no comments received on the proposed definition. This definition is adopted as proposed.

Days. There were no comments received on the proposed definition. This definition is adopted as proposed.

Debit. One commenter noted that the proposed definition is based on measures of function. This commenter said that if there are no units of measure included, measures of function cannot be used to calculate debits. Another commenter stated that units of measure are needed to calculate numbers of debits.

For the same reasons provided in the preamble discussion of the term "credit," we have modified this definition to refer to other suitable metrics. The units of measure depend on the method of determining debits.

Enhancement. One commenter expressed support for the proposed definition. Several commenters requested changes to this definition to provide clarification. They said that it is difficult to distinguish between enhancement, restoration, rehabilitation, and re-establishment. Two commenters suggested that this definition should not be limited to aquatic resources, since ecological improvements could be made to uplands. Two commenters stated that the definition should limit enhancement to increases in function within the normal range of the particular type of ecosystem. Two commenters disagreed that enhancement does not result in an increase in aquatic resource area.

Enhancement differs from restoration, rehabilitation, and re-establishment because the objective of enhancement is usually to improve one or two functions, which may result in a decrease in the performance of other functions. Increasing those particular functions does not change the amount of area occupied by the aquatic resource. In contrast, re-establishment and rehabilitation (which are forms of restoration) are intended to return most, if not all, natural and/or historic functions to a former or degraded aquatic resource. We acknowledge that ecological functions of uplands can be

augmented through enhancement activities, but the scope of this rule is focused on aquatic resources. Enhancement activities are likely to result in limited changes in functional performance, because of inherent limits to functional capacity at a particular compensatory mitigation project site. If a compensatory mitigation activity results in an increase in aquatic resource area, in addition to increases in one or more aquatic resource functions, then it would probably be more appropriately classified as restoration. However, there may be cases where an increase in aquatic resource area is considered to be an adverse effect (e.g., impoundment of a forested wetland and adjacent uplands that kills the trees and changes habitat types). While enhancement does not result in a gain in aquatic resource area for purposes of tracking “not net loss” of wetlands, this does not mean that it cannot be used to compensate for a loss in resource area at the impact site. The district engineer will determine on a case-by-case basis the appropriate type and amount of mitigation to compensate for permitted impacts.

Establishment (creation). One commenter said that establishment should not be used in areas with poor hydrology. Two commenters stated that this definition should not be limited to aquatic resources, since ecological improvement can be made to uplands. One commenter recommended using the term “creation” instead of “establishment” because the term “establishment” does not convey the difficulties and risks associated with wetland creation. Another commenter said that deepwater sites are regulated waters and filling those waters to make a wetland is conversion, not establishment (creation).

District engineers will evaluate proposed establishment (creation) projects to determine if there is appropriate hydrology to support the desired aquatic resource. As discussed above, we acknowledge that ecological functions of uplands can be enhanced, but that is outside the scope of this rule. The term “establishment” is used in this rule, to be consistent with the terminology developed by the White House Wetlands Working Group (WHWWG) in 2000 to track wetland gains and losses. The WHWWG terminology continues to be used for wetland reporting, such as the Council on Environmental Quality’s reports on implementation of the President’s wetlands goals. We acknowledge that deepwater sites are usually considered to be waters of the United States and we

have struck the phrase “or deepwater” from this definition.

Fulfillment of advance credit sales of an in-lieu fee program. This definition was developed for use in the regulations governing in-lieu fee programs. The fulfillment of advance credits from in-lieu fee programs is accomplished when an approved mitigation plan for an in-lieu fee project is implemented by the in-lieu fee program sponsor. Each approved mitigation plan for an in-lieu fee project will have a credit release schedule. As each milestone of the credit release schedule is achieved, a number of credits will be produced. The number of credits produced will fulfill that sponsor’s obligations for that same number of advance credits. Only after all previously sold advance credits in a service area have been fulfilled can additional released credits from the project be sold. As advance credits within a service area are fulfilled through the approved release of credits for an in-lieu fee project, an equal number of new advance credits in that service area become available to be provided or transferred (sold) to permittees.

Functional capacity. There were no comments received on the proposed definition. This definition is adopted as proposed.

Functions. A few commenters supported the proposed definition. Many commenters recommended that the agencies provide clarification to this definition. Several commenters said that this definition should either identify which functions are to be measured or define standard protocols for functional assessment methods. One commenter suggested that the assessed functions should include primary and secondary production, nutrient uptake and transformation, nutrient and organic matter input, storage, and export, and organic matter decomposition rates. Another commenter said that the definition should apply only to wetlands, not streams.

District engineers will determine appropriate functional assessments to use for particular permitting situations. We do not believe it is necessary to specify the type of functions provided by aquatic resources, since this definition is intended to have general applicability. We have removed the phrase “aquatic resources and other” from this definition, since the term “functions” applies to physical, chemical, and biological processes that occur in any ecosystem. Even though the focus of the Corps Regulatory Program is on functions provided by aquatic resources, we believe this definition should be based on the

general concept of what an ecosystem function is.

Impact. Two commenters said that the proposed rule incorrectly assumes that all impacts are adverse, and that the definition should recognize that some impacts may be beneficial.

We acknowledge that not all impacts authorized by DA permits are adverse, but the focus of this rule is on providing compensatory mitigation for losses of waters of the United States. Activities authorized by DA permits that benefit aquatic resources do not generally require compensatory mitigation. When determining the compensatory mitigation requirements for a particular permit, district engineers should consider environmentally beneficial activities that are provided by components of the overall project. In cases where environmentally beneficial activities or mitigation measures related to the aquatic environment are incorporated into the overall project, a smaller amount of compensatory mitigation may be required to offset the authorized adverse impacts to waters of the United States.

In-kind. Several commenters said that the proposed definition is too vague. Two of these commenters stated that in-kind compensation should be structurally and functionally similar. One commenter requested that the definition clarify the difference between “functionally similar” and “structurally similar”. Two commenters suggested that the final rule adopt the current definition of in-kind mitigation, which refers to specific ecological types of wetlands.

We have changed the phrase “and/or” to “and” to define in-kind mitigation as being of a similar structural and functional type as the impacted resource. The modification of this definition will also help clarify that in-kind mitigation should provide similar types of structure and functions as the impacted resource, while accommodating high quality compensatory mitigation projects. In-kind mitigation projects should result in resource structure and functional capacity that are comparable to reference aquatic resources. In other words, in-kind mitigation should not consist of replacing a degraded aquatic resource with a degraded compensation resource. An in-kind compensatory mitigation project should result in a high quality aquatic resource. Thus, a mitigation project that was the same class of wetlands as the impacted resource, but with greater species diversity and habitat quality, would be considered appropriate in-kind mitigation.

In-lieu fee program. Many commenters said that the rule should define the term “in-lieu fee program.” Several commenters stated that such a definition is necessary to clarify which programs would be subject to new regulations governing in-lieu fee programs.

We have added a definition of this term to the final rule. It is parallel to the definition of “mitigation bank” while recognizing basic differences between mitigation banks and in-lieu fee programs. This definition discusses how an in-lieu fee program is similar to a mitigation bank, but it also clarifies that the rules governing the operation and use of in-lieu fee programs differ from those that govern mitigation banks.

In-lieu fee program instrument. We have added a definition of this term that is parallel to the definition of “mitigation banking instrument.”

Instrument. We are adding this new definition to clarify that the use of the generic term “instrument” in this final rule may refer to either a mitigation banking instrument or an in-lieu fee program instrument.

Interagency Review Team. One commenter suggested modifying this definition to clarify that an Interagency Review Team (IRT) can review documents for more than one mitigation bank. Another commenter said that the term “mitigation bank review team” should be used instead since in-lieu fee programs would be phased out under the proposed rule.

We do not believe it is necessary to change this definition to state that an IRT can review more than one proposed mitigation bank at a time. A different IRT may be established for each proposed mitigation bank or in-lieu fee program, or the same IRT may be involved in all proposed mitigation banks or in-lieu fee programs in an area. Since this final rule provides for both mitigation banks and in-lieu fee programs, it would be inappropriate to revert to using “mitigation bank review team.”

Mitigation bank. Three commenters recommended using the word “aquatic” in place of “similar” to clarify that the district engineer can require out-of-kind compensatory mitigation. Two commenters said that this definition should acknowledge that ecological improvements to uplands may be provided through a mitigation bank. One commenter stated that this definition should include language to reflect the fact that a mitigation bank cannot be used to offset impacts to aquatic resources unless certain performance standards have been met.

We have modified the first sentence of this definition by removing the word “aquatic” and adding examples of resource types that could be used as compensatory mitigation for impacts authorized by DA permits: wetlands, streams, riparian areas. This change is consistent with the practice of allowing out-of-kind compensation.

Compensatory mitigation may be provided through the establishment and maintenance of non-wetland riparian areas, which are not aquatic resources. The changes to the first sentence also allow recognition that upland areas may provide important ecological functions within a mitigation bank, and compensatory mitigation credit can be provided by those functions. We do not believe it would be accurate to state in this definition that performance standards must be met before a mitigation bank may be used to provide compensatory mitigation for authorized impacts to aquatic resources. When a mitigation bank is approved, and certain administrative activities are accomplished, a limited number of credits may be released which can be sold or transferred to permittees to fulfill their compensatory mitigation requirements.

Mitigation banking instrument. One commenter suggested modifying this definition to allow federal facility management plans, integrated natural resource management plans, or other acceptable documentation to be used as mitigation banking instruments.

Federal facility management plans, integrated natural resource management plans, and similar documents are more appropriately considered as site protection instruments, not mitigation banking instruments. A mitigation banking instrument governs the establishment and operation of a mitigation bank, which involves more issues than how the site will be managed.

Off-site. Many commenters requested a more explicit definition of this term. Several commenters said that the term “near” is subjective and should be more clearly defined. One commenter suggested using “hydrologically connected” instead of “near.” Two commenters expressed support for the flexibility provided by the use of the term “or near” in this definition. One commenter said that the term “parcel” should be defined in measurable units, to establish reasonable distances and areas for parcels. Another commenter suggested that the agencies should consider loosening the definition of off-site mitigation instead of allowing for more opportunities for out-of-kind mitigation.

We have removed the phrase “or near” to simplify this definition and to remove ambiguity. Off-site compensatory mitigation is located on a parcel of land other than the parcel containing the impact site or a parcel contiguous to the impact site. The revised definition does not establish minimum distances for a compensatory mitigation project to be considered off-site. The use of in-kind mitigation versus out-of-kind mitigation is more appropriately addressed by district engineers on a case-by-case basis in response to project-specific circumstances, instead of modifying this definition.

On-site. Many commenters requested a more explicit definition of this term. Several commenters said that the term “near” should be more clearly defined because it is subjective. One commenter stated that the term “near” should be replaced with “hydrologically connected.” Some commenters expressed support for the flexibility provided by the use of the term “near” in this definition. Two commenters said that the term “parcel” should be defined more clearly.

For the same reasons as provided in the preamble discussion of the changes to the definition of “off-site,” we have modified the definition of “on-site” by removing the phrase “or near.” These changes will help ensure that these two definitions complement each other.

Out-of-kind. Two commenters said that the word “or” should replace the phrase “and/or” in this definition, to state that out-of-kind mitigation should be structurally or functionally similar. One commenter remarked that this definition should provide clarification on what are accepted forms of out-of-kind mitigation. Two commenters suggested that this definition refer to specific ecological types of wetlands.

We have removed the phrase “and/or” and replaced it with the word “and” since out-of-kind mitigation differs from the resources impacted by the authorized work in both structure and function. Providing clarification on accepted forms of out-of-kind mitigation is beyond the scope of this definition. Appropriate out-of-kind mitigation will be determined by a district engineer on a case-by-case basis in response to an application for a DA permit. There are a number of classification systems for the various ecological types of aquatic resources. For the purposes of a regulatory definition that applies to a wide variety of aquatic resources, it would not be appropriate to modify this definition to refer to a particular classification system.

Performance standards. One commenter requested that the agencies expand this definition to explain, in greater detail, what performance standards are.

We do not believe it would be appropriate to provide greater detail regarding performance standards in this definition. Performance standards will vary by aquatic resource type, and those standards are also likely to vary among geographic regions. Performance standards are also dependent on the techniques used to measure how well a compensatory mitigation project is meeting its objectives. General criteria for establishing appropriate ecological performance standards are provided in § 332.5 [§ 230.95].

Permittee-responsible mitigation. There were no comments on this proposed definition. This definition is adopted as proposed.

Preservation. Some commenters said that this definition should be clearer, while other commenters stated that the proposed definition is adequate. Two commenters recommended modifying this definition to explicitly state that the preserved site will be permanently protected through appropriate real estate or legal instruments. One of these commenters noted that making such a change would avoid passive mitigation that results in little or no mitigation benefits. Two commenters said that preservation should not be limited to aquatic resources, but should also include ecological improvements in uplands when appropriate. One commenter suggested revising this definition to acknowledge gains in aquatic resource functions, services, and values.

The protection of a compensatory mitigation project site is more appropriately addressed through the rule provisions for site protection in § 332.7(a) [§ 230.97(a)]. This definition merely explains what preservation is, in the context of compensatory mitigation for DA permits. As part of an overall compensatory mitigation project, uplands such as non-wetland riparian areas may be included with preserved aquatic resources, if they help protect or sustain those aquatic resources. Although preservation helps sustain the functions and services provided by the preserved aquatic resources, by preventing direct impacts through land use changes, there is no gain in acreage. There may be a “passive” gain in functions and services over the long-term, if the preservation activity serves to remove or reduce stressors on the resource, however the main purpose of preservation is to prevent a future loss of resources, not to provide a gain. For

this reason, higher compensation ratios are generally required.

Release of credits. This definition has been added to describe actions where the district engineer, in consultation with the IRT, determines that credits associated with an approved mitigation plan for a mitigation bank are available for sale, transfer, or debit, or in the case of an in-lieu fee program, for fulfillment of advance credit sales. The credit release schedule for an approved mitigation bank or in-lieu fee project plan will be used to determine the number and resource type of credits that are released, as long as appropriate milestones specified in that schedule are achieved. A proportion of projected credits for a specific mitigation bank or in-lieu fee project may be released upon approval of the mitigation plan.

Re-establishment. Three commenters said that this definition should be deleted from this rule. One commenter found this definition useful, while others remarked that this definition is unclear and difficult to distinguish from “restoration” and “enhancement.” Two other commenters recommended expanding this definition to include ecological improvements in uplands, instead of limiting it to aquatic resources.

Re-establishment is a form of restoration, where the functions are returned to the site where an aquatic resource previously existed. The other form of restoration is rehabilitation, which results in an improvement in most, if not all, aquatic resource functions at a degraded site. Re-establishment differs from enhancement because enhancement is the augmentation of certain functions in an existing aquatic resource. It is not appropriate to address ecological improvements to uplands in this definition, since it is focused on aquatic resource functions. Ecological improvements to uplands that are conducted as part of a compensatory mitigation project can be considered by the district engineer when determining the amount of credits provided by that compensatory mitigation project.

Reference aquatic resources. Three commenters said that the proposed definition contradicts extensive scientific literature that describes the use of reference conditions in ecological assessment. These commenters stated that the range of variability encompassed by anthropogenic disturbances should not be included in this definition. One commenter added that the term “reference condition” is used to describe aquatic systems that are stable and highly functional, and restoration projects should use reference

streams and wetlands as models to establish objectives. Another commenter recommended modifying this definition to describe the use of reference sites.

We have revised this definition to make it consistent with its current application in ecological assessment. Reference aquatic resources represent the full range of variability exhibited by a regional class of aquatic resources. That variability is due to both natural processes and anthropogenic disturbances. The term “reference standard” is used for the subset of reference aquatic resources that are the least disturbed and exhibit the highest levels of functions. Aquatic resources are not stable; instead, they are dynamic ecosystems that change over time. For the purposes of compensatory mitigation for DA permits, reference sites are used to help establish realistic objectives for compensatory mitigation projects, but these sites have other uses as well.

Rehabilitation. Many commenters said that the proposed definition is unclear. One commenter recommended eliminating this definition and another commenter stated that the term “enhancement” should be used instead. One commenter supported the proposed definition. Two commenters suggested that this definition should not be limited to aquatic resources, but should also include ecological improvements to uplands where applicable. One commenter recommended modifying the second sentence of this definition to read: “Restoration of an aquatic resource can result in an increase in function with or without an increase in size.”

Rehabilitation differs from enhancement in that rehabilitation is intended to result in a general improvement in the suite of the functions performed by a degraded aquatic resource. In contrast, enhancement activities focus on increasing one or two functions, rather than all the functions being performed by an existing aquatic resource. For the purposes of this rule, ecological improvements to uplands are more appropriately addressed through the crediting of compensatory mitigation projects. We do not believe it is necessary to add the suggested sentence to this definition, since rehabilitation does not include re-establishment, which is the other type of restoration. The lack of gain in aquatic resource area is already addressed by the last sentence of the definition of “rehabilitation.” We note that, while rehabilitation does not result in a gain in aquatic resource area for purposes of tracking “not net loss” of wetlands, this does not mean that it cannot be used to compensate for a loss

in resource area at the impact site. The district engineer will determine on a case-by-case basis the appropriate type and amount of mitigation to compensate for permitted impacts.

Restoration. Several commenters requested clarification of the proposed definition, and one commenter said that the definition should explain how restoration differs from enhancement. One commenter said that rehabilitation should not be considered as a form of restoration because rehabilitation does not result in an increase in wetland acreage, even though it improves wetland functions and/or values. Two commenters stated that this definition should not be limited to aquatic resources, so it should also include ecological improvements to uplands when appropriate.

Restoration differs from enhancement in that it results in either the re-establishment of an aquatic resource or the rehabilitation of a suite of functions at a degraded aquatic resource. In contrast, enhancement activities focus on the improvement of a subset of specific functions of an aquatic resource. Rehabilitation results in a general improvement in the amount of functions performed by aquatic resources, and is considered to be a form of restoration. As stated above, ecological improvements to uplands are more appropriately addressed through crediting of compensatory mitigation projects.

Riparian areas. One commenter suggested defining this term more narrowly, to specify the type of vegetation that characterizes riparian areas. One commenter recommended modifying this definition to limit it to open waters, since wetlands are also considered to be waterbodies.

We have modified the first sentence of this definition to clarify that riparian areas are lands adjacent to streams, rivers, lakes, and marine-estuarine shorelines. To simplify this definition, we have also removed the second sentence of the proposed definition.

Service area. There were no comments on this proposed definition. This definition is adopted as proposed.

Services. Several commenters said that the proposed definition of this term is unclear and too subjective. According to one commenter, using a subjective measure such as services to assess mitigation success will hinder the government's administration of the program. In addition, it will create compliance problems for industry, because they will not be able to effectively plan future activities as a result of this uncertain, subjective measure. Two commenters said that the

definitions of services and values should be combined. Other commenters recommended removing both terms from the final rule. One commenter stated that the reference to aquatic resources should be deleted because services are provided by all types of ecosystems, not just aquatic ecosystems.

This definition has been simplified by deleting the phrase "aquatic resource and other" since services may be provided by any type of ecosystem, including non-aquatic ecosystems. The concept of ecosystem services is important for considering where compensatory mitigation projects should be located. The relative locations of compensatory mitigation projects in the landscape helps address certain public interest factors, such as water quality, flood hazards, and fish and wildlife protection.

Sponsor. One commenter suggested that this definition should include an entity responsible for establishing and operating a mitigation bank or in-lieu fee program.

We have changed this definition to clarify that the sponsor is responsible for establishing, and in most cases operating, a mitigation bank or in-lieu fee program. There may be cases where sponsor turns over the long-term management (and ownership) of the mitigation bank site or in-lieu fee project site to another entity, so the word "operating" is modified by the phrase "in most circumstances" to reflect those situations.

Standard permit. There were no comments received on the proposed definition. It is adopted as proposed.

Temporal loss. We have added a definition of temporal loss which clarifies that temporal loss is the time lag between the loss of aquatic resource functions caused by the permitted impacts and the replacement of aquatic resource functions at the compensatory mitigation site. Temporal loss is one factor that must be considered in determining compensation ratios. The definition also provides that the district engineer may determine that compensation for temporal loss is not necessary when a mitigation project is initiated prior to or concurrent with the permitted impacts, except for resources with long development times (e.g., forested wetlands). This is intended to provide an additional incentive for timely mitigation.

Values. Two commenters said that the definitions of services and values should be combined. Several commenters said that the proposed definition of this term is unclear and too subjective, and others indicated that this definition should be deleted. One

commenter stated that using value as a measure of mitigation success reduces the predictability and regulatory certainty needed for industry and government to operate efficiently.

We have deleted this definition, since the term "services" is the current term being used to signify the importance of ecosystem functions to human populations. The use of the term "values" in the Regulatory Program during the past few decades has been similar to the way "services" is used today in most of the academic environmental literature, as well as policy documents. The use of the term "services" instead of "values" will provide a more objective means of assessing how impacted aquatic resources and compensatory mitigation projects relate to people.

In addition, ecosystem services can be more easily described than values. They are usually simply presented in qualitative terms as the benefits that are being provided to people in the watershed or other area of interest. The term "value" can have different meanings (e.g., monetary versus non-monetary values; landowner versus societal values). The valuation of aquatic resources and their functions is a complicated issue, and one that is unnecessary to resolve for this rule. Use of the term "services" will assist in program implementation, since agencies and stakeholders are more likely to reach a common understanding through descriptions of the ecosystem services being provided by a particular site.

Watershed. Many commenters recommend adding a definition of "watershed" to the rule. One commenter said that the definition should recognize that watersheds vary from region to region. On the other hand, another commenter stated that the definition should be interpreted and applied in a consistent manner regardless of the geographic location of the compensatory mitigation project. This commenter also suggested that the rule specifically identify the watersheds that are eligible for use as locations for compensatory mitigation projects.

We have adopted a definition for this term, based on the definition provided in EPA's Watershed Plan Handbook, which was published in December 2006. District engineers will determine appropriate watershed scales for compensatory mitigation projects, including services areas for mitigation banks and in-lieu fee programs. We do not believe it would be appropriate to identify specific watersheds in which compensatory mitigation can be conducted. In general, compensatory mitigation projects should be located in

the same watershed as the permitted impacts, at a scale determined to be appropriate by the district engineer based on the factors specified in the rule.

Watershed approach. Two commenters asked that the final rule include a definition of this term. We have added a definition of “watershed approach” that is based on concepts in this final rule.

Watershed plan. Several commenters said that there should be opportunities for local watershed groups or non-governmental organizations to develop watershed plans. Two commenters stated that this definition should be limited to plans with a specific goal of aquatic resource restoration and preservation to ensure that the watershed plan goals are consistent with federal, tribal, and state regulations. One commenter said that watershed plans should not include priority sites for aquatic resource restoration. On the other hand, another commenter stated that a watershed plan should identify priority sites for restoration and should also have a goal of ecosystem restoration. One commenter said that the proposed rule implies that any available watershed plan should be used to identify compensatory mitigation sites. This commenter stated that such an approach would be inappropriate unless the watershed plan is developed for the purpose of compensatory mitigation, including the protection of both natural and built environments.

We have modified this definition to include appropriate non-governmental organizations, such as local watershed groups, as potential developers of watershed plans. We have also changed this definition to clarify that, for the purposes of this rule, watershed plans are developed for the specific goal of aquatic resource restoration, establishment, enhancement, and preservation. This clarification is necessary because there are many different types of watershed plans, and those plans may be intended to fulfill a wide variety of purposes. We believe it is appropriate for watershed plans to identify priority sites for compensatory mitigation projects. In addition, we have replaced the word “ecological” with the phrase “aquatic resource” to clarify that a watershed plan appropriate for use in implementing this rule should address aquatic resource conditions in a watershed. In the last sentence of this definition, we have replaced the phrase “watershed management plans” with “wetland management plans” to avoid a circular definition. As discussed below in § 332.3(c) [§ 230.93(c)], district engineers will determine whether a

particular watershed plan is appropriate for use in a watershed approach to compensatory mitigation.

Several commenters said that key terms in the proposed rule are either undefined or vaguely defined. A number of commenters suggested additional terms to define in the final rule. These terms include “larger projects” and “smaller projects.” We do not believe it would be appropriate to provide specific definitions to distinguish between large and small projects. The difference between large and small is subjective, and should be at the discretion of the district engineer after considering site-specific and project-specific criteria. Other requested definitions are discussed in more detail below.

One commenter requested a definition of the term “aquatic resource function” since it is used repeatedly throughout the rule. We have provided a general definition of the term “functions” in this section, which applies to aquatic resources as well as other types of ecological resources.

Two commenters asked for a definition of “aquatic resource type” since it is used throughout the rule. Three commenters said that the final rule should define “aquatic resources.” We do not believe it is necessary to define these terms in this rule. Different aquatic resource types may be distinguished through a variety of classification systems. What constitutes an aquatic resource is also dependent on the classification system used. Different regions may have different thresholds for making distinctions among aquatic, mesic, and xeric resources.

Two commenters said that the rule should include a definition of “successful mitigation.” One commenter proposed a set of criteria to be used to determine if the mitigation is successful.

Successful compensatory mitigation projects will be identified by evaluating those projects against their ecological performance standards. Therefore, successful mitigation will be determined on a case-by-case basis.

Two commenters asked for a definition of “mitigation type.” We have defined mitigation types in the final rule: restoration (which includes re-establishment and rehabilitation), establishment, enhancement, and preservation. We have also defined the terms “in-kind” and “out-of-kind.”

One commenter said that the rule should have a definition of “complete prospectus.” A complete prospectus contains the items listed at § 332.8(d)(2) [§ 230.98(d)(2)].

One commenter requested a definition of “umbrella mitigation banking instrument.” We do not believe it is necessary to define this term, because it is described at § 332.8(h) [§ 230.98(h)].

One commenter said that the final rule should include a definition of “unavoidable impacts.” It is not necessary to define this term, since unavoidable impacts are identified on a case-by-case basis when a district engineer evaluates a permit application.

One commenter stated that this rule should provide a definition of “conversion” as it relates to man-made changes to aquatic resources. This commenter also requested that the final rule contain guidelines to determine when a conversion would be ecologically appropriate.

We do not believe it is necessary to define the term “conversion” since it is commonly understood to refer to an action that changes an area from one resource type to another resource type. Establishing guidelines for evaluating conversion is beyond the scope of this rule. For proposed changes to aquatic resources that require DA authorization, district engineers will determine on a case-by-case basis whether those activities constitute conversions and whether proposed conversions are in compliance with applicable regulations.

One commenter suggested adding a definition of “aggregate mitigation site,” to account for cases where a permittee desires to provide a single compensatory mitigation project for multiple impacts to waters of the United States. We do not believe it is necessary to define this term. District engineers can consider compensatory mitigation that has been provided in advance by permittees when evaluating compensatory mitigation options (see 33 CFR 332.3(b) and 40 CFR 230.92(b)).

One commenter said that the rule should include a definition of “degraded.” It would not be appropriate to define this term, since it is subjective. Assessment methods can be used to determine whether a particular resource is degraded, based on a threshold chosen by the district engineer. Best professional judgment may also be used to identify degraded resources in situations where appropriate assessment methods are not available.

One commenter stated that the term “stream” should be defined. We do not believe it is necessary to define this term. District engineers can determine on a case-by-case basis whether a particular waterbody is a stream.

One commenter requested a definition of “ecoregion.” We do not believe it is necessary to define this term. There are a number of classification systems for

identifying ecoregions. Ecoregions may also be identified through local criteria. District engineers will use appropriate criteria if ecoregions are to be used to define service areas for mitigation banks or in-lieu fee programs.

*33 CFR 332.3 and 40 CFR 230.93
General Compensatory Mitigation
Requirements*

Three commenters suggested that paragraph (c) of this section should be put in front of paragraph (b) of this section. Two commenters proposed that the Corps automated information system used for compensatory mitigation should include a regional list of rare habitat types.

We do not agree that paragraph (c) of this section, which discusses the watershed approach, should be placed in front of paragraph (b), which presents criteria concerning the type and location of compensatory mitigation. As discussed below, paragraph (b) has a preference hierarchy that includes the watershed approach. Although mitigation banks and in-lieu fee projects should be strategically located in areas that support a watershed approach to compensatory mitigation, the preference hierarchy in paragraph (b) will be first considered when determining the compensatory mitigation required for a DA permit. If a mitigation bank or in-lieu fee program does not have the appropriate number and resource type of credits available, then permittee-responsible mitigation should be determined using the watershed approach described in paragraph (c) of this section. District engineers have the discretion to add appropriate data layers to the Corps automated information system to include information on rare habitat types, but it is not necessary to make that a requirement in this rule.

(a) *General considerations.* One commenter remarked that the proposed rule does not provide criteria, standards, or meaningful guidance to ensure that the district engineer will require mitigation that will protect water quality. Another commenter said that there should be sufficient flexibility in the final rule to support new approaches or strategies that meet the standards identified, but do not fall into one of the existing categories.

Water quality standards are more appropriately addressed through the water quality certification process under section 401 of the Clean Water Act. A district engineer can require water quality management measures as part of the overall compensatory mitigation package required for a particular DA permit. Even though this rule is focused on a watershed approach, it provides

flexibility for district engineers to use innovative approaches or strategies for determining more effective compensatory mitigation requirements that provide greater benefits for the aquatic environment. We have added to this section a provision that allows the district engineer, when evaluating compensatory mitigation options, to consider what would be environmentally preferable, taking into account the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their relative significance within the watershed, and the costs of the compensatory mitigation project.

One commenter stated that the economic cost of mitigation should not be a primary consideration when determining the amount, location, or type of compensatory mitigation required, and that reference to economic costs should be deleted from this section. Several commenters said that the district engineer should not be required to consider economic costs when assessing the success and sustainability of a mitigation project. Another commenter, however, recommended that the final rule require the district engineer to consider economic factors more comprehensively, including not only the economic cost of the compensatory mitigation, but also the full range of costs and benefits to society stemming from the loss of aquatic resources.

Economic costs are an important consideration when determining the practicability of a proposed compensatory mitigation project. In addition to economic costs, existing technology and logistics must also be considered. If a particular compensatory mitigation project is cost-prohibitive, then an alternative compensation project that is more practicable should be required. District engineers will also consider impacts to the public interest, including potential losses of aquatic resource functions and services, when evaluating permit applications and compensatory mitigation proposals, and determining appropriate and practicable compensatory mitigation requirements.

We have added § 332.3(a)(2) [§ 230.93(a)(2)] to provide clarification regarding the potential mechanisms for providing compensatory mitigation. It states that restoration should be the first option considered since the likelihood of success is greater. Restoration also helps reduce impacts to ecologically important uplands, such as mature forests, where compensatory mitigation activities may be proposed because of land availability. The 404(b)(1)

Guidelines prohibit discharges in areas where there may be other significant environmental consequences (see 40 CFR 230.10(a)).

Some commenters recommended that the rule allow compensatory mitigation projects on federal lands where state wildlife agencies lease management rights for fish and wildlife purposes. Others commenters suggested prohibiting compensatory mitigation projects on existing public conservation lands.

We have added § 332.3(a)(3) [§ 230.93(a)(3)], which was moved from § 332.8(a)(2) [§ 230.98(a)(2)] of the proposed rule. We have modified this paragraph to be generally applicable to all compensatory mitigation projects, not just mitigation banks. Compensatory mitigation projects may be located on federal lands, as long as those projects comply with the provisions of this part, including the site protection requirements in § 332.7(a)(4) [§ 230.97(a)(4)].

(b) *Type and location of compensatory mitigation.* Several commenters stated that the established order of preference in the proposed rule (i.e., mitigation bank credits; permittee-responsible mitigation in accordance with a watershed plan or watershed approach; on-site, in-kind permittee-responsible mitigation; and lastly, off-site, out-of-kind permittee-responsible mitigation) is too limiting and creates inefficiency. Many commenters stated that the proposed rule establishes a preference for mitigation banks, and some of these commenters argued that the preference for mitigation banks over in-lieu fee programs cannot be justified. One commenter suggested that this rule stipulate that mitigation banks should not necessarily represent a “first resort” to fulfilling mitigation requirements if there are on-site opportunities that are likely to provide greater ecological benefits. However, another commenter said that section 314 warrants a stronger preference for using approved mitigation banks.

We have substantially revised and reorganized this section of the final rule, and have provided flexibility for district engineers to make compensatory mitigation decisions based on what is environmentally preferable and is most likely to successfully provide the required compensatory mitigation. Sections 332.3(b)(2)–(6) [§ 230.93(b)(2)–(6)] present a preference hierarchy, which was developed through careful consideration of comments received in response to the proposed rule, as well as various studies on the different approaches for providing compensatory mitigation. The hierarchy is based on

administrative and environmental considerations, to reduce risk and uncertainty associated with compensatory mitigation projects, as well as temporal losses of aquatic resource functions and services. Reduction of risk and uncertainty associated with compensatory mitigation projects is achieved by favoring compensatory mitigation that is further along in the planning and approval process or will better support a watershed approach. Since there are time lags associated with all sources of compensatory mitigation (see the 2001 NRC Report), our focus is on reducing temporal losses to the extent practicable. Administrative considerations include the regulations governing mitigation banks, in-lieu fee programs, and permittee-responsible mitigation that are provided in this rule, as well as the timing of actions required for those sources of compensatory mitigation. Environmental considerations include the expected ecological benefits of third-party compensatory mitigation as well as independent studies that have shown that the ecological success of permittee-responsible mitigation is uneven. There have been few independent studies of the ecological success of mitigation banks and in-lieu fee programs, so we have no basis for establishing a preference based solely on third-party mitigation success.

Section 332.3(b)(1) [§ 230.93(b)(1)] discusses general principles for determining the appropriate type and location for compensatory mitigation projects. Some of these principles were taken from § 332.3(b)(4) [§ 230.93(b)(4)] of the proposed rule, which discussed the use of off-site and out-of-kind compensation. Since these basic principles should be applied earlier in the selection process, we have moved those provisions to § 332.3(a)(1) [§ 230.93(a)(1)] of the final rule. Paragraph (b)(1) of this section also states that the compensatory mitigation options provided in paragraphs (b)(2) through (b)(6) should be applied in the order they are given, to make it clear that this is a hierarchy from highest to lowest preference. It is important to understand that this is a preference hierarchy that does not override a district engineer's judgment as to what constitutes the most appropriate and practicable compensatory mitigation based on consideration of case-specific circumstances. In this paragraph, we have added a provision to address compensating for impacts to marine resources. This provision states that compensatory mitigation project sites

for marine resources should be located in the same marine ecological system as the impact site, citing reef complexes and littoral drift cells as examples of marine ecological systems. We have also added provisions indicating that compensation for impacts to aquatic resources in coastal watersheds should be located in a coastal watershed where practicable, and that mitigation projects should not be located where they will increase risks to aviation by attracting wildlife to areas where aircraft-wildlife strikes may occur (e.g., near airports).

Section 332.3(b)(2) [§ 230.93(b)(2)] establishes a preference for the use of mitigation bank credits if the mitigation bank has the appropriate number and resource type of credits available. This preference is based on the requirements in this rule: before credits can be sold or transferred to permittees the sponsor must have an approved instrument, as well as an approved mitigation plan and other assurances in place. Those other assurances are specified in the mitigation banking instrument and usually include securing the mitigation bank site, establishing financial assurances, and finalizing the appropriate site protection mechanisms. Because of these requirements for mitigation banks, there is generally less risk and uncertainty (and less temporal loss) than there is with in-lieu fee programs and permittee-responsibility. Because of the credit release schedule required for mitigation banks, there is some degree of demonstrated success in providing the compensatory mitigation. In addition, the planning and resources involved in developing and implementing a mitigation bank help provide greater assurance that the compensatory mitigation project will provide environmental benefits. However, district engineers can apply these considerations to other sources of compensatory mitigation to override the preference for mitigation bank credits. For example, the district engineer may authorize the use of released credits from an in-lieu fee program since the requirements for release of these credits are comparable to the requirements for release of credits from an approved mitigation bank. In a situation where the permittee has proposed to restore an outstanding resource, and has provided sufficient scientific and technical analysis to demonstrate that such a project will be successful, the district engineer may authorize the use of that compensatory mitigation project instead of mitigation bank credits.

If the permitted impacts are not in the service area of an approved mitigation bank, or are in the service area of an approved mitigation bank, but that

mitigation bank does not have the appropriate number and resource type of credits available, and an approved in-lieu fee program does not have appropriate released credits available, § 332.3(b)(3) [§ 230.93(b)(3)] establishes a preference for in-lieu fee program credits. In-lieu fee programs fall into the next level of the hierarchy because of the levels of planning and review they are required to perform as a result of this rule. In-lieu fee programs are required to develop a compensation planning framework that supports a watershed approach (see § 332.8(c) [§ 230.98(c)]). In-lieu fee programs can also bring substantial expertise to aquatic resource restoration and protection activities, and many in-lieu fee program sponsors are conservation organizations with an interest in long-term management of aquatic resources. This preference may be overridden by a high quality permittee-responsible mitigation project or one that is likely to meet performance standards before the in-lieu fee program sponsor fulfills his or her obligation for advance credits.

If an approved mitigation bank or in-lieu fee program cannot be used to provide the required compensatory mitigation, § 332.3(b)(4) establishes a preference for permittee-responsible mitigation conducted under a watershed approach. In cases where a watershed approach is not practicable for permittee-responsible mitigation, under § 332.3(b)(5) [§ 230.93(b)(5)] the district engineer should consider options for on-site and/or in-kind compensation to fulfill the compensatory mitigation requirements. The last option under the preference hierarchy is for permittee-responsible mitigation through off-site and/or out-of-kind compensatory mitigation (see § 332.3(b)(6) [§ 230.93(b)(6)]).

One commenter said the proposed rule seems excessively rigid, and the limited funds available to public agencies should be used to implement mitigation where it will be most cost-effective. One commenter said that wetland establishment should not be an acceptable form of wetland compensation, as it is too uncertain and has a bad track record. One commenter recommended that this section be re-organized to explain how the watershed approach should be applied to each mitigation location option.

Cost considerations may be used to evaluate whether the proposed compensatory mitigation requirement for a DA permit is practicable. However, the ecological success of the compensatory mitigation project and its effectiveness at offsetting the permitted impacts are also important

considerations. We recognize that wetland establishment may not be successful in many situations, so we have established a preference for restoration in § 332.3(a)(2) [§ 230.93(a)(2)]. The watershed approach is discussed in § 332.3(c) [§ 230.93(c)]. District engineers will apply the watershed approach to the extent practicable when considering compensatory mitigation options, as well as during the review and approval of instruments for mitigation banks and in-lieu fee programs.

The final rule states that compensatory mitigation decisions will be based on what is environmentally preferable, which, in a particular situation, might be on-site compensation. As discussed above, it provides a hierarchy of preferences for satisfying compensatory mitigation requirements for DA permits, starting with mitigation bank credits.

Many commenters supported eliminating the preference for in-kind and on-site compensatory mitigation. Most of these commenters said that compensatory mitigation requirements should be based on ecological criteria, as well as the likelihood of offsetting the permitted impacts, not on a preference for on-site mitigation. Some commenters noted that rigid rules favoring on-site compensation often yield small, poorly functioning compensatory mitigation projects. One commenter noted that federal agencies that review permit applications are often restricted from accepting more environmentally meaningful compensation proposals because of the preference for in-kind, on-site compensatory mitigation projects. Several other commenters, however, recommended that the final rule express a preference for on-site mitigation. Two commenters said that compensatory mitigation wetlands should be located as close as possible to the impacted wetlands, and should be the same wetland type. A few commenters suggested that on-site, in-kind mitigation should be preferred until substantive watershed-level plans are developed to guide compensatory mitigation decisions. Several commenters stated that off-site mitigation should only be considered if other forms of mitigation are likely to be ineffective, and several commenters requested clarification of the circumstances under which off-site or out-of-kind mitigation can be provided. A few commenters stated that district engineers needed to be provided direction for considering off-site mitigation.

We believe that compensatory mitigation requirements should be

guided by ecological and practicability considerations, to help ensure that the required compensation successfully fulfills its objective, to offset aquatic resource functions lost as a result of the permitted impacts. The watershed approach, as well as the other considerations provided in § 332.3 [§ 230.93] will help meet these objectives. Because of its poor record of ecological success, a preference for on-site mitigation cannot be justified. The final rule is supported by the findings of the 2001 NRC Report, which indicated that an automatic preference for on-site, in-kind compensatory mitigation is inconsistent with a watershed approach, since there are circumstances in which on-site or in-kind mitigation is neither practicable nor environmentally preferable. District engineers will use available tools and information to guide their decision-making regarding where compensatory mitigation projects should be located. As additional data are gathered, and new tools are developed, district engineers will use those items as appropriate.

A number of commenters agreed that it may be appropriate to replace certain aquatic resource functions on-site and other functions off-site and that this flexibility is a positive aspect of the rule. However, several commenters suggested that the rule should not allow a combination of off-site and on-site mitigation, as it is overly burdensome and would dilute the overall effectiveness of compensation. One commenter said that compensating for functions at different locations may create situations where each site is not fully functional. Two commenters stated that the rule should allow a single, permittee-sponsored mitigation project to compensate for the aquatic impacts of a linear facility, such as a transmission line, which may affect more than one watershed.

We believe that using a combination of on-site and off-site compensatory mitigation is often necessary or preferable to successfully offset the functions lost at the impact site. This is an important facet of a watershed approach to compensatory mitigation. To be effective, compensatory mitigation projects must be located in appropriate landscape settings. The off-site aquatic habitat restoration or establishment activities should provide the suite of functions performed by that habitat. The on-site mitigation will likely focus on effectively replacing specific functions, such as water quality or water quantity functions. Therefore, from a watershed perspective, there will likely be a net increase in aquatic

resource functions. In general, off-site compensatory mitigation will be located in the same watershed as the impact site. District engineers also have flexibility under this rule to allow compensation for linear projects to be conducted on one or multiple sites, based on environmentally preferable and practicable compensatory mitigation options.

A number of commenters expressed concern that an emphasis on off-site compensatory mitigation can lead to the transfer of wetland ecosystem services from urban to rural areas. Two commenters argued that unless the rule requires applicants to include a description of service values and benefits at the impact site and the compensatory mitigation project site, rural areas will benefit and urban populations will incur the costs. One commenter stated that recent and past studies indicate that the location of mitigation banks is dictated primarily by land costs rather than by sound scientific watershed principles.

We recognize that aquatic resources in urban settings can provide important functions and services, and we believe it is important that urban areas not become devoid of aquatic resources simply because it is more difficult to successfully restore or establish aquatic habitat in developed areas. Compensatory mitigation required by district engineers will be located in areas where it is appropriate and practicable to conduct successful aquatic resource restoration, establishment, and enhancement activities. In some cases, this will result in compensatory mitigation for impacts in urban areas to be conducted in more remote locations; in other cases, it may be appropriate to replace certain aquatic resources in urban areas. Site selection is a primary consideration for compensatory mitigation projects and district engineers will evaluate proposed mitigation projects, including mitigation banks, using the watershed approach to ensure that they contribute to the functions and sustainability of aquatic resources within a watershed. As discussed above, the use of a combination of on-site and off-site compensatory mitigation can be effective in retaining aquatic resource functions and services in urban areas.

(c) Watershed approach to compensatory mitigation. Many commenters supported use of a watershed approach for compensatory mitigation. One commenter said that consideration of watershed functions is an orderly, incremental next step to move section 404 permitting towards a watershed-based perspective. One

commenter stated that an ecosystem approach will result in a comprehensive package that best fits the landscape and its needs. Several commenters noted that the use of a watershed approach would increase the flexibility for compensatory mitigation and ensure a project's sustainability. Four commenters encouraged the Corps to use its funding to develop a general and flexible framework for consideration of landscape or watershed needs, rather than formal watershed plans.

We have retained the watershed approach in the final rule, with modifications made in response to specific comments. The watershed approach retains many of the recommendations from the 2001 NRC Report. While the watershed approach provides flexibility for identifying an appropriate compensatory mitigation project, as well as its location in the watershed, a main objective of the watershed approach is to maintain and improve the quantity and quality of wetlands and other aquatic resources in watersheds through strategic selection of compensatory mitigation project sites. As experience is gained in the use of the watershed approach, Corps districts will use that experience to improve decision-making for compensatory mitigation requirements.

One commenter suggested that use of a watershed approach be encouraged, but not required, and a few commenters asserted that the term "watershed approach" is too ambiguous to be a mandatory requirement. Many commenters recommended that the agencies not require use of the watershed approach until there is consensus on how watersheds are defined and the development of planning tools. One commenter said that a state, district, or county cannot be compelled to establish a watershed approach. One commenter stated that the language in § 332.3(c)(3) [§ 230.93(c)(3)] suggests that watershed approach will be taken on a project-by-project basis and contradicts the entire idea of a watershed approach. This commenter added that watershed studies should not be project-specific.

The watershed approach described in the proposed rule is intended to be a general framework for better decision-making for compensatory mitigation requirements for DA permits. The rule language needs to be flexible, so that district engineers can adapt the general framework to more effectively address aquatic resource needs in their regions. We have added a definition of the term "watershed" to § 332.2 [§ 230.92], but the appropriate watershed scale to use for the watershed approach will vary by

region, as well as the particular aquatic resources under consideration. There are a number of planning tools available for use with a watershed approach, and more will be developed as this rule is implemented and further experience is gained from using a watershed perspective. As stated in § 332.3(c)(1) [§ 230.93(c)(1)], the watershed approach is to be used to the extent appropriate and practicable. There will be situations, such as compensatory mitigation requirements for small impacts, where it would not be cost-effective to utilize a watershed approach. Since using a watershed approach is not appropriate in areas without watershed boundaries, such as marine waters, we have added a provision (§ 332.3(c)(2)(v) [§ 230.93(c)(2)(v)]) to clarify that other types of spatial scales may be more appropriate in those areas. This rule does not require the development of watershed studies on a project-by-project basis.

Several commenters supported the idea of a watershed and/or ecosystem approach but said that watershed plans should be prepared before permitted impacts can occur. A few commenters stated that many existing watershed plans are not comprehensive. One commenter noted that it will be difficult to implement the watershed approach in a meaningful way in the majority of developing watersheds that are without watershed plans. Several commenters requested that the rule stipulate that only mitigation banks that conform to approved watershed plans shall be approved by the district engineer and the IRT. Several commenters stated that, in the absence of a watershed plan, a watershed approach will lead to inappropriate mitigation and the cumulative loss of wetland functions. These commenters also noted that the proposed rule did not provide an incentive to undertake real watershed planning, and recommended that the agencies develop criteria and standards for watershed plans that incorporate the recommendations of the National Research Council and the elements of watershed plans discussed in the rule.

As with the 2001 NRC Report, the watershed approach described in this final rule does not require a formal watershed plan. The watershed approach may be based on a structured consideration of watershed needs and how wetlands and other types of aquatic resources in specific locations will address those needs. We realize that in many areas, watershed plans appropriate for use in planning compensatory mitigation activities have not been developed. Although it would

be desirable to have watershed plans designed to more fully support a watershed approach, we believe that a watershed approach can be effectively implemented without watershed plans. Mitigation banks can support a watershed approach without using watershed plans. There are different types of watershed plans that could be developed for purposes other than aquatic resource restoration, establishment, enhancement, and/or preservation activities. For example, some watershed plans are conceived to guide development activities or the placement of storm water infrastructure. Therefore, we have modified § 332.3(c)(1) [§ 230.93(c)(1)] to state that the district engineer will determine whether a watershed plan is appropriate for use in the watershed approach for compensatory mitigation. The final rule does not provide disincentives to develop watershed plans. District engineers are encouraged to work with other government agencies and stakeholders to develop watershed plans to support decision-making in the Corps Regulatory Program, but we also recognize that the development of watershed plans is resource-intensive, and may not be feasible in many areas. Criteria and standards for developing watershed plans appropriate for use in the Corps Regulatory Program may be established at a later time.

Some commenters stated that it is unclear how the watershed approach will be implemented in the absence of a watershed plan. One commenter stated that most watershed management plans are relatively small in scope relative to an economically sustainable service area, and therefore using such plans can thwart regional water quality needs. Others argued that the government, not permit applicants, should develop watershed plans, because most applicants lack the time and resources needed to develop those plans. One commenter said that watershed plans vary considerably from region to region and are usually unable to support evaluations of compensatory mitigation needs. This commenter recommended that EPA and the Corps establish a certification process to assure the format and information content of watershed plans is sufficient to meet the intent of the proposed rule.

To implement a watershed approach in the absence of a watershed plan, district engineers will utilize the considerations specified in § 332.3(c)(2) [§ 230.93(c)(2)] and available information on watershed conditions and needs, as discussed in § 332.3(c)(3) [§ 230.93(c)(3)]. Although many of the watershed plans that have been

developed in the past focus on small watersheds, water quality considerations can be effectively addressed through a watershed approach without relying on watershed plans. Most watershed plans will be developed through collaboration among federal, tribal, state, and local government agencies, as well as non-governmental organizations, landowners, and various other stakeholders. This rule does not require the development of watershed plans by permit applicants. As discussed above, the district engineer will determine whether an existing watershed plan is appropriate for use in a watershed approach for compensatory mitigation. We do not believe it is necessary to establish a certification process for appropriate watershed plans.

Commenters requested clarification regarding watershed parameters, interstate watersheds, the effect the watershed approach will have on section 404 permitting, and the definitions of watershed and watershed approach. A few commenters cited the high cost of obtaining data for a watershed approach and the difficulties in developing watershed plans. Many commenters recommended additional considerations to be included in the watershed approach. These considerations include the following: (1) Potential wetland landscape function; (2) aquatic resources in an ecosystem context; (3) decisions regarding mitigation for aquatic resources that take into account the needs of the ecosystem as a whole, including mitigation priorities for other resources, such as endangered species; (4) interactions and habitat connectivity; (5) inventory of historic as well as existing aquatic resources and conditions; (6) social values; (7) provision of adequate and suitable on-site storm water management; (8) consideration of aquatic resource problems and risks, and specific opportunities for addressing those problems and risks; and (9) evaluation of functions of the current wetland landscape.

Appropriate watershed parameters for use in a watershed approach will be determined by district engineers for their regions of responsibility. District engineers may consult with other agencies and other interested parties to identify watershed parameters that should be used. The intended effect of implementing a watershed approach to compensatory mitigation is to improve the success and effectiveness of aquatic resource restoration, establishment, enhancement, and/or preservation required by DA permits, and to maintain and improve aquatic resource functions

and services within watersheds. The terms “watershed” and “watershed approach” have been defined at § 332.2 [§ 230.92]. If an appropriate watershed plan is not available, district engineers are to use a watershed approach based on analysis of available information (see § 332.3(c)(3)(i) [§ 230.93(c)(3)(i)]). Permit applicants are not required to incur substantial costs to provide information for the watershed approach. The nine considerations provided in the previous paragraph are already addressed through various provisions in this rule. For example, social values are considered as ecosystem services. We have added a sentence to § 332.3(c)(2)(iv) [§ 230.93(c)(2)(iv)] (§ 332.3(c)(2)(ii) [§ 230.93(c)(2)(ii)] in the proposed rule) to state that the identification and prioritization of resource needs should be as specific as possible, to enhance the use of the watershed approach. We have also added a provision to this section which states that a watershed approach may include on-site compensatory mitigation, off-site compensatory mitigation, or a combination of on-site and off-site compensatory mitigation (see § 332.3(c)(2)(iii) [§ 230.93(c)(2)(iii)]).

Many commenters did not believe that the rule should specify minimum information requirements for use of the watershed approach to compensatory mitigation site selection. Several commenters said that this would place an undue burden on the regulated community and the agencies, especially if the information is not available, and could potentially delay the issuance of permits or the implementation of mitigation plans. Others expressed concern that, because the minimum information mentioned in the preamble is not currently available in many areas, a requirement for such information would limit the use of a watershed approach. Some commenters argued that the rule should not rely on only the applicants to provide supporting data for a watershed approach. Several commenters supported the inclusion of minimal information requirements. One commenter noted that these requirements are necessary to establish a consistent and scientifically defensible method of using the watershed approach. One commenter suggested that the requirements be based on information generally known to be available for most watersheds. Other commenters argued that all projects regardless of size should be subject to the requirement for additional information.

We have revised § 332.3(c)(3) [§ 230.93(c)(3)] to clarify the information

that the district engineers should use as the basis for a watershed approach, and to identify potential sources for such information. While there is no bright line for the minimum amount of information needed to support a watershed approach, the final rule identifies information that is generally needed to implement a watershed approach effectively. That information will address watershed conditions and needs, and should include potential sites (as well as priority sites) for compensatory mitigation projects. We have indicated that appropriate information may be available from sources such as wetland maps, soil surveys, aerial photographs, local ecological reports, etc. In § 332.3(c)(3)(iii) [§ 230.93(c)(3)(iii)], we state that the level of information and analysis must be commensurate with the scope and scale of the proposed impacts that require a DA permit, as well as the functions lost as a result of those impacts. Larger projects will generally warrant greater investment in information gathering to ensure proper consideration of watershed factors in the selection of appropriate compensatory mitigation.

(d) Site selection. One commenter stated that the proposed site selection criteria are well-defined and appropriate. Another commenter said that the criteria were too broad. One commenter stated that the rule should require the district engineer to deny the use of compensatory mitigation project sites that are not ecologically suitable. Two commenters suggested that site selection criteria should consider species that should be present or have access to the compensatory mitigation project site. Another commenter noted that the proposed rule provides end goals of a site selection process but does not provide details concerning how these goals would be met. One commenter stated that requirements that further limit compensatory mitigation site selection would be overly burdensome. Two commenters expressed concern that mitigation banks would be prohibited near airports. One commenter recommended that the agencies discourage compensatory mitigation projects on public lands as these tend to result in a loss of wetlands accompanied only by some limited improvement in lands already set aside for conservation purposes.

This provision provides site criteria that district engineers must consider, to the extent practicable, to help determine whether a proposed compensatory mitigation project site will be suitable for successfully replacing lost aquatic resource functions. They are general

considerations, since it is impractical to provide a comprehensive list that accounts for different regions across the country. If a proposed compensatory mitigation project site is determined to be unsuitable, then other sites ought to be considered. Section 332.3(d)(1)(vi) [§ 230.93(d)(1)(vi)] includes consideration of habitats for species of interest. In some cases, selecting an appropriate compensatory mitigation project site will be an iterative process, so that the most suitable site for achieving as many objectives as possible can be found. The intent of § 332.3(d) [§ 230.93(d)] is to assist in site selection that will support ecologically successful and sustainable compensatory mitigation projects. As discussed in the preamble to the proposed rule, locating compensatory mitigation projects (including mitigation banks) near airports is likely to attract wildlife species and pose hazards to aviation. This does not mean that no compensatory mitigation projects can be located near any airport; it means that compatibility with existing facilities must be considered. We believe it is appropriate, in some instances, to site compensatory mitigation projects on public lands, where they are consistent with the use and management of the public land, and the credits are based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place.

(e) Mitigation type. Many commenters recommended that the rule retain a preference for in-kind mitigation. Several commenters stated that out-of-kind mitigation does not address the specific functions, services, or values of the resource being impacted. Several commenters said that the current preference for on-site, in-kind mitigation should be continued until substantive watershed-level plans are developed to guide compensatory mitigation activities, and one commenter noted that the proposed rule appears to allow the district engineer to accept out-of-kind mitigation without determining if it serves the needs of the watershed. One commenter was concerned that the rule has loosened the definition of in-kind to allow more flexibility, which would lead to a more relaxed mitigation approach, and other commenters noted that a broad application of “out-of-kind” would allow the replacement of a wetland with a stream habitat or vice versa.

The final rule retains a preference for in-kind mitigation. As defined in § 332.2 [§ 230.92], the term “in-kind” refers to similar structural and functional types.

However, we would like to clarify that in-kind mitigation does not mean compensating for impacts to degraded aquatic resources by providing degraded compensatory mitigation projects. A compensatory mitigation project should result in high quality aquatic resources that provide optimum functions within its landscape context, taking into account unavoidable constraints.

We have modified the example in § 332.3(e)(2) [§ 230.93(e)(2)] to provide clarification as to what constitutes in-kind mitigation in terms of aquatic resource type. The revised example states that tidal wetlands are most likely to compensate for unavoidable impacts to tidal wetlands. Perennial streams are used as the other example of in-kind mitigation. Although out-of-kind mitigation may not offset all aquatic resource functions and services provided by the aquatic resource being affected by the permitted activity, out-of-kind mitigation may be important for restoring or improving watersheds, especially in cases where certain aquatic resource types have been disproportionately lost from a watershed (see the 2001 NRC Report). It is not necessary to develop watershed plans to allow out-of-kind mitigation, but watershed factors need to be considered. Section 332.3(e)(2) [§ 230.93(e)(2)] requires district engineers to document the basis for requiring out-of-kind mitigation in the administrative record for the permit action.

Several commenters supported the provision in the proposed rule that allows for out-of-kind compensation, and one commenter said that out-of-kind mitigation should be used when it is “environmentally preferable” to in-kind mitigation. A number of commenters requested further guidance on when out-of-kind mitigation is appropriate and a more definitive and transparent list of “factors” to be considered when proposing or evaluating out-of-kind mitigation. One commenter noted that the rule as proposed does not limit the types of projects that could be authorized as compensatory mitigation for permanent stream losses. Another commenter suggested that stream mitigation should only be appropriate compensation for wetland impacts in limited situations. One commenter expressed concern that the requirements in the proposed rule will make it difficult to provide in-kind compensation for losses of ephemeral channels.

The final rule states that district engineers can require the use of out-of-kind compensatory mitigation when he or she determines that it will serve the

aquatic resource needs of the watershed. In addition, § 332.3(a)(1) [§ 230.93(a)(1)] states that, when evaluating compensatory mitigation options, the district engineer will consider what is environmentally preferable. This includes consideration of in-kind versus out-of-kind mitigation. District engineers will determine on a case-by-case basis if out-of-kind mitigation would be more appropriate for offsetting the losses of aquatic resource functions caused by the permitted impacts. In this rule, it would not be appropriate to list factors for consideration, since these are likely to vary by geographic region and by watershed. District engineers will determine appropriate and practicable compensatory mitigation requirements for permanent losses of streams. Unless there are case-specific watershed considerations that warrant out-of-kind mitigation for stream impacts, district engineers will generally require stream restoration, enhancement, or preservation activities to provide required compensatory mitigation for permitted impacts to streams. The appropriateness and practicability of requiring in-kind compensation for permitted losses of ephemeral streams will be determined by district engineers on a case-by-case basis.

One commenter recommended that the rule specify the types of compensatory mitigation activities that are preferred. This commenter said that re-establishment should be the preferred method of mitigation and that establishment should be rarely accepted. Another commenter stated that the proposal places full discretion with the district engineer for making determinations of what type of compensatory mitigation might be most appropriate in any given scenario.

Preferred compensatory mitigation activities in terms of what would be best for the aquatic environment, including a particular watershed, will be determined by the district engineer on a case-by-case basis. We have added a new paragraph at § 332.3(a)(2) [§ 230.93(a)(2)], which states that restoration should be the first option considered for providing compensatory mitigation. Aquatic resource establishment may be acceptable after considering the likelihood of success of a particular compensatory mitigation project, including the suitability of the proposed site to satisfy the objectives of the compensatory mitigation project after that project is fully implemented. The final rule retains the discretion of the district engineer to determine the appropriateness and practicability of any compensatory mitigation required for DA permits.

Three commenters supported adding a provision which states that district engineers should not permit out-of-kind mitigation for rare or hard to replace wetlands. Two commenters also stated that such a provision would eliminate compensatory mitigation for those habitat types that are not the easiest to recreate or those that would not have a relatively high likelihood of success. Some commenters objected to the inclusion of "relative likelihood of success in establishing different habitat types" as it allows impacts to higher quality, difficult-to-replace wetlands (e.g., fens or forested wetlands), without requiring their replacement. One commenter added that meeting ecological needs should take priority over the likelihood of a compensatory mitigation project's success. One commenter noted that a strict preference for on-site, in-kind mitigation often results in compensatory mitigation projects that have relatively little ecological value, are more difficult to establish, and are less likely to be sustained over the long term.

To reduce losses of difficult-to-replace aquatic resources, we have added § 332.3(e)(3) [§ 230.93(e)(3)] which states that, in cases where further avoidance and minimization is not practicable, the required compensatory mitigation must be provided through in-kind rehabilitation, enhancement or preservation to the extent practicable. When evaluating a request for a section 404 permit for an activity that would result in the loss of a difficult-to-replace aquatic resource, the district engineer will determine whether the proposed activity fully complies with the 404(b)(1) Guidelines, including requirements to avoid and minimize impacts to those resources to the maximum extent practicable and to consider alternatives. The likelihood of success must be considered when evaluating compensatory mitigation proposal. If the potential for successfully satisfying the objectives of a compensatory mitigation project is low, then an alternative compensatory mitigation project with a higher likelihood of success should be required instead. There will always be some risk and uncertainty associated with compensatory mitigation projects, but risks and uncertainties need to be minimized as much as possible so that the objectives of those projects will be achieved.

A few other commenters suggested that the rule specify that the credit or ratio authorized for out-of-kind mitigation be equivalent across mitigation providers. Two commenters recommended that stream credits be

treated the same as wetlands credits in the rule.

Appropriate compensation ratios will be determined by district engineers on a case-by-case basis (see § 332.3(f) [§ 230.93(f)]). District engineers will determine the appropriate units of measure for wetland and stream credits.

(f) *Amount of compensatory mitigation.* Some commenters agreed with the minimum mitigation ratio in the proposed rule. Many commenters argued that the suggested baseline mitigation ratio of one-to-one in the proposed rule is not conservative enough, and is not scientifically defensible given the high documented rate of failure or under-performance of many mitigation sites. A considerable number of these commenters also argued that mitigation should never be at a ratio that is less than one-to-one. One commenter suggested that a 1.5 to 1 ratio would be a better minimum ratio and would reasonably account for expected failures. One commenter stated that the rule gives the district engineer too much discretion to decide on the replacement ratio.

We have modified § 332.3(f)(1) [§ 230.93(f)(1)] to clarify that, in cases where the district engineer determines that compensatory mitigation is required to offset unavoidable impacts to aquatic resources, the amount of compensatory mitigation must be, to the extent appropriate and practicable, sufficient to replace lost aquatic resource functions. With this rule, we are encouraging the use of functional and condition assessments to determine the appropriate amount of compensatory mitigation needed to offset authorized impacts, instead of relying primarily on surrogate measures such as acres and linear feet. In the future, there will be more assessment methods available to quantify impacts and compensatory mitigation. We recognize that, in some cases, it may not be appropriate and practicable to require full replacement of aquatic resource functions. This paragraph also states that in cases where functional or condition assessments or other suitable metrics are not used, a minimum one-to-one acreage or linear foot compensation ratio must be used. The latter provision will help ensure that an equivalent area or length of aquatic habitat will be used to provide compensatory mitigation, to help offset aquatic resource losses that will occur as a result of the permitted activity. When determining the appropriate compensation ratio in the absence of a functional or condition assessment method, it is necessary to rely on other metrics, such as area and linear

measures. In this rule, a baseline ratio greater than one-to-one cannot be justified because of the uncertainties surrounding impact and compensatory mitigation sites. Those uncertainties must be accounted for on a case-by-case basis by district engineers. Most aquatic resources likely to be impacted by activities that require DA permits are degraded to some degree. District engineers can only require an amount of compensatory mitigation that is roughly proportional with the permitted impacts, so that it is sufficient to offset those lost aquatic resource functions. Only in cases where a functional or condition assessment or other suitable metric is used can the district engineer require less than one-to-one compensation on an acreage or linear foot basis. Even in cases where functional or condition assessment methods are used, these will not usually result in less than one-to-one ratios, because of the other factors (uncertainty, temporal loss) that must be considered.

A few commenters noted said there is no scientific basis for a replacement ratio based on linear feet. According to these commenters, compensatory mitigation credits and debits must be based on the net gain or loss of stream functions, not stream length. Several commenters argued that the use of a required minimum replacement ratio in the absence of a functional assessment is too inflexible for stream mitigation. One commenter supported efforts to achieve a one-to-one replacement ratio in stream mitigation. Another commenter argued that a one-to-one minimum replacement ratio would be too inflexible and that, in some instances, stream restoration is better handled by other means (e.g., rotational grazing and livestock exclusion).

The use of linear feet may be more appropriate for determining compensatory mitigation amounts for aquatic resources that are more linear in nature, such as streams. District engineers retain the discretion to quantify stream impacts and required compensatory mitigation in terms of area or other appropriate units of measure. Where they are available and appropriate for use, we encourage the use of functional and condition assessments to quantify debits and credits for stream impacts and compensation. The amount of required stream compensatory mitigation is dependent on the method of providing the compensation, as well as other factors (see § 332.3(f)(2) [§ 230.93(f)(2)]).

Many commenters requested further guidance as to when functional assessments should be used to determine the required amount of

compensatory mitigation. A few commenters stated that there could be situations where a functional assessment is inappropriate or not needed (e.g., temporary impacts to unvegetated waters). Commenters also requested clarification as to whether a preferred assessment method would be specified in the final rule, if the district engineer will perform these assessments, and how the Corps planned to reconcile differences in opinion regarding functional assessments. While some commenters supported the use of functional assessments, others recommended retaining replacement ratios based on area until there is an approved model for accurate functional assessment. According to one commenter, functional assessment methods and mitigation ratios should be determined with input or consensus from the regulated community. One commenter said that use of a functional assessment methodology should never result in less mitigation than the amount of acreage or linear footage impacted. However, several commenters urged the agencies to insert language into the rule that would provide district engineers with explicit guidelines to allow for mitigation ratios of less than one-to-one where appropriate.

Functional assessments will be used to determine compensatory mitigation amounts in cases where such methods are available, appropriate, and practicable for use. There are on-going efforts to develop and refine functional assessment methods and other science-based assessment tools. If appropriate functional assessment methods are not available, or if it is not practicable to use the appropriate and available functional assessment method for a particular project, then other appropriate metrics are to be used. We have modified § 332.3(f)(1) [§ 230.93(f)(1)] to include the use of condition assessment methods and other appropriate metrics for determining the amount of compensatory mitigation that is to be required for DA permits. Condition assessments are typically based on indices of biological integrity. District engineers will determine on a case-by-case basis whether a particular functional or condition assessment method is appropriate and practicable for calculating compensatory mitigation amounts for DA permits. District engineers may consult with the regulated public and other stakeholders on the appropriateness of using existing functional or condition assessment methods in a particular region, or for certain types of aquatic resources, but

the district engineer retains responsibility for the final decision as to how much mitigation will be required and how it is determined.

Since functional assessments typically provide quantitative measures of specific functions performed by an impact site, and expected functions to be provided by the compensatory mitigation project site, there may be cases where the compensatory mitigation project site is expected to provide higher levels of functions than the impact site, especially if the impact site is substantially degraded. Where quantitative measures are used, there needs to be flexibility to ensure that the required compensatory mitigation is roughly proportional to the permitted impacts.

In § 332.3(f)(2) [§ 230.93(f)(2)], we have added “likelihood of success” and “the distance between the affected aquatic resource and the compensation site” to the list of factors to be considered by district engineers when determining the appropriate amount of compensatory mitigation for permitted impacts. We have also added a new § 332.3(f)(3) [§ 230.93(f)(3)], to state that in cases where an in-lieu fee program will be used to provide the required compensatory mitigation, and advance credits will be used to provide that compensatory mitigation, the district engineer must require additional compensatory mitigation to account for the risk and uncertainty associated with in-lieu fee projects that have not yet been implemented. Finally we note that, while temporal loss must also be considered in determining mitigation ratios, the definition of “temporal loss” in § 332.2 [§ 230.92] specifies that district engineers may determine that additional compensation for temporal loss is not required if the mitigation is initiated prior to or concurrent with the permitted impacts, except for resources with long development times (e.g., forested wetlands).

(g) *Use of mitigation banks and in-lieu fee programs.* Two commenters supported the use of mitigation banks for all DA authorizations. One commenter requested clarification on whether mitigation banks could provide compensatory mitigation for all types of mitigation requirements. A few commenters stated that mitigation banks should not be used to provide compensation for after-the-fact permits until all appropriate federal, state and local enforcement conditions are met, and that compensatory mitigation should not be allowed instead of restoration if the activity would not have been eligible for a DA permit. Another commenter suggested that

ratios for after-the-fact permits should be higher. Another commenter said that mitigation banks should only be used in after-the-fact permits with a debit penalty.

Since the final rule includes in-lieu fee programs as a source of compensatory mitigation, we have modified this paragraph to include both mitigation banks and in-lieu fee programs. We have also modified this paragraph to refer to the preference hierarchy provided in § 332.3(b) [§ 230.93(b)]. Mitigation banks and in-lieu fee programs may be used to compensate for impacts to aquatic resources authorized by general permits and individual permits, including after-the-fact permits. Corps enforcement actions will be handled in accordance with the regulations at 33 CFR part 326, which stipulate when after-the-fact permit applications will be accepted. If the district engineer determines that compensatory mitigation is necessary, he will determine the appropriate ratio based on what is required to compensate for the aquatic resources.

Two commenters said that the provision stating that mitigation banks may also be used to satisfy requirements arising out of an enforcement action, such as supplemental environmental projects, should be included in 33 CFR 332.3(g). One commenter said that mitigation banks should be used to resolve violations.

The Corps does not have the authority to require supplemental environmental projects to resolve Clean Water Act violations. EPA has a Supplemental Environmental Projects (SEP) Policy that allows the Agency to consider projects proposed by violators to mitigate the penalties assessed for violations of the CWA. Mitigation banks and in-lieu fee programs can qualify as these types of projects if they meet the basic requirements of the Agency’s SEP Policy.

(h) *Preservation.* Many commenters supported the use of preservation as a form of compensatory mitigation. Several commenters said that preservation is needed in urban and coastal areas. Other commenters stated that preservation is important to sustainable ecosystems and to protect watershed health. Several commenters recommended that the rule require the use of a permanent legal instrument to ensure the protection of the preserved site. Several additional commenters argued that compensation ratios should be greater than one-to-one for preservation mitigation projects. Some commenters supported a requirement that any use of preservation should be the result of a watershed plan or a

watershed approach. One commenter said that the requirement for the preserved resource to “contribute to the ecological sustainability of the watershed” is too vague.

The 2001 NRC Report stated that wetland preservation is an important tool for maintaining wetland diversity in a watershed, and achieving the goals of the Clean Water Act in that watershed. Preservation is particularly valuable for protecting unique, rare, or difficult-to-replace aquatic resources, such as bogs, fens, and streams, and may be the most appropriate form of compensatory mitigation for those resources. We recognize that wetland preservation does not, in the short term, result in new wetland resources and thus contribute to the “no overall net loss” goal, but over longer time periods preservation helps reduce wetland losses by removing the protected wetlands from the pool of wetlands that may be subject to future development activities that require DA permits. Aquatic resource preservation, when combined with restoration or establishment activities, can provide important aquatic services in a watershed. Section 332.3(h)(1)(v) [§ 230.93(h)(1)(v)] requires the site containing the preserved resources to be permanently protected through appropriate instruments.

Decisions on whether to allow preservation as part of a compensatory mitigation package will be made by the district engineer, based, to the extent appropriate and practicable, on the watershed approach. We have modified § 332.3(h)(1) [§ 230.93(h)(1)] to clarify that all five criteria must be met for preservation to be used as compensatory mitigation for DA permits. We have also modified § 332.3(h)(1)(ii) [§ 230.93(h)(1)(ii)] to state that the resources to be preserved must provide a significant contributory to the ecological sustainability of the watershed. In determining whether this requirement is met, the district engineer may also consider whether the resource to be preserved is unique, rare, or hard to replace. To support compliance with that requirement, this provision also requires the district engineer to use appropriate quantitative assessment tools, in cases where such tools are available. The district engineer will also decide whether a proposed preservation site contributes to ecological sustainability of the watershed, based on case-specific factors.

Many commenters stated that preservation alone is not an acceptable form of compensatory mitigation and preservation does not promote “no net loss” of wetlands. Several commenters

said that preservation and enhancement should only be used to augment aquatic resource restoration and establishment. Other commenters recommended that only a small percentage of credits for a particular compensatory mitigation project should be given for preservation and only when it is used in conjunction with restoration, enhancement, and/or establishment.

As stated in § 332.3(h)(2) [§ 230.93(h)(2)], preservation will be provided in conjunction with aquatic resource restoration, establishment, and/or enhancement activities, unless the district engineer waives this requirement in a situation where preservation has been identified as a high priority using a watershed approach. If the district engineer makes such a waiver, a higher compensation ratio shall be required. For each mitigation bank and in-lieu fee project involving preservation, the district engineer, in consultation with the IRT, will determine the number of credits that will result from that preservation activity.

(i) *Buffers.* Many commenters agreed that upland buffers and riparian areas should be used as compensatory mitigation. Several commenters stated that buffers should be required for all compensatory mitigation projects. Some commenters noted that uplands and buffers play important roles in wetland and stream mitigation banks and are an integral part of a compensatory mitigation project's functions and values. One commenter said that buffers should not be used to generate compensatory mitigation credits unless they contribute substantially to habitat connectivity. A number of commenters said that buffers should not be used as compensatory mitigation.

Upland buffers and non-wetland riparian areas can provide substantial contributions to the ecological sustainability of aquatic resources within watersheds. These areas may also be critical to the success of aquatic resource restoration, establishment, enhancement, and preservation activities. It is not feasible to require buffers for all compensatory mitigation projects; such decisions need to be made by district engineers on a case-by-case basis. We have added a sentence to § 332.3(i) [§ 230.93(i)] to clarify that buffers may provide habitat or corridors necessary for the ecological functioning of aquatic resources.

One commenter said that the final rule should allow credit for riparian and upland areas that serve as the principal or sole compensatory mitigation in certain circumstances (*e.g.*, in arid regions in the western United States).

Some commenters suggested that adjacent upland habitat should not be counted separately for compensatory mitigation credit, unless a minimum one-to-one ratio of wetland restoration or establishment is provided. Three commenters requested guidance that explains how and when buffers could be used to provide compensatory mitigation credit.

We have added a sentence to § 332.3(i) [§ 230.93(i)] to clarify that in cases where buffers are required by the district engineer as part of a compensatory mitigation project, compensatory mitigation credit will be provided for those buffers. In most cases, the required buffers will supplement aquatic resource restoration, establishment, enhancement, and/or preservation activities. To qualify as providing compensatory mitigation credit, adjacent upland habitat must contribute to the long-term viability of the adjoining aquatic resources. District engineers will determine on a case-by-case basis whether buffers are necessary components of compensatory mitigation projects.

(j) *Relationship to other federal, tribal, state, and local programs.* Several commenters requested clarification regarding the relationship between compensatory mitigation undertaken for purposes of compensating for losses under the Corps Regulatory Program and mitigation actions taken under other federal, state, or local programs. Many commenters said that the same compensatory mitigation project site or mitigation bank should satisfy all sets of statutory requirements without the need for additional compensatory mitigation required by the Corps, as long as the functions provided through compensatory mitigation under each statute are the same or complementary. One commenter noted that the rule should recognize that compensatory mitigation, including compensation provided by mitigation banks, may be designed to comprehensively address requirements under multiple programs and authorities for the same activity. Another commenter stated that this provision is contrary to the intent of the statute that the regulations should maximize opportunities for mitigation credits. Other commenters, however, supported this provision of the proposed rule.

Compensatory mitigation projects used to fulfill the compensation requirements for DA permits may be used to satisfy the environmental requirements for other programs, such as wetlands regulatory programs administered by tribal, state, and local

governments. In cases where tribal, state, or local governments regulate similar activities to those regulated by the Corps, compensatory mitigation projects may be designed to fulfill all applicable compensation requirements. For example, a surface coal mining activity that requires authorization under section 404 of the Clean Water Act and the Surface Mining Control and Reclamation Act (SMCRA) may offset environmental losses through a compensatory mitigation project that is designed to satisfy the requirements of both statutes. Also, mitigation banks and in-lieu fee programs that are developed for the purposes of providing compensatory mitigation under the Corps Regulatory Program may also be used to provide compensatory mitigation for Corps Civil Works projects (see section 2036(c) of the 2007 Water Resources Development Act) or activities conducted on military installations (see 10 U.S.C. 2694b).

We have revised § 332.3(j) [§ 230.93(j)] by subdividing it into several paragraphs to make it easier to read. In § 332.3(j)(1) [§ 230.93(j)(1)], we have replaced the phrase “compensate for environmental impacts authorized under” with the phrase “satisfy the environmental requirements of” to clarify that a single compensatory mitigation project can be used to satisfy the requirements of more than one law. We have replaced the reference to the National Pollutant Discharge Elimination System Program (NPDES) with the phrase “other federal programs such as the Surface Mining Control and Reclamation Act” since activities authorized under the NPDES do not generally require compensatory mitigation. A coal mining project that requires authorization under both section 404 of the Clean Water Act and SMCRA can often satisfy the compensatory mitigation requirements for both authorizations through a single compensatory mitigation project.

Section 332.3(j) [§ 230.93(j)] is not contrary to section 314. It requires accounting for the use of compensatory mitigation credits. It does not limit production of compensatory mitigation credits; instead, it prevents the same credits from being used for different projects.

In § 332.3(j)(1)(i) [§ 230.93(j)(1)(i)], we have modified the rule language to state that the compensatory mitigation project must include appropriate compensation required by the DA permit. This is intended to address situations where a compensatory mitigation project may be designed to address the environmental requirements of both the DA permit and other permits issued by other federal,

tribal, state, or local agencies. In such cases, the additional environmental benefits required through those other permits could be satisfied by other components of the compensation project.

In the revisions to § 332.3(j)(1)(ii) [§ 230.93(j)(1)(ii)], we are clarifying that the same credits can not be used to provide mitigation for more than one permitted activity. We are also clarifying that in-lieu fee programs can be designed to holistically address requirements under multiple programs and authorities. We have added § 332.3(j)(3) [§ 230.93(j)(3)] to clarify that compensatory mitigation projects can also be designed to satisfy the mitigation requirements of the Endangered Species Act, as long as they comply with the requirements of this section.

One commenter noted that the proposed rule does not recognize the inherent ability of many of these programs to provide the necessary financial incentives for landowners to restore and enhance their wetlands and wildlife habitat as part of a larger resource management plan for their lands in the hopes of garnering future compensatory mitigation credits. Two commenters agreed with the provision in the proposed rule that stipulates that projects undertaken with federal funds should not be used to generate mitigation credits. Two commenters disagreed with this proposed provision. One commenter stated that the agencies should retain flexibility in managing these landscapes and promote creativity in assigning credits for large-scale mitigation banks that offer a variety of ecosystem services beyond wetlands replacement.

Section 332.3(j)(2) [§ 230.93(j)(2)] has been made into a separate paragraph to address situations where federal funding is provided for wetland conservation projects. In cases where a landowner has taken advantage of financial incentives to restore or enhance wetlands on their property, that landowner can also produce compensatory mitigation credits that can be used for DA permits, as long as those credits are the result of supplemental ecological improvements. In other words, the ecological improvements that result from the financial incentives provided to the landowner cannot be used to satisfy compensatory mitigation requirements of DA permits, but additional ecological improvements involving aquatic resource restoration, establishment, enhancement, and/or preservation may be used as compensatory mitigation for DA permits, provided these additional

improvements were not part of the requirements for obtaining the financial incentives. For example, if a federal program has a 50% landowner match requirement, neither the federally funded portion of the project, nor the landowner's 50% match, which is part of the requirements for obtaining federal funding, may be used for compensatory mitigation credits. However, if the landowner provides a greater than 50% match, any improvements provided by the landowner over and above those required for federal funding could be used as compensatory mitigation credits. Note however that in order to sell credits to a third party, a landowner must have an approved mitigation banking instrument. The final rule provides flexibility for managing landscapes to produce a variety of ecological functions and services, but the rule also requires careful accounting of any credits that are produced.

(k) Permit conditions. Many commenters supported the provision in the proposed rule that calls for compensatory mitigation requirements to be included as enforceable conditions of DA permits. One commenter stated that performance standards should be mandatory and enforceable permit components. One commenter stated that financial assurances should be included in the DA permit. Another commenter requested clarification of whether the term “describe” means to provide an overview of the proposed mechanism for financing a compensatory mitigation project or whether the intent is to give Corps the right to review and/or approve a final draft legal instrument.

We have substantially revised this section to clarify the requirements for special conditions for individual permits requiring permittee-responsible mitigation (§ 332.3(k)(2) [§ 230.93(k)(2)]), requirements for special conditions for general permits requiring permittee-responsible mitigation (§ 332.3(k)(3) [§ 230.93(k)(3)]), and the use of mitigation banks and in-lieu fee programs (§ 332.3(k)(4) [§ 230.93(k)(4)]). For individual permits that require permittee-responsible mitigation, the special conditions must identify who is responsible for providing the compensatory mitigation, incorporate by reference the approved mitigation plan, state the objectives and substantive requirements of the compensatory mitigation project, and describe any required financial assurances or long-term management. For general permit authorizations that require permittee-responsible mitigation, the special conditions must describe the compensatory mitigation proposal,

require district engineer approval of a final mitigation plan before commencing work in waters of the United States (unless exceptions are granted), and address, as appropriate, the requirements of § 332.3(k)(2) [§ 230.93(k)(2)]. Examples of situations where the district engineer may waive the requirement to approve a final mitigation plan before the permittee commences work in waters of the United States include after-the-fact permits and cases where the authorized work must be completed immediately (e.g., emergency situations).

If a mitigation bank or in-lieu fee program will be used to provide the required compensatory mitigation, § 332.3(k)(4) [§ 230.93(k)(4)] describes requirements for permit conditions. For individual permits and general permits, the special conditions must specify the number and resource type of third-party mitigation credits the permittee is required to secure. For individual permits (i.e., standard individual permits and letters of permission), the special conditions must specify the particular mitigation bank or in-lieu fee program that will be used to provide the compensatory mitigation. For general permits, there is more flexibility because of the timeframes that must be met, such as the 45-day pre-construction notification review period for nationwide permits. For general permit verifications, the special conditions must specify either the mitigation bank or in-lieu fee program that will be used, or state that the use of a mitigation bank or in-lieu fee program will be identified at a later time, once the permittee has negotiated the terms of securing the appropriate number and resource type of credits from the sponsor, and the district engineer has approved the use of those credits. In the latter case, once the district engineer has approved the use of those credits, the permittee would then secure the credits from the sponsor in order to fulfill his or her compensatory mitigation requirements. Once the permittee has secured credits from the sponsor, and provided the appropriate documentation to the district engineer (see § 332.3(l) [§ 230.93(l)]), the responsibility for providing the required compensatory mitigation is transferred from the permittee to the third-party mitigation sponsor.

The provision requiring a description of any required financial assurances is intended to ensure that the provisions regarding those financial assurances are addressed as enforceable conditions of the DA permit. The regulations relating to financial assurances at § 332.3(n) [§ 230.93(n)] should be used as a guide for writing those conditions.

Several commenters argued that compensatory mitigation plans should not be included in permits, and some commenters said that this provision would delay the permitting process. Two commenters recommended flexibility in this section so the district engineer can accept a preliminary compensatory mitigation plan prior to permit issuance and an approved final mitigation plan prior to the start of construction.

The approved mitigation plans must be linked to the individual permit or to the general permit verification through special conditions, so that the Corps has a legal basis for ensuring compliance with the terms and conditions of its permits. For individual permits, the mitigation plan must be approved before the permit can be issued (see § 332.4(c)(1) [§ 230.93(c)(1)]). Approval of a final mitigation plan prior to issuance of an individual permit is necessary to ensure that the approved compensatory mitigation project provides appropriate compensation for the permitted impacts. For general permits that require compensatory mitigation, the district engineer may approve a conceptual or detailed mitigation plan in order to meet applicable timeframes for general permit verifications. However, the permittee cannot begin work in waters of the United States authorized by general permit until a final mitigation plan has been approved by the district engineer.

Two commenters said that both the permittee and the mitigation bank must be required to comply with the permit conditions relating to compensatory mitigation and be subject to enforcement for failure to meet their obligations. One commenter stated that if an in-lieu fee program is approved by the district engineer to provide required compensatory mitigation for a DA permit, the special conditions of that DA permit must indicate which in-lieu fee program will be used to provide that compensatory mitigation. One commenter asked whether the Corps has the authority to specify in a permit condition that the permittee must purchase credits at a specific bank, which could restrict the permittee's ability to negotiate, and would prevent the permittee from purchasing credits from a given bank because they were the least expensive rather than the most environmentally beneficial.

In cases where the district engineer has determined that the use of a mitigation bank or in-lieu fee program is appropriate to satisfy some or all of the compensatory mitigation requirements for a DA permit, the responsibility for providing the compensatory mitigation

is transferred to the third-party mitigation sponsor once the permittee has secured the appropriate number and resource type of credits and the necessary documentation has been provided to the district engineer in accordance with § 332.3(l) [§ 230.93(l)]. The Corps has the authority to impose conditions on a DA permit that specify which mitigation bank or in-lieu fee program will be used to provide the required compensatory mitigation. Permittees are free to negotiate with mitigation banks or in-lieu fee programs before the permit is issued. Once they have made arrangements to purchase the appropriate number of credits, the name of the third-party provider and the number and resource type of credits must be approved by the district engineer, and in the case of an individual permit, included as a special condition in the permit. If the permittee later finds an alternative source of third-party mitigation, then he or she can request a permit modification to change the special conditions to use that alternative compensatory mitigation, contingent upon approval by the district engineer. The district engineer will determine whether the modified compensatory mitigation proposal is sufficient for offsetting the permitted losses of aquatic resources. For general permits, the district engineer has the option of specifying the mitigation bank or in-lieu fee program in the special conditions, or stating that the use of a mitigation bank or in-lieu fee program is contingent upon approval by the district engineer.

Three commenters supported the inclusion of long-term management provisions in the permit conditions. According to one commenter, requiring adequate arrangements for long-term management funds prior to permit issuance will help ensure mitigation project success and provide a significant incentive for the permit applicant to supply adequate financing acceptable to the resources agencies. One commenter argued that it would be difficult to enforce this permit condition until a proven tool for control of invasive species is found. Another commenter was unclear if the intent was to describe the long-term management provisions or give the Corps the right to review and/or approve the legal instrument.

The control of invasive species is an implementation issue that is more appropriately addressed on a case-by-case basis. For the purposes of § 332.3(k) [§ 230.93(k)], the special conditions should address, to the extent appropriate, how the provisions at § 332.7(d) [§ 230.97(d)] will be satisfied. That section discusses long-term

management for compensatory mitigation projects. District engineers will evaluate proposals for long-term management to determine whether they are sufficient for the purposes of compensatory mitigation for DA permits. The requirements for long-term management plans will be specified through enforceable special conditions.

(l) *Party responsible for compensatory mitigation.* One commenter stated that when a mitigation bank or in-lieu fee program is cited as a responsible party in the permit, responsibility should be transferred from the permittee to the sponsor once the permittee has completed the payment transaction. One commenter, however, said that the responsibility for compensatory mitigation should remain with the project proponent. If a project proponent has the responsibility to provide successful mitigation, that person has an incentive to avoid and minimize impacts.

In this rule, when a permittee has secured the required number and resource type of credits from an approved mitigation bank or in-lieu fee program, and the district engineer receives the documentation specified in § 332.3(l)(3) [§ 230.93(l)(3)], the responsibility for providing the required compensatory mitigation is transferred to the sponsor. As indicated in §§ 332.3(l)(2) and 332.8(d)(8) [§§ 230.93(l)(2) and 230.98(d)(8)], a mitigation banking instrument and an in-lieu fee program instrument must have a provision stating that the legal responsibility for providing compensatory mitigation lies with the sponsor once a permittee has secured credits from that sponsor (see § 332.8(d)(6)(ii)(C) [§ 230.98(d)(6)(ii)(C)]). The combination of the third-party instrument and the documentation demonstrating that the permittee has secured the appropriate number and resource type of credits, establishes a legally enforceable transfer of responsibility. If the sponsor fails to provide the required compensatory mitigation, the district engineer will take appropriate action to achieve compliance with the terms of the instrument. Such actions may include suspending credit sales, use of the financial assurances to provide alternative compensation, referring the non-compliance with the terms of the instrument to the Department of Justice, or using in-lieu fee program account funds to secure credits from another source of third-party mitigation.

We have modified § 332.3(l)(2) [§ 230.93(l)(2)] to include in-lieu fee programs. This provision states that mitigation banking instruments and in-

lieu fee program instruments must contain a provision expressing the sponsor's agreement to assume responsibility for providing the required compensatory mitigation once the credits have been secured by the permittee and the district engineer receives the appropriate documentation.

In addition, we have modified § 332.3(l)(3) [§ 230.93(l)(3)] to explain what documentation is required to confirm that the appropriate number and resource type of credits have been secured from the sponsor. This paragraph also states that the district engineer may pursue measures against the sponsor to ensure compliance if that entity fails to provide the required compensatory mitigation in a timely manner.

(m) *Timing.* Several commenters said that all temporal losses should be considered in mitigation ratios. Some commenters recommended that the rule require additional compensatory mitigation if functions have not been restored in a certain time frame, and this should not be left to the discretion of the district engineer. These commenters stated that many functions are likely to require more than one year to become restored or established. Three commenters requested more flexibility in timing requirements. One commenter said that the final rule should not require permanent mitigation, particularly at a ratio greater than one-to-one, for temporary losses of wetland functions.

District engineers can require additional compensatory mitigation to offset temporary losses of aquatic resource functions if the compensatory mitigation project cannot be implemented in advance of, or concurrent with, the permitted impacts. Factors to be considered in determining appropriate compensatory mitigation ratios are provided at § 332.3(f)(2) [§ 230.93(f)(2)]. We understand that different functions often develop at different rates after aquatic resource restoration, establishment, or enhancement activities are implemented, because of the ecosystem development processes that occur. However, it is usually not feasible to require full functionality of a compensatory mitigation project to be achieved before the permitted impacts occur. The provisions in this rule are intended to minimize temporal losses of aquatic resource functions, to the extent practicable. There is sufficient flexibility in the timing requirements provided by this rule. District engineers will determine appropriate compensatory mitigation requirements for temporary impacts. It is important to

understand that temporary impacts may result in permanent changes to, or losses of, specific functions. As an incentive for timely mitigation, district engineers may determine that additional compensation for temporal losses is not necessary if the mitigation project is initiated prior to or concurrent with the permitted impacts, except in the case of resources with long development times (e.g., forested wetlands).

One commenter noted that it is virtually impossible to implement a compensatory mitigation project in advance of, or concurrently with, permitted impacts on large, multi-phased, linear transportation projects that are constructed over several years. Another commenter stated that the proposed rule is silent on how it would be applied to projects that occur in phases, where the amount of compensatory mitigation should be timed to correspond to each phase of development. This commenter said that the rule ought to provide the flexibility to allow applicants to build phased mitigation that tracks the project phases.

For linear transportation projects, district engineers will consider the practicability of requiring advance or concurrent compensatory mitigation. Depending on the specific circumstances surrounding a phased development project, compensatory mitigation may be required up-front as the first phase of the development project is constructed. Or there could be separate compensatory mitigation projects required for each phase. The appropriate approach for phased construction projects is at the discretion of the district engineer.

(n) *Financial assurances.* Most commenters supported the provision in the proposed rule that requires mitigation providers to secure financial assurances to ensure project completion and long-term management. Other commenters did not agree with the financial assurances provisions. Some commenters said that the financial assurance provisions should be strengthened. One commenter suggested that financial assurances should only be required for larger, more critical projects comprising several acres, large-scale preservation and protection, or wetland banking projects. One commenter stated that financial assurances should not be required for projects authorized by nationwide permits.

We have modified § 332.3(n) [§ 230.93(n)] to address the comments received on the proposed financial assurance provisions. The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the

compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority) the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project. Decisions regarding the appropriate type and amount of financial assurances should not be based solely on the size of the compensatory mitigation project, or whether it is a mitigation bank. The risk and uncertainty associated with a specific compensatory mitigation project should be considered. For small losses of waters of the United States authorized by nationwide permits and regional general permits, it may not be practicable to require financial assurances, and permit conditions may be all that is necessary to provide a high level of confidence that the required compensatory mitigation is provided.

Two commenters stated that compensatory mitigation providers who have substantial assets and can demonstrate a continuing ability to cover expenses associated with compensatory mitigation requirements should not have to provide financial assurances. Two commenters said that the use of financial instruments, such as those proposed in the rule, is inconsistent with other EPA programs with potentially much greater financial liability.

Section 332.3(n)(2) [§ 230.93(n)(2)] identifies a number of different mechanisms that can be used to address financial assurance requirements at the discretion of the district engineer.

Three commenters said that the financial assurance requirements should not be duplicative of the financial assurances that a permittee may be required to give under state or local law to secure the performance of the same activities.

District engineers can consider whether financial assurances required for compensatory mitigation projects under state or local laws are sufficient for the purposes of achieving compliance with compensatory mitigation requirements for DA permits. State or local requirements for financial assurances may be adequate in cases where the same compensatory mitigation project will be used to satisfy the requirements of the Corps Regulatory Program, as well as similar state or local regulatory programs.

Two commenters said that, because a mitigation bank sponsor is not allowed 100 percent immediate credit release, the sponsor should only have to post financial assurances for the percentage of the mitigation bank site that has been debited for use and that has not met final or interim performance standards.

The initial debiting (release of credits) for mitigation banks provided at § 332.8(m) [§ 230.93(m)] provides some capital to the mitigation bank sponsor once the instrument has been approved and certain tasks are achieved. That capital is intended to support the success of the mitigation bank during its early stages of development. Since the ecological success of a mitigation bank is usually dependent upon having sufficient funds available to do the tasks necessary for aquatic resource restoration, establishment, and/or enhancement activities, the amount of any required financial assurances must reflect the costs of doing those necessary activities. The district engineer, in consultation with the sponsor and the IRT, will determine the appropriate amount for the required financial assurances.

Three commenters stated that financial assurances should not be required for government agencies. One commenter said that government agencies should be required to provide financial assurances if adequate funding cannot be assured.

This rule does provide flexibility for government agencies in meeting financial assurance requirements. In cases where a formal, documented commitment from a government agency is provided, the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project. This flexibility is afforded since government agencies tend to be relatively stable entities, and operate in the public interest.

Two commenters stated that financial assurances should include all construction and monitoring costs.

We have added a new sentence to § 332.3(n)(2) [§ 230.93(n)(2)] to clarify that district engineers will consider construction and monitoring costs, as well as costs for land acquisition, planning and engineering, legal fees, mobilization, and long-term stewardship when determining amounts of required financial assurances. In addition, we have modified this paragraph to require documentation of the basis for the financial assurance amount in the administrative record for either the DA permit or the third-party mitigation instrument. We have also added a new paragraph (3) to § 332.3(n) [§ 230.93(n)], which states that if

financial assurances are required, the DA permit must include a special condition requiring those assurances to be in place before commencing the permitted activity.

Several commenters recommended that the final rule explicitly state that financial assurances are only to be released upon the full completion of all compensatory mitigation requirements. In contrast, some commenters said that financial assurance should be phased out as phases of compensatory mitigation projects are completed. A few commenters stated that a portion of the financial assurance should be retained until the end of the monitoring period, after the compensatory mitigation project has met all legal and performance standards.

Section 332.3(n)(4) [§ 230.93(n)(4)] states that financial assurances shall be phased out once the compensatory mitigation project has been determined by the district engineer to be successful in accordance with its performance standards. The DA permit or third-party mitigation instrument has to clearly specify the conditions under which the financial assurances will be released. Financial assurances should not be phased out until the district engineer decides that the compensatory mitigation project has met its performance standards. Phasing out financial assurances in increments before compliance with performance standards has been achieved would increase the risk that insufficient financial assurances would be available if the compensatory mitigation project were to fail at a later date.

One commenter said that the proposed rules for financial assurance will consume critical federal and state staff resources in managing, tracking, and enforcing these new requirements, and it could result in considerable expenses for many permittees with little value added.

Financial assurances are important to ensure that a compensatory mitigation project will be implemented and maintained. Requiring financial assurances is not a new practice, so we do not expect there to be substantial changes in staff resources for managing, tracking, and enforcing this rule.

A number of commenters supported the suggestion requiring advance notice to the district engineer before financial assurances are canceled or allowed to lapse. Several commenters said that a minimum of 120 days should be the standard for notification and a few commenters indicated that 30 days should be the minimum. Other commenters recommended minimum time periods of 45, 60, and 90 days. One

commenter suggested that the Corps suspend or revoke a permit if the financial assurance has lapsed. Another commenter stated that, in order to perform this function adequately, the Corps district would need additional staff.

We have added paragraph (5) to § 332.3(n) [§ 230.93(n)] to require financial assurances to be in a form that ensures that the district engineer receives notification at least 120 days in advance of any termination or revocation. District engineers will determine, on a case-by-case basis, the appropriate action to take if notified that the financial assurances will lapse. We do not believe that this provision would impose additional burdens on Corps staff, since it simply provides notice in cases where a requirement for a compensatory mitigation project is not being fulfilled.

One commenter suggested that the financial assurances should be structured to ensure that in the event of a failure of a compensatory mitigation project, the Corps can easily obtain funds to pay for project correction by a third party, if needed.

The Corps lacks statutory authority to accept directly, retain, and draw upon financial assurances, such as performance bonds, to ensure compliance with permit conditions. These limitations are a result of the Miscellaneous Receipts Statute (31 U.S.C. § 3302(b)). If the Corps were to directly, retain, and draw upon those funds, the monies would be categorized as a “miscellaneous receipt” under the Miscellaneous Receipts Statute and would be deposited in the U.S. Treasury without being used to ensure permit compliance.

District engineers have the authority to condition the approval of a permit to require the posting and execution of financial assurances by a third-party mitigation sponsor or a permittee, as long as the Corps is not positioned to accept directly, retain, or draw upon those funds in the event of a default. Financial assurances should be executed with the signatures of an additional governmental or non-governmental environmental management entity or entities as a bond “surety” or “sureties,” who agree to ensure performance if the Corps should determine that the sponsor or permittee, as the bond “principal,” has defaulted on any of his or her responsibilities. The third-party instrument or permit conditions should also specify that the Corps stands as a third-party “obligee” to the principal and surety(ies) of the bond, possessing the full and final authority to determine the penal sum

amount, and to determine whether the principal and the surety(ies) have specifically performed some or all of the obligations, covenants, terms, conditions, and agreements of the financial assurance. Finally, the financial assurance should specify that if both the principal and the surety(ies) default in their responsibilities, the Corps retains the full and final discretionary authority to identify new parties as additional surety(ies) to the bond.

We have added a new paragraph (6) to § 332.3(n) [§ 230.93(n)] to state that financial assurance are to be payable at the direction of the district engineer to his designee or to a standby trust agreement. In cases where a standby trust is used, all amounts paid by the financial assurance provider are to be directly deposited into the standby trust fund for distribution by the trustee in accordance with the district engineer’s instructions. Still, the district engineer cannot accept directly, retain, or draw upon those funds.

Several commenters recommended that each Corps district be required to develop consistent requirements for financial assurances, so that there will be a level playing field among mitigation providers for all types of compensatory mitigation. One commenter requested that Corps project managers and attorneys receive training on how to evaluate the appropriateness of a proposed financial assurance. One commenter suggested that the agencies incorporate an appeals or arbitration process into the rule in case a district engineer imposes excessive or other unreasonable requirements.

Additional guidance for financial assurances is provided by Regulatory Guidance Letter 05–01, which is available at: http://www.usace.army.mil/cw/cecwo/reg/rgls/rgl05_01.pdf. For individual permits, prospective permittees can utilize the Corps administrative appeal process. The administrative appeal process can be used in cases where a district engineer proffers an individual permit, and the prospective permittee does not agree with the terms and conditions of that permit. The regulations governing the Corps administrative appeal process are found at 33 CFR part 331.

(c) *Compliance with applicable law.* No comments were received on this subsection. In the second sentence, we have added “in-lieu fee program” instrument, since this final rule includes in-lieu fee programs as another source of compensatory mitigation for DA permits.

33 CFR 332.4 and 40 CFR 230.94 Planning and Documentation

(a) *Pre-application consultations.* Several commenters supported the provision for pre-application consultations, as they would save time and reduce misunderstandings. Some commenters expressed concern that pre-application meetings would stretch district staff resources. A few commenters said that discussing compensatory mitigation before the public review and comment period is at odds with sequencing requirements, which require consideration of avoidance and minimization prior to consideration of compensatory mitigation.

We believe that pre-application coordination is an important tool that provides prospective permit applicants an opportunity to address important issues in early planning stages. The Corps current regulations already include pre-application consultations (see 33 CFR 325.1(b)), so we do not believe this provision would place additional burdens on district resources. We have removed the word “compensatory” from this paragraph to clarify that all potential mitigation measures, including avoidance, minimization, and compensation, should be discussed during pre-application consultations.

(b) *Public review and comment.* Many commenters supported the proposed requirement that public notices include a statement describing how impacts to aquatic resources will be avoided, minimized, and compensated for. These commenters stated that the requirement would result in better up-front planning and design and would allow for more meaningful public participation. There were many other commenters, however, who did not support this proposed provision. Several of these commenters recommended that only a brief statement of avoidance, minimization, and compensation, or conceptual mitigation plan, be included in the public notice. Several commenters suggested that this subsection should be reworded to ensure that the public and the agencies are aware that any mitigation options described in a public notice are preliminary measures that the applicant has proposed, and may be changed during the evaluation process. Some commenters requested that the final rule specify that this provision is required of all permits, instead of limiting it to individual permits.

We have clarified in the final rule that the mitigation statement in the public notice is to be based on the information submitted by the applicant, in

accordance with the new requirement at 33 CFR 325.1(d)(7). As discussed in the section of this preamble that addresses § 325.1(d)(7), this should be a brief statement because this occurs in the early stages of the evaluation process, and the evaluation of mitigation options is an iterative process. As district engineers conduct their evaluations in accordance with applicable Corps regulations, the 404(b)(1) Guidelines, and regulations governing other applicable laws (e.g., section 7 of the Endangered Species Act), additional avoidance and minimization may be required, and compensatory mitigation requirements will be determined in greater detail to offset the permitted impacts to the extent appropriate and practicable. We have also modified § 332.4(b)(1) [§ 230.94(b)(1)] to allow prospective permittees to indicate an intention to use an approved in-lieu fee program. In the last sentence of § 332.4(b)(1) [§ 230.94(b)(1)] we have replaced the word “project” with impacts, since the impacts that require DA authorization often comprise a small proportion of the overall project. The Corps can only require appropriate and practicable compensatory mitigation to offset the permitted impacts to waters of the United States (see 33 CFR 320.4(r)(2)).

We do not believe it is necessary to reword this subsection to clarify that the mitigation statement contains preliminary mitigation measures proposed by the permit applicant. It is understood that these preliminary measures may be revised in response to public comment and other input to the permit process. It would not be appropriate to expand the requirements of § 332.4(b) [§ 230.94(b)] to letters of permission and general permits because those forms of authorization do not require project-specific public notices. Public notices are required only for standard permits.

We have added § 332.4(b)(2) [§ 230.94(b)(2)] to require district engineers to consider any timely comments and recommendations received from other federal agencies, tribal, state, or local governments, and the public. We have modified § 332.4(b)(3) [§ 230.94(b)(3)] to state that, for activities authorized by letters of permission and general permits, district engineers must comply with review and approval processes for compensatory mitigation proposals and plans that are applicable to those forms of DA authorization. We have also modified § 332.4(b)(1) [§ 230.94(b)(1)] to provide that certain information may be kept confidential for business purposes. For example, permittees may not want

to reveal the exact parcel of land that they are considering for a compensatory mitigation project if they have not yet secured the site, since revealing this information may adversely affect their ability to do so. The district engineer must agree that any information withheld is legitimately confidential for business purposes, and must ensure that adequate information is included in the public notice to enable the public to provide meaningful comment.

(c) *Mitigation plan.* Many commenters supported the provision that requires a permit applicant to prepare a detailed draft mitigation plan and submit it to the district engineer for review and approval. Commenters noted that this requirement emphasizes the need for up-front planning for compensatory mitigation, and provides a level of assurance that the compensatory mitigation project will be completed. Three commenters recommended that an applicant also be required to submit a draft mitigation plan to other appropriate federal, state, or local government agencies. One commenter supported the provision but also suggested that the final rule should provide a time frame for the Corps to review and approve the mitigation plan to ensure that the permit process is not delayed by this requirement. Another commenter said that it was unclear if this provision applies to general permits. One commenter indicated that National Environmental Policy Act case law does not establish a requirement for a complete mitigation plan to be provided at the time of permit issuance.

We have revised § 332.4(c) [§ 230.94(c)] to clarify the different requirements for mitigation plans for individual permits, general permits, and third-party mitigation. Section 332.4(c)(1)(i) [§ 230.94(c)(1)(i)] describes mitigation plan requirements for individual permits. Before an individual permit can be issued, a final mitigation plan must be approved by the district engineer. This will help ensure that the required compensatory mitigation is appropriate for the authorized impacts. The final mitigation plan must include the items listed in § 332.4(c)(2) through (c)(14) [§ 230.94(c)(2) through (c)(14)], but the level of detail should be commensurate with the scale and scope of the impacts that will be authorized by the individual permit. We have also added language to this paragraph that allows district engineers to utilize permit conditions to address any of the items listed in paragraphs (c)(2) through (c)(14). Paragraph (c)(1)(i) does not require the prospective permittee to provide contract-ready mitigation plans. However, the mitigation plans need to

be sufficiently detailed to demonstrate that the items listed in paragraphs (c)(2) through (c)(14) have been appropriately addressed. District engineers must also ensure that the final mitigation plans have the appropriate level of detail necessary for compliance under the Corps regulatory authorities. If the prospective permittee intends to use a mitigation bank or in-lieu fee program to provide the required compensatory mitigation, he or she needs to provide the name of the mitigation bank or in-lieu fee program, as well as baseline information and a description of the number of credits to be provided.

For activities authorized by individual permits, district engineers may coordinate draft mitigation plans with commenting agencies during the permit application evaluation process. We do not agree that it is necessary to impose a requirement for district engineers to approve a final mitigation plan within a specific number of days.

To address requirements for mitigation plans for activities authorized by general permits, we have added § 332.4(c)(1)(ii) [§ 230.94(c)(1)(ii)]. If compensatory mitigation is required for an activity authorized by a general permit, the district engineer may approve a conceptual or detailed mitigation plan to meet required timeframes for general permit verifications. A final mitigation plan must be approved by the district engineer before the permittee commences work in waters of the United States. If third-party mitigation will be used, the mitigation plan must include information on the baseline conditions and the credits to be provided, and either the name of the specific mitigation bank or in-lieu fee program to be used, or a statement that a mitigation bank or in-lieu fee program will be used, contingent upon approval of the district engineer. The latter provision will allow permittees to seek the appropriate number and resource type of credits from a third-party mitigation sponsor and negotiate the terms of securing those credits. However, the number and resource type of credits must be approved by the district engineer before those credits are secured by the permittee (see § 332.3(k)(4) [§ 230.93(k)(4)]).

For mitigation banks and in-lieu fee programs, we have added § 332.4(c)(1)(iii) [§ 230.94(c)(1)(iii)], which states that the mitigation plans must include the items listed in paragraphs (c)(2) through (c)(14) of this section. Mitigation plans must be prepared for each separate compensatory mitigation project site. The review and approval process for

mitigation plans for third-party mitigation is provided at § 332.8 [§ 230.98].

Three commenters supported the proposed list of items to be included in mitigation plans. One commenter stated that requiring these items would improve the efficiency of permit reviews and the success of compensatory mitigation projects. There were also many commenters who disagreed with these requirements. Several commenters said that requiring these items to be included in mitigation plans would delay compensatory mitigation projects. One commenter stated that the content of a mitigation plan should not be left to the discretion of the district engineer. In contrast, another commenter stated that the final rule needs to provide flexibility for the district engineer to decide, on a case-by-case basis, what needs to be included in a mitigation plan; such considerations should be based on the size and nature of the compensatory mitigation project. One commenter recommended that in-lieu fee programs should be required to submit a draft mitigation strategy, in place of the mitigation plan.

The items listed in § 332.4(c)(2) through (c)(14) [§ 230.94(c)(2) through (c)(14)] are necessary to help ensure that mitigation plans for DA permits contain the appropriate types of information for the purposes of developing successful compensatory mitigation projects and facilitating effective compliance measures. Because of the potential variability among compensatory mitigation project types, as well as differences in compensatory mitigation practices among regions, the rule provides flexibility in the level of detail required for the content of mitigation plans. It specifies that while all required items must be addressed, the level of detail should be commensurate with the scope and scale of the impacts. This is up to the district engineer to determine. Under the regulations governing in-lieu fee programs, a sponsor will be required to develop a compensation planning framework (see § 332.8(c) [§ 230.98(c)]), as well as mitigation plans for each in-lieu fee project (see § 332.8(j) [§ 230.98(j)]).

One commenter objected to the proposed language stating that the level of detail in the mitigation plan would be commensurate with the scale and scope of the project, because that language is vague and would result in mitigation plans of varied thoroughness and quality. Another commenter said that the level of detail should take the nature of the impacted resource into account. One commenter stated that the level of detail should not be related to the size

and scale of the project; instead, the level of detail should be sufficient to evaluate the water quality benefits and to ensure that the compensatory mitigation project offsets the impacts.

Flexibility in the level of detail required for mitigation plans is necessary to account for differences in compensatory mitigation projects. It would be impractical to require the same level of detail for all mitigation plans developed for individual permits, general permits, and third-party mitigation. Rather, projects with significant impacts will necessarily need to devote more effort and resources to mitigation planning than projects with minor impacts. We have modified § 332.4(c)(1)(i) [§ 230.94(c)(1)(i)] to state that, for individual permits, the level of detail of the mitigation plan should be commensurate with the scale and scope of the impacts. The same principle applies to general permits. Compensatory mitigation projects required for DA permits rarely focus solely on water quality benefits. These projects usually result in the restoration, establishment, and/or enhancement of other aquatic resource functions, such as habitat and water quantity storage.

(2) *Objectives.* We added “physiographic province” to the list of types of geographic areas that may be served by the objectives of a compensatory mitigation project.

(3) *Site selection.* We have added a reference to § 332.3(d) [§ 230.93(d)] to this paragraph.

(4) *Site protection instrument.* One commenter recommended that every parcel of land set aside for compensatory mitigation have a recorded conservation easement held by a third-party governmental agency or non-profit organization. Another commenter suggested that the site protection instrument should ensure the permanent protection of the mitigation site.

Specific requirements for site protection are provided in § 332.7(a) [§ 230.97(a)]. In some cases, it is not practicable to require execution of a conservation easement that would be held by a third party. For example, it may not be possible to find a third-party willing to hold the conservation easement. While the goal of the rule is to ensure permanent protection of all compensatory mitigation project sites, we recognize that the degree of long-term protection afforded by real estate instruments varies from state to state.

(5) *Baseline information.* One commenter recommended the addition of stream-oriented baseline information requirements. Other commenters recommended requiring additional

baseline information, including geographic coordinates of all impact and mitigation sites, planned alterations to lands or waters adjacent to the proposed site, flooding frequency of a proposed mitigation site, and a delineation of waters of the United States, including jurisdictional wetlands (if any unavoidable impacts to jurisdictional waters will occur on the proposed mitigation site).

We have modified this paragraph to add several more examples of information that may be required as baseline information. A map showing the locations of the impact and mitigation site(s) or the geographic coordinates for those site(s) should be provided. Also, information concerning other site characteristics appropriate to the type of resource proposed as compensation may also be included in the baseline information. We have added a sentence stating that the baseline information should also include a delineation of waters of the United States on the proposed compensatory mitigation project site. We have added a reference to in-lieu fee programs to the last sentence of this paragraph, since we are including in-lieu fee programs in this rule.

(6) *Determination of credits.* One commenter recommended that the explanation of the rationale for determining credits should be detailed and should include results of a functional assessment of the impacted habitat.

We believe that the level of detail of the mitigation plan, including the rationale for determining credits, should be commensurate with the scale and scope of the impacts. Appropriate functional or condition assessments may not be available in some regions, and for some activities that require DA authorization, it may not be practicable to use functional or condition assessments. We have added a reference to § 332.3(f) [§ 230.93(f)] since credit determinations are related to the amount of compensatory mitigation required. In § 332.4(c)(6)(i) [§ 230.94(c)(6)(i)], we are clarifying that the determination of credits relates to the required permittee-responsible mitigation. Section 332.4(c)(6)(ii) [§ 230.94(c)(6)(ii)] applies to permittees intending to secure credits from mitigation banks or in-lieu fee programs.

(7) *Mitigation work plan.* One commenter suggested that the mitigation work plan should specify whether the wetland to be used to provide compensatory mitigation will be permanent, temporary, or ephemeral.

The mitigation work plan is to provide written specifications and work

descriptions for compensatory mitigation projects. If wetlands compensatory mitigation is to be provided, the objectives are the most appropriate place to describe the wetland type. We have modified this paragraph by replacing “plant species to be planted at the site” with “methods for establishing the desired plant community” since the means for establishing a particular plant community is not limited to planting certain species at the compensatory mitigation project site. We have also added “soil management” since soil amendments and other techniques may be needed for the project. Also, we added information on elements that might be needed for stream mitigation project work plans, such as planform geometry, channel form, watershed size, design discharge, and riparian area plantings.

(8) *Maintenance plan.* We received no comments and made no changes to this paragraph.

(9) *Performance standards.* One commenter expressed concern that the requirement to include ecologically based performance standards in a mitigation plan for impacts to ephemeral channels will create a significant burden for permit applicants. This commenter also said that such requirements will put local Corps staff in a difficult position in terms of evaluating such standards, when no widely available metrics exist.

Ecological performance standards are necessary to assess whether the project is achieving its objectives. Performance standards will vary by aquatic resource type and geographic region. This rule provides the district engineer with flexibility to require standards that are appropriate for compensatory mitigation projects that involve ephemeral streams. Since ecological performance standards are discussed in more detail in § 332.5 [§ 230.95], we have added a reference to that subsection.

(10) *Monitoring requirements.* One commenter suggested replacing “adaptive management” with “remedial measures” in this paragraph.

Since this rule utilizes adaptive management to address deficiencies in compensatory mitigation projects, it would not be appropriate to make the suggested change. Since monitoring is discussed in more detail at § 332.6 [§ 230.96], we have added a reference to that subsection.

(11) *Long-term management plan.* Several commenters supported the inclusion of a long-term management plan in the mitigation plan. One commenter recommended that the long-term management plan also include a

description of long-term management needs and detailed annual cost estimates for these needs, and identify the funding mechanism that will be used to meet those needs. Two commenters said that there should be no requirement for long-term management other than for structural components that may have been constructed as part of the compensatory mitigation project, once monitoring requirements have been fulfilled and the compensatory mitigation project has been determined to be successful.

In order for compensatory mitigation to offset permitted losses, compensation projects need to be sustainable for the long-term. Accordingly, the rule requires that provisions necessary for long-term management be provided as permit conditions or as stipulations in a mitigation banking or in-lieu fee program instrument. Specific requirements for long-term management plans are provided in § 332.7(d) [§ 230.97(d)]. In response to these comments, we have added a new § 332.7(d)(2) [§ 230.97(d)(2)] to state that a long-term management plan should include a description of long-term management needs, annual cost estimates for these needs, and identify the funding mechanism that will be used to meet those needs. Since long-term management is discussed in more detail in § 332.7(d) [§ 230.97(d)], we have added a reference to that subsection.

(12) *Adaptive management plan.* We have modified this paragraph to reflect changes to the definition of adaptive management at § 332.2 [§ 230.92] and the regulations governing adaptive management at § 332.7(c) [§ 230.97(c)]. We have also added a reference to § 332.7(c) [§ 230.97(c)], since the rules governing adaptive management are provided in that subsection.

(13) *Financial assurances.* One commenter requested further clarification of the term “high level of confidence.” Another commenter noted that requiring financial assurances would cause a workload burden on Corps districts.

Financial assurances are intended to provide a pool of funds that would be available to implement a compensatory mitigation project. The term “high level of confidence” is used because having sufficient funding is often a critical element for successfully providing the required compensation. The funds available from financial assurances can be used to correct deficiencies in a compensatory mitigation project or to provide alternative compensation. Requiring financial assurances for compensatory mitigation projects is not

a new practice, so it will not cause substantial increases in the Corps workload. Since financial assurances are discussed in more detail in § 332.3(n) [§ 230.93(n)], we have added a reference to that subsection.

(14) *Other information.* Two commenters recommended that the mitigation plan include a discussion of the alternative mitigation options considered and a full explanation of why the chosen option will best replace the functions and values of the impacted aquatic resource.

Alternative compensatory mitigation options are more appropriately discussed prior to submittal of a mitigation plan. Once the district engineer has determined the appropriate and practicable compensatory mitigation option for a particular DA permit, the prospective permittee will prepare the mitigation plan.

33 CFR 332.5 and 40 CFR 230.95 Ecological Performance Standards

A number of commenters supported the use of ecological performance standards because they are based on objective and verifiable characteristics that can be measured with a “reasonable amount of effort.” Three commenters supported establishing criteria and metrics based on aquatic functions rather than type and amount of wetlands or streams. Several commenters stated that the proposed rule focuses on process and procedure, but lacks explicit ecological performance measures. However, a number of commenters supported the lack of specifics in the proposed rule so that ecological performance standards are tailored to each site.

We have modified § 332.5 [§ 230.95] by splitting it into two paragraphs. Paragraph (a) states that the approved mitigation plan must contain performance standards to assess whether the compensatory mitigation project is achieving its objectives. The last sentence of § 332.5(a) [§ 230.95(a)] has been modified to clarify that other applicable metrics, such as acres, could be used to evaluate compensatory mitigation projects. In § 332.5(b) [§ 230.95(b)] we have modified the first sentence to state that performance standards must be objective and verifiable. We have also added a sentence to paragraph (b), to require ecological performance standards to be based on the best available science that can be measured or assessed in a practicable manner. This will help ensure that performance standards for compensatory mitigation projects are based on ecological outcomes, not construction tasks or administrative

milestones that may not reflect gains in aquatic resource functions or services.

This rule cannot provide specific ecological performance standards for use in compensatory mitigation projects. Instead, it must focus on the general principles for ecological performance standards. Performance standards must be developed on a project-by-project basis, to address the objectives of a compensatory mitigation project. District engineers can develop templates for ecological performance standards, to provide consistent standards for the types of aquatic resources found in their areas of responsibility.

Some commenters noted that the proposed rule emphasizes functional standards instead of area-based performance standards, and said that it will be difficult for the Corps to move to a functional approach because simple functional assessment methods do not exist for many types of wetlands, and regulators are much more comfortable with measuring acres and linear feet. A few commenters contended that nowhere in the rule is compensatory mitigation required to actually replace the functions of the aquatic habitat destroyed.

Functional standards are necessary to demonstrate that compensatory mitigation projects offset losses of aquatic resource functions resulting from activities authorized by DA permits. Area-based performance standards tied to functions can also be used, to determine the functional capacity of a compensatory mitigation project. However, area or linear measures alone would not constitute ecological performance standards. Functional or condition assessments should be used where appropriate and practicable to better describe how compensatory mitigation projects offset losses of aquatic resource functions. We are continuing to develop and refine functional assessment methods and other science-based assessment tools, but where such tools are not available, the performance standards must still attempt to describe a successful project in ecological terms that can be measured (e.g., the project has established an appropriate hydrologic regime or has an appropriate number of acres of specific types of plant communities at specified levels of development, including particular species, etc). The purpose of compensatory mitigation is discussed in § 332.3(a)(1) [§ 230.93(a)(1)]. This paragraph states that the “fundamental objective of compensatory mitigation is to offset unavoidable impacts to waters of the United States authorized by DA permits.”

One commenter suggested that the Corps welcome partnerships with local and state agencies and quickly approve performance standards in watersheds with extensive wetland inventory and functional data. A few commenters recommended that the agencies provide detail on aquatic resource characteristics to be considered (e.g., vegetation, soil and hydrology), specification of wetland factors that might require remediation to meet performance standards, and development of a pre-planning simulation for adaptive management. Several commenters said that the proposed rule fails to provide guidance as to how proposed performance-based standards will be interpreted and applied, and that ecological success criteria are vague and not likely to include meaningful criteria that will account for all wetland functions.

District engineers are encouraged to work with federal, state, and local resource agencies to develop ecological performance standards that are appropriate for the types of aquatic resources found in their areas of responsibility. District engineers are responsible for developing ecological performance standards that are objective and verifiable. Such performance standards must be clearly written, so that independent parties can assess whether compensatory mitigation projects are meeting their performance standards. Ecological performance standards may be based on specific wetland characteristics. We have added a new sentence to § 332.5(b) [§ 230.95(b)] to clarify that reference aquatic resources can be used to establish performance standards that are reasonably achievable, by reflecting the range of variability exhibited by the regional class of aquatic resources.

R 332.6 and 40 CFR 230.96 Monitoring

(a) *General.* Commenters generally supported the emphasis on compensatory mitigation project site management and monitoring. Several commenters said that the agencies must strengthen compliance monitoring and enforcement activities. Three commenters said that Corps guidance states that monitoring reports are a high priority when “substantial mitigation” is required, but it does not define substantial mitigation.

Compliance activities are dependent upon available resources, and the Corps is placing greater emphasis on compensatory mitigation project compliance through its performance standards developed under the Program Assessment Rating Tool for the President’s “Budget and Performance

Integration” management initiative. The Corps guidance relating to “substantial mitigation” is not part of this rulemaking, and therefore does not need to be defined. That guidance appeared in the Corps Regulatory Program’s Standard Operating Procedure dated October 15, 1999, which is in the process of being revised. Under this final rule, monitoring reports are required for all mitigation project sites, but the content and level of detail of the reports must be commensurate with the scale and scope of the mitigation project.

We have added § 332.6(a)(2) [§ 230.96(a)(2)] to clarify that district engineers may conduct site inspections on a regular basis during the monitoring period to evaluate the performance of compensatory mitigation project sites. These site visits will be used to verify the findings of monitoring reports. We have modified the language that was in § 332.6(c)(2) [§ 230.96(c)(2)] of the proposed rule, since only the district engineer has the authority to conduct site visits to assess compliance with the conditions of a DA authorization. Representatives of federal, tribal, state, or local resources agencies may be asked to participate in these site visits, at the invitation of the district engineer and with the express consent of the landowner.

(b) *Monitoring period.* There was no consensus among commenters regarding the appropriate length for monitoring periods. One commenter said that compensatory mitigation in coral reef habitats should be monitored for more than five years. Another commenter suggested that monitoring be required for seven to ten years. Several commenters stated that monitoring periods should be flexible and site specific. A number of commenters supported the proposed five year monitoring period. One commenter said that longer monitoring periods are needed to account for the development of certain aquatic resource types, or for natural events, such as drought or floods, that may affect the development of plant communities. This commenter also said that longer monitoring periods are necessary to develop realistic objectives and performance standards.

We believe that five years is an appropriate starting point for determining the required monitoring period. The final rule states that the mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years, and a longer monitoring period must be required for aquatic resources with slow

development rates (e.g., forested wetlands, bogs). The rule also allows the district engineer to reduce or waive remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. To reduce or waive the remaining monitoring requirements before the five year period ends, there should be at least two consecutive monitoring reports issued where the success criteria are met. This will help account for variability in environmental conditions, to ensure that the compensatory mitigation project is truly meeting its performance standards. Performance standards should be designed, to the extent practicable, to account for the ecological characteristics of early developmental stages of aquatic ecosystems, so that a determination of ecological success can be made within five years. For aquatic habitat types where five years is insufficient to determine ecological success through performance standards that satisfy the criteria at § 332.5 [§ 230.95], longer monitoring periods may be required. We have modified the last sentence of § 332.6(b) [§ 230.96(b)] to include adaptive management as a reason for revising monitoring requirements.

(c) Monitoring reports. Many commenters stated that monitoring reports should be standardized to expedite the Corps review and that minimum monitoring requirements and performance standards should be provided in the rule. A number of commenters said that the Corps should specify the minimum required reporting elements for each habitat type. Some commenters recommended that monitoring reports include sufficient detail to facilitate scientific comparison between the functions of filled wetlands and the functions of mitigation bank credits used to compensate for those filled wetlands. One commenter stated that the rule should require inspections and brief progress or status reports for all compensatory mitigation projects that require monitoring, to facilitate adaptive management.

We have modified § 332.6(a)(1) [§ 230.96(a)(1)] to clarify that the content and level of detail for monitoring reports must be commensurate with the scale and scope of the compensatory mitigation project, as well as the compensatory mitigation project type. The information to be included in a monitoring report is at the discretion of the district engineer, who should take into account the characteristics of the compensatory mitigation project when determining those requirements. The content of

monitoring reports will also depend on the ecological performance standards for the compensatory mitigation project, since the purpose of the monitoring report is to demonstrate how the project is progressing towards achieving those standards. If the performance standards require the use of functional assessments to assess the performance of the compensatory mitigation project, then the results of those assessments should be provided in the monitoring reports. We do not believe it is appropriate to require monitoring reports to include scientific comparisons of wetland functions between mitigation and impact sites, because the tools necessary to conduct such comparisons are not available in many areas, or they may not be practicable for certain types of projects, such as small compensatory mitigation projects provided for activities authorized by general permits. Furthermore, the appropriateness of the required mitigation to replace aquatic functions and services lost at the impact site is evaluated at the time the mitigation plan is approved, including the identification of appropriate ecological performance standards for the mitigation project. After this point, monitoring is needed to ensure that the mitigation project is developing as planned and progressing satisfactorily towards meeting the performance standards. District engineers will determine, on a case-by-case basis, the need for site inspections to assess compensatory mitigation project sites.

We have modified § 332.6(c)(1) [§ 230.96(c)(1)] to state that as-built plans may be provided in monitoring reports. We have also modified § 332.6(c)(1) [§ 230.96(c)(1)] to stipulate that monitoring reports may include the results of condition assessments or other types of assessments.

Two commenters stated that Corps guidance does not instruct district engineers on what actions to take if permittees or third-party mitigation providers fail to submit required mitigation reports. Several commenters recommended that mitigation plans and mitigation banking instruments include built-in, agreed-upon penalties for failure to submit accurate, timely, and complete monitoring reports that are required by the permit or instrument.

We have added § 332.6(c)(2) [§ 230.96(c)(2)] to stipulate that the permittee or sponsor is responsible for submitting monitoring reports as required by the special conditions of the DA permit or the terms of the third-party mitigation instrument. If permittees or third-party mitigation sponsors do not provide the required

monitoring reports, they are not in compliance with the terms and conditions of their permits or instruments, respectively. In such cases, district engineers will take appropriate compliance actions in accordance with the Corps regulations at 33 CFR part 326. Failure to comply with the conditions of a DA permit issued under section 404 of the Clean Water Act could result in the assessment of Class I administrative penalties. Therefore, it is important that monitoring report requirements be specified as conditions in DA permits.

Some commenters said that monitoring reports should be made available to the public, but other commenters indicated that they should not be made public.

Since monitoring reports are public information, § 332.6(c)(3) [§ 230.96(c)(3)] has been changed to clarify that monitoring reports must be provided to interested federal, tribal, state, and local resource agencies, and the public upon request. District engineers may establish policies and procedures for how to fulfill these requests for monitoring reports and other public information, including establishing time frames for responding to the requests and recouping nominal costs for filling those requests (e.g., duplication costs). As discussed above, we have moved the language regarding site inspections that was in § 332.6(c)(2) [§ 230.96(c)(2)] of the proposed rule to § 332.6(a)(2) [§ 230.96(a)(2)], since it is a general issue relating to monitoring.

33 CFR 332.7 and 40 CFR 230.97 Management

(a) Site protection. Several commenters supported the flexibility regarding the use of real estate and legal instruments for long-term site protection. A number of commenters stated that compensatory mitigation project sites should be protected in perpetuity through conservation easements, rather than deed restrictions or other legal instruments. A few commenters said that conservation easements are an overly restrictive and unnecessary requirement for stream mitigation. One commenter said that when a compensatory mitigation project is located within a right-of-way owned by a public agency, requiring a real estate instrument is unnecessary. Several commenters said that the proposed rule ignores the jurisdiction of federal and state regulatory programs, and compromises private property rights. These commenters believe that the rule exceeds the authority of the agencies to regulate activities under section 404 of the Clean Water Act.

The goal of the rule is to ensure permanent protection of all compensatory mitigation project sites. Specifically the rule states that the aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project must be provided long-term protection through real estate instruments or other available mechanisms. However, we recognize that the terms of real estate or legal instruments used to protect compensatory mitigation project sites will differ, because of the variability in real estate laws among states and local jurisdictions. For example, in some states perpetual protection cannot be required, because the real estate or legal instruments may be in effect for a limited number of years. Therefore, we cannot require specific terms for real estate instruments in this rule. The terms for conservation easements, restrictive covenants, and other mechanisms are more appropriately addressed by district engineers on a case-by-case basis. However, we have added a provision which states that, where practicable, a conservation easement or restrictive covenant should establish in an appropriate third party (e.g., governmental or non-profit resource management agency) the right to enforce site protections and provide the third party the resources necessary to monitor and enforce these site protections. For stream compensatory mitigation projects, appropriate means of site protection will be determined by district engineers, after considering the characteristics of the compensation activities and the real estate interests of the project proponent. For example, in-stream rehabilitation measures may not warrant long-term protection. Specific requirements for site protection are at the discretion of the district engineer. There are other examples of situations where it may not be feasible to require site protection through real estate or legal instruments for compensatory mitigation projects. One potential situation is the construction of oyster habitat or the restoration of sea grass beds in state-owned tidal waters, where the project proponent does not have a real estate interest, but may obtain authorization to conduct those environmentally beneficial activities. Another example may be the restoration of tidal marshes or other coastal resources, since the long-term sustainability of those projects in the dynamic coastal environment cannot be assured because of the natural littoral processes that occur in those areas.

This rule does not exceed the agencies' authority under the Clean

Water Act. The Corps has the authority to add special conditions to its permits, when such conditions are necessary to satisfy legal requirements such as compliance with the 404(b)(1) Guidelines or to satisfy the public interest (see 33 CFR 325.4(a)). For example, compensatory mitigation may be required to comply with the 404(b)(1) Guidelines and to support the objective of the Clean Water Act, which is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. This final rule addresses compensatory mitigation that may be required for DA permits issued under the Corps jurisdictional authority under section 404 of the Clean Water Act and sections 9 and 10 the Rivers and Harbors Act of 1899. Compensatory mitigation requirements that may be imposed by state regulatory programs are to be addressed through applicable state regulations. While compensatory mitigation requirements may affect how private property is used, such permit conditions do not necessarily result in a taking of private property.

If a compensatory mitigation project is located in a right-of-way owned by a public agency, then alternative mechanisms may be used to provide site protection. This rule does not compromise private property rights. Permittees can propose alternative compensatory mitigation projects in cases where a particular parcel of land is needed for uses other than compensatory mitigation.

One commenter asked for clarification as to why there is a preference for non-profit conservation organizations versus for-profit conservation organizations. Some commenters requested a definition of the phrase "long-term protection."

We do not state a preference for non-profit conservation organizations. Section 332.7(a)(1) [§ 230.97(a)(1)] provides examples of suitable land managers, and does not limit potential land managers. Long-term protection refers to measures taken to sustain and preserve the compensatory mitigation project after performance standards are met and monitoring requirements have been fulfilled.

Several commenters asserted that in addition to fishing and grazing rights, compatible uses of compensatory mitigation projects on public lands should include non-motorized public recreation, including development of multi-use trails. They said that the agencies should recognize that any trails or other features or activities that would impact jurisdictional waters of the United States would require DA permits and compensatory mitigation. Other

commenters recommended restricting incompatible uses. One commenter stated that a mitigation bank needs to be preserved in perpetuity and protected from negative impacts. This commenter said that the phrase "restrict or" should be removed from § 332.7(a) [§ 230.97(a)] of the proposed rule, because incompatible uses must not be allowed.

To the extent appropriate and practicable, incompatible uses that might jeopardize the objectives of the compensatory mitigation project will be prohibited. District engineers will determine which uses are compatible and incompatible on a case-by-case basis. We have added mineral extraction to § 332.7(a)(2) [§ 230.97(a)(2)] as an example of an incompatible use. We have removed the phrase "restrict or" from this provision (now designated as § 332.7(a)(2) [§ 230.97(a)(2)]).

To address potential alterations to compensatory mitigation projects on public lands, including federal facilities, that may result from changes in statutes, regulations, or agency needs or mission, we have also added § 332.7(a)(4) [§ 230.97(a)(4)]. This provision requires the public agency authorizing the incompatible use to provide alternative compensatory mitigation acceptable to the district engineer for any loss in functions resulting from the incompatible use.

Several commenters said that in cases where a third party is the holder of the conservation easement, the easement should contain a requirement that the regulating agency be notified should there be any action taken to void the easement (e.g., in legal actions related to bankruptcy, tax reversion, or similar circumstances). In the event that a third party holder defaults on an easement or is no longer authorized to hold an easement, then that easement should revert to the regulating agency.

We have added § 332.7(a)(3) [§ 230.97(a)(3)] to require long-term protection mechanisms to include provisions requiring 60-day advance notification to the district engineer if any action is taken to void or modify the mechanism. The Corps, however, does not have authority to hold easements for compensatory mitigation projects.

(b) *Sustainability*. A number of commenters agreed that compensatory mitigation projects should be designed to be self-sustaining once performance standards have been achieved. One commenter expressed a preference for self-sustaining mitigation projects to those requiring on-going human intervention, such as irrigation, but acknowledged that in arid regions, surface water supplies may be severely limited or unavailable because of

established water rights. This commenter said that pumped groundwater may be the only practicable solution.

This rule requires compensatory mitigation projects to be designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. Where use of active structures such as pumps cannot be avoided, it is permitted, however the project sponsor should carefully evaluate the project design to ensure that it is self-sustaining to the maximum extent practicable. At the end of § 332.7(b) [§ 230.97(b)], we have added a provision requiring the acquisition and protection of water rights where needed. That provision also requires documentation in the permit conditions or the third-party mitigation instrument.

Several commenters stated that monitoring will be required to make sure that mitigation projects are self-sustaining. One commenter recommended denying compensatory mitigation credit for projects requiring active engineering features or excessive management such as pumps or manipulated impoundments except in exceptional circumstances. Another commenter said that language supporting active management and maintenance, as well as adaptive management, should be included. Commenters also stated that when an existing, human-created wetland is being impacted, it may be appropriate to develop mitigation features with shorter life expectancies.

Determining whether an implemented compensatory mitigation project is self-sustaining should occur during the original monitoring period. In general, compensatory mitigation should not require active engineering features such as pumps, but should be appropriately sited to ensure that natural hydrology and landscape position will support long-term sustainability. If this is not possible in some areas, district engineers may decide that active engineering features or active management may be necessary for a compensatory mitigation project to meet its objectives. Adaptive management and long-term management are addressed in paragraphs (c) and (d) of this section, respectively. Appropriate compensatory mitigation project design, objectives, and life expectancies are most appropriately determined by district engineers on a case-by-case basis.

(c) *Adaptive management.* A number of commenters supported the use of adaptive management to address unforeseen changes in aquatic resource functions of compensatory mitigation

projects. Several commenters recommended the use of legal instruments to protect compensatory mitigation sites instead of relying on adaptive management strategies. One commenter suggested that if a permittee has made a “good faith effort” to meet performance standards, no additional compensatory mitigation requirements should be imposed other than an extension of the monitoring period. Several commenters said that requiring adaptive management efforts beyond what is currently required as remediation or contingency actions will impose additional financial and resource burdens on mitigation providers. One commenter requested that the final rule clarify that “monitoring and adaptive management” will not be used as a substitute for developing a mitigation site plan.

We have modified § 332.7(c) [§ 230.97(c)] to be consistent with the changes to the definition of adaptive management made in § 332.2 [§ 230.92]. The protection of compensatory mitigation projects sites through real estate instruments and other mechanisms will not address poor performance that could be remedied through adaptive management measures. The focus of adaptive management should be on taking measures to achieve performance and satisfy the objectives of the compensatory mitigation project. Extending the monitoring period may not be an appropriate adaptive management approach to achieve the desired performance, however, if the district engineer determines that the project is progressing towards meeting performance standards and that more time is all that is needed, he may determine that extension of the monitoring period is an appropriate adaptive management response. We recognize that there may be additional costs associated with an adaptive management approach, but we believe that such an approach is necessary to achieve compensatory mitigation project objectives, or to provide comparable or superior ecological benefits. An adaptive management plan is part of a mitigation plan (see § 332.4(c)(12) [§ 230.94(c)(12)]), not a substitute for a complete mitigation plan.

We have added § 332.7(c)(1) [§ 230.97(c)(1)] to require permittees or third-party mitigation sponsors to notify the district engineer if a permittee-responsible mitigation project or a mitigation bank or in-lieu fee project cannot be constructed in accordance with the approved mitigation plans. Any significant modification of a compensatory mitigation project

requires the approval of the district engineer, and must comply with the conditions of the permit or the third-party mitigation instrument. If a change is necessary that does not comply with the permit or instrument as approved, the permit or instrument must be modified.

Several commenters stated that an adaptive management plan should describe a technical approach to dealing with performance issues such as invasive species, but should not depend on agency review and approval of specific management decisions. One commenter said that requiring applicants to develop up-front adaptive management plans would allow flexibility and responsiveness on the part of the applicant while preserving final agency approval or disapproval of the results. Several commenters recommended allowing responsible parties to determine remediation actions and report on those actions and the results to the district engineer. A number of commenters said that the proposed rule leaves the district engineer too much discretion to dismiss remediation measures as not being “appropriate and practicable.”

Management decisions that deviate from the approved mitigation plans require approval from the district engineer. However, a certain amount of responsiveness to conditions on the ground may be built in to the mitigation plan itself. In such cases, as long as the project sponsor is operating in accordance with the approved mitigation plan, no special notification or additional approval is required, although monitoring reports should include appropriate information to allow the district engineer to assess how the project is progressing. In § 332.7(c)(2) [§ 230.97(c)(2)] of the final rule, we have modified this paragraph to require the responsible party to notify the district engineer as soon as possible if the compensatory mitigation project is not achieving its performance standards as anticipated. The district engineer may determine that modification of the approved mitigation plans is necessary to ensure compliance with the DA permit or third-party instrument. District engineers will evaluate proposed measures to determine if they will address deficiencies in the compensatory mitigation project and/or require modification of the approved mitigation plans. It is necessary to provide the district engineer with the authority to determine whether remediation measures are appropriate and practicable. If the proposed remediation measures do not meet those two criteria, the district engineer may

determine that it is necessary for the responsible party to provide alternative compensatory mitigation. In § 332.7(c) [§ 230.7(c)] we have replaced the phrase “remediation measures” with “measures” since appropriate measures may involve activities other than remediation.

One commenter agreed that the performance standards may need to be revised, but only if performance and conditions at the compensatory mitigation project site warrant revision of the objectives. Another commenter stated that § 332.7(c)(3) [§ 230.97(c)(3)] of the proposed rule should be modified to clarify that performance standards will not be lowered simply because the compensatory mitigation project has not been able to meet those standards.

The last sentence of § 332.7(c)(2) [§ 230.97(c)(2)] states that district engineers will consider whether compensatory mitigation projects are providing comparable ecological benefits to the original objectives, when determining whether it is necessary to require adaptive management. This will not result in a lowering of performance standards. Alternative compensatory mitigation may be required to offset a shortfall in aquatic resource functions. District engineers will also consider whether the compensatory mitigation project is providing ecological benefits that are comparable or superior to the approved compensatory mitigation project (see § 332.7(c)(4) [§ 230.97(c)(4)]).

Several commenters agreed with statements in the preamble of the proposed rule indicating that district engineers will not require additional monitoring or corrective actions for compensatory mitigation projects that have not developed as intended due to natural catastrophes. A number of commenters suggested that flooding issues should be further explained in the final rule, or references to those issues eliminated. Several commenters said that the final rule should avoid creating a loophole in those cases where diseased vegetation results from poor stock or contractor error, and not a natural catastrophe. A few commenters recognized that, at certain stages of restoration projects, those activities may not be able to withstand a natural disaster; in such cases the district engineer should have discretion to extend deadlines for completion. One commenter stated that the discussion of natural disasters should be part of the adaptive management plan. Another commenter asked for guidance on using financial assurances to address damage caused by a natural disaster.

In § 332.7(c)(4) [§ 230.97(c)(4)], we address adaptive management as it relates to natural disasters. Except in the case of natural disasters, this rule does not allow revisions to performance standards unless they reflect ecological benefits that are comparable or superior to the originally approved objectives. If a natural disaster causes deficiencies in a compensatory mitigation project, the district engineer will evaluate the circumstances and determine whether it would be appropriate and practicable to require measures to address those deficiencies. Additional monitoring may be required to assess how a compensatory mitigation project is responding to a natural disaster. District engineers will determine on a case-by-case basis whether flood events warrant taking action to repair compensatory mitigation projects. In cases where diseased plant stock may have been used at a compensatory mitigation project site, it may be appropriate either to require replanting, or to allow natural revegetation. It is appropriate for adaptive management plans to consider potential natural disasters that may occur, to the extent that they can be reasonably foreseen. Financial assurances may be used to provide alternative compensatory mitigation if the compensatory mitigation project fails as a result of a natural disaster that occurs before the monitoring period has ended.

(d) *Long-term management.* One commenter suggested that § 332.7(d) [§ 230.97(d)] conflicts with § 332.7(b) [§ 230.97(b)], which states that compensatory mitigation projects should be designed to be self-sustaining. Many commenters supported the proposed requirement to identify the party responsible for the long-term management of the compensatory mitigation project site. Several commenters agreed that the mitigation bank sponsor should maintain management responsibilities unless they are formally transferred to another party. Several commenters stated that funding for the long-term management of mitigated projects must be arranged prior to the issuance of any permits.

Although compensatory mitigation projects should, to the extent it is practicable to do so, be self-sustaining, active long-term management and maintenance are often necessary for a compensatory mitigation project to fulfill its objectives. In such cases, provisions for long-term management need to be provided as permit conditions or as stipulations in a mitigation banking or in-lieu fee program instrument. Such permit conditions or instrument stipulations

should identify the party responsible for long-term management, and if another party agrees to assume that responsibility at a later date, the permit or instrument can be modified by the district engineer to transfer that responsibility. For permittee-responsible mitigation, § 332.7(d)(4) [§ 230.97(d)(4)] has been added to require approval of any required long-term financing mechanisms before the permitted impacts occur.

We have added § 332.7(d)(2) [§ 230.97(d)(2)], which states that a long-term management plan should include a description of long-term management needs for the compensatory mitigation project and annual cost estimates for those needs, and identify the funding mechanism that will support the long-term management activities. In § 332.7(d)(3) [§ 230.97(d)(3)], which was § 332.7(d)(2) [§ 230.97(d)(2)] of the proposed rule, we have added a sentence to allow the district engineer to impose, where appropriate, provisions to address inflationary adjustments and other contingencies.

One commenter supported the requirement for a long-term management plan that identifies the responsible entity and addresses “long-term funding mechanisms” as specified in the proposed § 332.4(c)(11) [§ 230.94(c)(11)], but believed that this requirement conflicts with the proposed § 332.3(n)(3) [§ 230.93(n)(3)], which states that financial assurances would be phased out once performance standards have been met. Instead, this commenter suggests that the rule be clarified by describing the two required types of financial assurances: (1) Financial assurances for the construction and establishment of the compensatory mitigation project, which would be phased out incrementally as performance standards are met, and (2) funding for long-term management of the compensatory mitigation project. Several commenters said that the rule should more explicitly recognize that funding of long-term management can be “phased-out” or reduced over time.

In this rule, financial assurances are used to provide a high level of confidence that compensatory mitigation projects will be completed, whereas long-term management measures are used to help ensure the long-term sustainability of compensatory mitigation projects. Funding for financial assurances is handled differently than funding for long-term management. The final rule clearly differentiates between financial assurances for construction and establishment of compensatory mitigation projects and funding

mechanisms for long-term management of those projects. In general, funding for long-term management should not be phased out over time, since those activities usually need to be conducted for substantial periods of time. There may be occasions where long-term management is no longer necessary because a compensatory mitigation project has developed to the point where active management measures are no longer needed to fulfill the objectives of that project. In such cases, the responsible party should contact the district engineer and request that the long-term management provisions be modified to release those obligations.

Several commenters said that long-term management for compensatory mitigation projects on public land should not be required, or at the very least should be privately funded. Several commenters stated that the proposed rule is ambiguous and could result in different standards applying to compensatory mitigation sites on public lands versus private lands because it allows district engineers flexibility in determining requirements for long-term management on public lands on a case-specific basis. One commenter said that adequate financing of long-term stewardship of a compensatory mitigation site should be demonstrated for the public or private authority accepting stewardship responsibility, because this will ensure consistency of site maintenance whether the responsible party is a private or public entity.

In cases where compensatory mitigation project sites are owned by public entities, it may not be necessary to include provisions for the financing of any required long-term management if, for example, a formal, documented commitment from a government agency is provided (i.e., stewardship commitment). For public agencies, identifying adequate financing at the time of permit issuance may be problematic since agency funding can vary from year-to-year with budget cycles, thus underscoring the need for a formal, documented commitment. In cases of non-governmental organizations or private land managers accepting responsibility for long-term management of compensatory mitigation projects, including mitigation bank sites or in-lieu fee project sites, it will be necessary for those entities to demonstrate that there will be adequate funds available for the long-term management activities. It is important to note that many public and private land managers are no longer accepting the long-term stewardship responsibilities of compensatory mitigation sites unless

an endowment or other source of long-term funding is provided by the permittee or sponsor.

Although not included in the text of the proposed rule, in the preamble we requested comments on including a provision that would require that the arrangements for adequate capitalization of long-term management funds be finalized prior to permit issuance. Several commenters disagreed with adding such a provision. They said that finalization of long-term management funds should not be required prior to permit issuance because it is often difficult to locate and establish a long-term management entity. These commenters also indicated it may take substantial time to arrange adequate capitalization of long-term management funds. However, several other commenters said that capitalization should take place prior to the permit issuance in order to ensure that compensatory mitigation project sites will be maintained in the long-term. An alternative solution offered by several commenters would be to require mitigation banks to provide incremental long-term management funding as credits are released. These commenters also suggested that an endowment fund be created in order to aid in the establishment of mitigation banks.

We have added § 332.7(d)(4) [§ 230.97(d)(4)] to require approval of any required long-term financing mechanisms before the activity authorized by the DA permit is initiated. This does not mean that the long-term management measures need to be established and fully funded, but they do need to be described and approved. This provision applies to permittee-responsible mitigation projects. For third-party mitigation, provisions necessary for long-term management must be addressed in the instrument (see § 332.7(d)(3) [§ 230.97(d)(3)]). For mitigation banks and in-lieu fee programs, long-term management is also addressed in § 332.8(u) [§ 230.98(u)]. For in-lieu fee programs, costs per unit credit are explicitly required to take into account long-term management and protection of in-lieu fee project sites (see § 332.8(o)(5)(ii) [§ 230.98(o)(5)(ii)]). For banks, this will be taken care of by market pricing of credits, since the bank sponsor is responsible for long-term management and must ensure that revenues are adequate to cover this responsibility.

In cases where long-term financing for long-term management of compensatory mitigation projects is necessary, district engineers should consider the need to make inflationary adjustments and certain financial assumptions. For

example, district engineers may consider total return assumptions and capitalization rates in the case of endowments, or Consumer Price Index adjustments in the case of annual payments.

33 CFR 332.8 and 40 CFR 230.98 Mitigation Banks and In-Lieu Fee Programs

(a) *General considerations.* Four commenters supported the provision in the proposed rule that stipulates mitigation banks can be sited on public or private land. There were several commenters, however, who opposed locating mitigation banks on public land. One commenter stated that public lands are to be protected, held in public trust, and managed for their natural resources, ecosystem services, and the recreational and aesthetic values. This commenter said that when private lands are impacted and those impacts are mitigated on public lands, the public gains nothing and more natural habitat is lost. Commenters also stated that it is not appropriate for private developers to profit from compensatory mitigation projects conducted on lands purchased with public funds. One commenter said that, given the current demands for management on public lands, that use of public lands cannot be adequately controlled to assure long-term success of the mitigation bank. Four commenters noted that the statement that credits are based solely on aquatic resource functions may be interpreted as limiting credits to only those activities in wetlands and other aquatic resources, and not activities in uplands that support and enhance those functions.

We have moved § 332.8(a)(2) [§ 230.98(a)(2)] of the proposed rule to § 332.3(a)(3) [§ 230.93(a)(3)], since the principles in this paragraph should apply to all compensatory mitigation projects, including permittee-responsible mitigation. Public entities should be allowed to establish mitigation banks or in-lieu fee projects on their lands. Public entities are often prospective permittees who may need to provide compensatory mitigation for their projects. As long as mitigation banks or in-lieu fee projects established on public lands provide environmental benefits over and above what normal management activities provide, there should be no conflict. Credits secured by private developers can provide a source of income for public entities to conduct aquatic resource restoration, establishment, enhancement, and/or preservation activities that could not be done under their current budgets. Credits provided by mitigation banks and in-lieu fee projects include

environmental benefits resulting from riparian areas, buffers, and uplands (see § 332.8(o)(7) [§ 230.98(o)(7)]).

Several commenters said that mitigation bank site selection should be tied to watershed analyses, and should, to the extent possible, dovetail with existing regional watershed plans, many of which identify or prioritize regional restoration needs. One commenter noted that the mitigation bank approval process does not require a watershed assessment, and said that such an assessment is essential for determining the ecological functions that the mitigation bank is likely to achieve.

The selection of mitigation bank sites should, to the extent practicable, follow a watershed approach. As stated in § 332.8(b)(3) [§ 230.98(b)(3)], the district engineer and the IRT are to use a watershed approach when evaluating proposed mitigation banks and in-lieu fee programs. For in-lieu fee programs, the required compensation planning framework must support a watershed approach to compensatory mitigation (see § 332.8(c)(1) [§ 230.98(c)(1)]).

We have modified § 332.8(a) [§ 230.98(a)] by adding in-lieu fee programs, since § 332.8 [§ 230.98] contains regulations governing both forms of third-party mitigation: mitigation banks and in-lieu fee programs. We have divided § 332.8(a)(1) [§ 230.98(a)(1)] of the proposed rule into two paragraphs. Section 332.8(a)(1) [§ 230.98(a)(1)] states that all mitigation banks and in-lieu fee programs must have an approved instrument signed by the sponsor and the district engineer before being used to provide compensatory mitigation for DA permits. This provision facilitates compliance with terms of a mitigation banking instrument or an in-lieu fee program instrument. So called “ad hoc” third-party mitigation providers cannot operate as banks or in-lieu fee programs without an approved instrument. While a permittee-responsible mitigation project is free to use a third party to provide some or all of the design, construction and management services required for project implementation, liability for project success cannot be transferred to a third party except where there is an approved instrument. Section 332.8(a)(2) [§ 230.98(a)(2)] stipulates that mitigation bank sites and in-lieu fee project sites must be planned and designed to be self-sustaining, but may also require some active management to ensure their long-term viability and sustainability.

(b) *Interagency Review Team.* Three commenters supported the establishment of the Interagency Review Team (IRT). Several commenters,

however, stated that the IRT impedes the process. Those commenters recommended streamlining the review process by eliminating the IRT and using public notices instead. One commenter said that it is unclear whether an IRT is a standing committee or whether a new one is formed for each mitigation bank proposal. One commenter asked who will fund IRT activities. Several commenters asked for clarification on the role of the IRT. One commenter said that the team should retain the name “mitigation bank review team.”

The participation of the IRT is necessary to provide expertise and advice to district engineers who are evaluating third-party mitigation proposals from potential mitigation bank sponsors and in-lieu fee program sponsors. Because of our experience with the 1995 mitigation banking guidance, we believe that the IRT review process is more effective than a simple public notice process for determining the potential success and usefulness of a proposed mitigation bank. With this rule, we are extending the IRT review process to all in-lieu fee programs, with the hope of achieving the same benefits.

District engineers have the flexibility to establish standing IRTs in their geographic areas of responsibility, or to establish a new IRT for each proposed mitigation bank or in-lieu fee program. Participation in an IRT will be funded through that agency’s budget. Since the IRT concept will be used for both mitigation banks and in-lieu fee programs, we are retaining “interagency review team.”

Many commenters stated that state, local, or tribal entities should be included in the IRT. Some commenters also recommended that the IRT have a state co-chair whenever the mitigation bank is being implemented under both state and federal mitigation banking programs, rather than allowing the district engineer discretion to make that determination. Some commenters said that the proposed rule diminishes the advisory role of state and federal resource agencies. Many commenters stressed the need for collaboration with state and local agency personnel. One commenter stated that the rule must establish strong, uniform standards so as not to undermine states that currently employ more stringent and protective mitigation standards for aquatic resources. This commenter also said that the rule should prompt those states with weak programs to raise their standards, and to ensure that state and local agencies have a more equal role with their federal counterparts.

Representatives of the U.S. EPA, National Marine Fisheries Service, and U.S. Fish and Wildlife Service will automatically be included on the IRT if they choose to participate. Beyond this, the district engineer determines the composition of the IRT. Section 332.8(b)(2) [§ 230.98(b)(2)] states that the district engineer will seek to include in the IRT all public agencies with a substantive interest in the establishment of a mitigation bank or in-lieu fee program. This includes state, local, or tribal entities. As stated in § 332.8(b)(1) [§ 230.98(b)(1)], other federal, tribal, state, or local agencies may serve as co-chairs of an IRT, if the mitigation bank or in-lieu fee program will also be used to satisfy their requirements. Since this rule is focused on compensatory mitigation for DA permits, we believe it is appropriate for the district engineer to be the primary authority to administer these regulations. There are states that have developed their own regulations governing mitigation banks or in-lieu fee programs. This rule merely addresses the federal concerns regarding compensatory mitigation required by DA permits under section 404 of the Clean Water Act and/or sections 9 and 10 of the Rivers and Harbors Act of 1899. Therefore, it reflects the decision-making responsibilities of the U.S. Army Corps of Engineers. It does not affect state or local government aquatic resource regulatory programs. State or local governments can issue their own regulations governing compensatory mitigation required under their environmental statutes or regulations.

A number of commenters recommended that the district engineer exercise the ultimate authority for approvals granted under this rule following due consideration of the IRT recommendations. However, several commenters said that decisions should not rest solely with district engineers. Numerous respondents requested the elimination of the requirement in the rule that the resource agencies be signatories to the mitigation banking document. One commenter said that the rule should be expanded to accommodate additional review processes.

As stated in § 332.8(b)(4) [§ 230.98(b)(4)], the district engineer retains the final authority for approving mitigation banking instruments or in-lieu fee program instruments, since these third-party mitigation sources will be used to satisfy compensatory mitigation requirements for DA permits. If there is a co-chair, that co-chair will decide whether the proposed mitigation bank or in-lieu fee program can be used to provide compensatory mitigation

under the other federal, tribal, state, or local program. We believe that allowing IRT members to sign mitigation banking instruments or in-lieu fee program instruments is beneficial, and helps demonstrate their support of approved instruments; however, under today's rule they are not required to do so and the district engineer may approve an instrument regardless of whether or not other IRT member agencies sign it. In § 332.8(b)(3) [§ 230.98(b)(3)] we have added a sentence that allows IRT members the option of submitting letters of concurrence, instead of signing an instrument. We do not agree that this rule should be expanded to other review processes. This rule was promulgated in response to the congressional mandate in section 314 of the National Defense Authorization Act for Fiscal Year 2004, which only directed the development of standards and criteria for compensatory mitigation for CWA section 404 permits. For program efficiency, we have included requirements for RHA section 9 and 10 permits as well, but we do not believe it is efficient or appropriate to cover review processes for requirements under other statutes in these regulations.

Since the final rule contains in-lieu fee programs, in § 332.8(b)(3) [§ 230.98(b)(3)] we have modified the second sentence to clarify that the IRT will review the prospectus, instrument, and other appropriate documents and provide comments to the district engineer. Examples of "other appropriate documents" include mitigation plans for mitigation banks and in-lieu fee project sites, as well as monitoring reports, proposed adaptive management measures, and documents supporting proposed credit releases. Also included are the compensation planning frameworks required of all in-lieu fee programs, which are included as part of their instruments. At the end of § 332.8(b)(3) [§ 230.98(b)(3)], we have added two sentences. One sentence stipulates that comments from IRT members must be received within specified time limits, to ensure timely processing of instruments. The other sentence states that IRT comments received after specified deadlines will only be considered at the discretion of the district engineer to the extent doing so does not jeopardize the deadlines for the district engineer's actions.

We have also added § 332.8(b)(5) [§ 230.98(b)(5)], which allows district engineers and IRT members to enter into memoranda of agreement with other agencies to perform some or all of the IRT functions described in § 332.8 [§ 230.98]. This may be particularly appropriate in states with robust

programmatic general permits for the section 404 program. However, the district engineer retains sole authority for approving instruments and other documentation.

(c) *Compensation planning framework for in-lieu fee programs.* We have added this section to the final rule to provide a level of watershed planning for in-lieu fee programs that goes beyond the watershed planning typically conducted by mitigation banks. The compensation planning framework is also intended to help reduce some of the risk and uncertainty surrounding in-lieu fee programs, since those programs will be able to sell a limited number of credits before selecting and implementing compensatory mitigation projects. The compensation planning framework will be used to select, secure, and implement aquatic resource restoration, establishment, enhancement, and/or preservation activities.

In the proposed rule, the agencies proposed to phase out the use of in-lieu fee programs within 5 years. We also asked for comment on this provision, and asked that commenters who supported continued authorization of in-lieu fee programs as third-party mitigation providers explain their rationale for allowing two different types of providers (banks and in-lieu fee programs) to operate under different requirements. We also asked for comment on how to ensure that in-lieu fee programs achieve the same level of success and certainty in providing compensation for permitted impacts as mitigation banks. One response we received to this request was that many in-lieu fee programs conduct more extensive and intensive watershed-based resource planning prior to securing sites and developing mitigation plans for specific projects. These commenters argued that in-lieu fee programs were better positioned to identify and provide resources that best meet the needs of the watershed, even when these resources are not the "easiest" to provide, or appropriate sites are more expensive or difficult to secure. The agencies have determined that this may be a legitimate advantage of in-lieu fee programs, and this consideration was part of the basis for our determination to allow continued authorization of in-lieu programs in this final rule. To ensure that this benefit is realized, we have formalized this comprehensive planning process in the requirement for in-lieu fee programs to include a compensation planning framework in their instrument.

The compensation planning framework will include the following

information: One or more geographic service areas; a general description of the threats to aquatic resources in the service area(s), including how the in-lieu fee program would help offset impacts resulting from those threats; an analysis of historic aquatic resource loss in the service area(s); an analysis of current aquatic resource conditions in the service area(s), supported by an appropriate level of field documentation; a statement of aquatic resource goals and objectives for each service area, including general amounts, types, and locations of aquatic resources the proposed in-lieu fee program will seek to provide; a prioritization strategy for selecting and implementing compensatory mitigation activities; an explanation of any preservation objectives, including how those preservation activities would satisfy the criteria at § 332.3(h); a description of any public or private stakeholder involvement in the development of the framework; a description of the long-term protection and management strategies for activities; a strategy for periodic evaluation and reporting on the in-lieu fee program's progress in achieving its goals and objectives; and other information determined by the district engineer to be necessary for effective compensation planning by in-lieu fee programs.

The level of detail necessary for the compensation planning framework is at the discretion of the district engineer, and will take into account the characteristics of the service area(s) and the scope of the in-lieu fee program. Once the planning framework is approved as part of the in-lieu fee program instrument, all specific mitigation projects developed by the in-lieu fee program to provide compensation for DA permits must be consistent with it. Any modification to the framework must be approved as a significant modification to the instrument by the district engineer, after consultation with the IRT.

(d)(1) *Review process.* Many commenters supported the proposed timeframes for the review of mitigation banking instruments. Several commenters said that the time frames should be shorter. Several commenters stated that the proposed time frames are inadequate to allow all agencies time to receive, review, and comment on proposed mitigation banks. One commenter stated that setting unrealistic deadlines will only serve to weaken the process and discourage any substantive review of third-party mitigation proposals. Some commenters expressed concern that the proposed time frames may be unachievable due to

the workloads of the Corps and the IRT. Several commenters said that the IRT process would result in delays in implementation and increased costs for mitigation banks, as well as increased risk of failure or environmental deterioration of mitigation bank sites resulting from time-consuming modifications of instruments. Two commenters stated that the Corps should place deadlines on its own actions, such as establishing a time frame for a district engineer to approve or deny a final mitigation banking instrument.

In response to comments, we have modified a number of time frames in the final rule to provide sufficient time to complete specific tasks. For instance, we have changed § 332.8(d)(8) [§ 230.98(d)(8)] to increase, from 15 days to 30 days, the period by which the district engineer must notify the IRT whether or not he intends to approve the instrument or amendment. We have also added time frames to certain provisions to make the review process more effective. For example, we have added a requirement for a district engineer to notify the sponsor within 30 days whether a draft instrument or amendment is complete (see § 332.8(d)(6)(i) [§ 230.98(d)(6)(i)]).

We believe that the time frames in the final rule will provide efficiency to the review and approval process for third-party mitigation, while taking into account the workload of the agencies. We do not agree that these timeframes would adversely affect an agency's ability to provide substantive comments. It is important to consider the savings on time and resources that third-party mitigation can provide in comparison to permittee-responsible mitigation, where individual mitigation plans must be reviewed and approved in accordance with the regulations in this part. We also believe that the time frames provided in this rule will result in fewer delays for mitigation banks and in-lieu fee programs, since the 1995 mitigation banking guidance and the 2000 in-lieu fee guidance did not establish time frames for review and approval. The reduced delays, as well as the required time frames for project implementation, will help protect the environment through timely implementation of compensatory mitigation projects. This rule imposes appropriate time frames for the Corps to complete its decisions, to ensure timely responses to requests to approve third-party mitigation instruments or amendments to previously approved instruments.

Several commenters recommended that the rule provide flexibility for

Corps districts to take advantage of state procedures to the extent practicable to make it easier for sponsors to go through the permit process and to avoid unnecessary duplication of effort.

In areas where DA permits are needed to construct mitigation banks or in-lieu fee projects, and programmatic general permits are available to authorize such activities, district engineers are encouraged to use those programmatic general permits to provide the required authorization. District engineers have the discretion to determine that use of programmatic general permits may not be appropriate for authorizing the construction of mitigation banks, to ensure adequate coordination of instrument approval and any required DA authorization. District engineers are also free to enter into MOAs with state agencies administering programmatic general permits to perform some or all of the review functions associated with mitigation bank and in-lieu fee program approval; however, the district engineer retains the final responsibility and authority for ensuring that the requirements of the CWA and this part are met.

One commenter noted that the proposed rule does not require that permits be issued or denied within a fixed amount of time and mitigation banks should not categorically be accorded a higher priority than permit decisions.

The procedures for issuing DA permits are provided at 33 CFR part 325, and are outside the scope of today's rule. The regulations governing the timing for processing DA permit applications are provided at 33 CFR 325.2(d).

Since the final rule includes in-lieu fee programs as a source of compensatory mitigation for DA permits, we have revised § 332.8(d)(1) [§ 230.98(d)(1)] to include in-lieu fee programs. Since in-lieu fee programs usually cannot secure compensatory mitigation project sites until a period of time after the in-lieu fee program instrument is approved and the in-lieu fee program becomes operational, we have added a provision that stipulates that mitigation plans for in-lieu fee project sites will be prepared as those sites are identified. The sentence stating that a mitigation banking instrument must include the mitigation plan by reference has been moved to § 332.8(l)(2) [§ 230.98(l)(2)] and modified to include in-lieu fee projects.

(d)(2) *Prospectus*. A number of commenters requested clarification on the definition of what constitutes a "complete" prospectus, and who determines whether a prospectus is

complete. Other commenters stated that the proposed time period of 15 days for the district engineer to notify a potential sponsor whether the prospectus is complete is too short. One commenter stated that the proposed rule may force trained scientists to quickly become de facto financiers who are expected to understand prospectus preparation.

We have modified § 332.8(d)(2) [§ 230.98(d)(2)] to include in-lieu fee programs. We have also modified this paragraph to clarify that the review process for a proposed mitigation bank or in-lieu fee program begins when the sponsor submits a complete prospectus to the district engineer. We have changed the time period for the district engineer to notify the sponsor whether the prospectus is complete to 30 days, to allow adequate time for this review to occur. An entity who wants to develop a mitigation bank or in-lieu fee program must be able to provide a complete prospectus. We believe that the requirements for a complete prospectus constitute basic information that is necessary for district engineers, IRT members, and the public to effectively evaluate the potential for the proposed mitigation bank or in-lieu fee program to provide successful and sustainable compensatory mitigation projects. As with any business venture, knowledge in financial matters is often a requisite for success.

For a proposed mitigation bank, a complete prospectus includes the following information: The objectives of the proposed mitigation bank; how the mitigation bank will be established and operated; the proposed service area; the general need for and technical feasibility of the proposed mitigation bank; the proposed ownership arrangements and long-term management strategy for the mitigation bank; the qualifications of the sponsor to successfully complete the type(s) of mitigation project(s) proposed, including information describing any past such activities by the sponsor; the ecological suitability of the site to achieve the objectives of the proposed mitigation bank, including the physical, chemical, and biological characteristics of the bank site and how that site will support the planned types of aquatic resources and functions; and assurance of sufficient water rights to support the long-term sustainability of the mitigation bank.

For a proposed in-lieu fee program, a complete prospectus includes the following information: The objectives of the proposed in-lieu fee program; how the in-lieu fee program will be established and operated; the proposed service area(s); the general need for and

technical feasibility of the proposed in-lieu fee program; the proposed ownership arrangements and long-term management strategy for the in-lieu fee project sites; the qualifications of the sponsor to successfully complete the type(s) of mitigation project(s) proposed, including information describing any past such activities by the sponsor; the compensation planning framework; and a description of the in-lieu fee program account.

To clarify that a sponsor does not need to submit a new prospectus to request modification of an approved instrument, we have added a sentence stating that the sponsor needs to submit a written request for instrument modification, with appropriate documentation. What constitutes appropriate documentation for an instrument modification is at the discretion of the district engineer, and is dependent on the type of modification.

(d)(3) Preliminary review of prospectus. A few commenters asked why site visits are not mentioned within the preliminary review process.

A district engineer may conduct site visits as necessary to provide feedback on a draft prospectus.

(d)(4) Public review and comment. Several commenters said that issuing the public notice when a mitigation bank prospectus is received is inefficient because the mitigation plan may only be preliminary. A number of commenters agree with the proposed length of the public comment period, others suggested extending it to 60 or 90 days. Some commenters opposed any public comment period, contending that it will complicate the process. On the other hand, several commenters said that the public comment period is required by the National Environmental Policy Act. Several commenters suggested that there be public notice and comment for draft mitigation banking instruments.

The public notice is an important means of assisting district engineers in making informed decisions on proposed mitigation banks and in-lieu fee programs, as well as modifications of third-party mitigation instruments. Comments submitted in response to a public notice can help ensure that a proposed third-party mitigation operation is in the public interest and complies with applicable laws and regulations. We have modified § 332.8(d)(4) [§ 230.98(d)(4)] to specify that the public notice will be 30 days, unless the district engineer determines that more time is necessary to solicit meaningful comment. We do not believe it would be appropriate to have comment periods of less than 30 days

for third-party mitigation operations. We have also added a sentence to this paragraph to require, for proposed modifications of approved instruments, a public notice that includes a summary of the proposed modification and any appropriate documentation. We do not believe it is necessary to subject draft mitigation banking instruments to a public notice and comment process, because these documents are essentially contractual in nature. The principle aspects of a proposed mitigation bank or in-lieu fee program that would benefit from the public notice and comment process are covered by the prospectus.

Several commenters said that there should be public notices announcing final mitigation banking instruments. Some commenters asked whether the resulting mitigation bank instrument and the alternatives analysis will be available to the public. A number of commenters said that the Corps must be required to make mitigation plans, instruments, and monitoring reports easily accessible to resource agencies and the public so that they may assist in holding permittees and banks accountable for mitigation compliance.

District engineers may announce the approval of a mitigation banking instrument or an in-lieu fee program instrument by issuing a public notice. Approved third-party mitigation instruments are public information that will be provided to interested parties upon request. Alternatives analyses are not typically conducted for third-party mitigation activities. If a permit is required to construct a mitigation bank or in-lieu fee project, and an alternatives analysis was required to issue that permit, then the documentation of the alternatives analysis would be in the administrative record for the permit action. The last sentence of § 332.8(d)(8) [§ 230.98(d)(8)] states that final mitigation banking and in-lieu fee program instruments must be made available to the public upon request.

(d)(5) Initial evaluation. We have added this provision to the final rule, to allow district engineers to provide prospective third-party mitigation sponsors with an initial evaluation of the potential for the proposed mitigation bank or in-lieu fee program to provide compensatory mitigation for DA permits. Initial evaluation letters will be provided to sponsors within 30 days of the end of the public notice comment period. A sponsor may either submit a draft instrument or revise the prospectus, depending on the district engineer's initial evaluation.

This provision will add efficiency to the review and approval process, because potentially unsuitable

proposals for third-party mitigation will not proceed to draft instruments that are unlikely to be approved. This initial evaluation allows for feedback from the district engineer, so that a sponsor can revise the prospectus to address any deficiencies. The initial evaluation process does not apply to modifications of previously approved instruments.

(d)(6) Draft instrument. In § 332.8(d)(6)(i) [§ 230.98(d)(6)(i)] we added a requirement that the district engineer determine, within 30 days of receipt of a draft instrument, whether that draft instrument is complete. If the draft instrument is incomplete, the district engineer will notify the sponsor to request the information necessary to make the draft instrument complete and notify the sponsor as soon as he receives the additional information and determines that the instrument is complete.

We also added a sentence to § 332.8(d)(6)(i) [§ 230.98(d)(6)(i)], which states that in the case of an instrument modification, the sponsor must prepare a draft amendment and submit it to the district engineer. This clarifies that, for instrument modifications, the sponsor is not required to submit a new draft instrument. A draft amendment may consist of a specific instrument provision or a new or modified mitigation plan.

In § 332.8(d)(6)(i) [§ 230.98(d)(6)(i)], we also explained the required content of draft mitigation banking or in-lieu fee program instruments. For mitigation banks, a draft instrument must include: a description of the proposed geographic service area of the mitigation bank; accounting procedures; a provision stating that legal responsibility for providing the compensatory mitigation lies with the sponsor once a permittee secures credits from the sponsor; default and closure provisions; reporting protocols; mitigation plans that include all applicable items listed in § 332.4(c)(2) through (14); a credit release schedule; and any other information deemed necessary by the district engineer.

For in-lieu fee programs, the draft instrument must include: A description of the proposed geographic service area(s) of the in-lieu fee program; accounting procedures; a provision stating that legal responsibility for providing the compensatory mitigation lies with the sponsor once a permittee secures credits from the sponsor; default and closure provisions; reporting protocols; the compensation planning framework; specification of the initial allocation of advance credits and a draft fee schedule for these credits, by service area, including an explanation of the

basis for the allocation and draft fee schedule; a methodology for determining future project-specific credits and fees; a description of the in-lieu fee program account required by § 332.8(i); and any other information deemed necessary by the district engineer.

Several commenters requested that the rule define “service area” more clearly. One commenter supported the increased flexibility in defining the service areas that can be served by mitigation banks, but another commenter said that the proposed definition is too restrictive. A number of commenters stated that service areas should be determined solely on the basis of its suitability to restore functions for impacted resources within a watershed, without regard to whether there are sufficient mitigation needs to support an economically viable bank. A few commenters agreed with the proposed rule that economic viability should be included in the determination of mitigation bank service areas. One commenter said that the service areas of mitigation banks should be based on watershed plans or, in the absence of a plan, the service area should be limited to the area and types of wetlands for which they can reasonably be expected to compensate functionally. Several commenters supported the provision that the district engineer, with input from the IRT, will determine a mitigation bank’s service area.

The criteria for establishing service areas for mitigation banks and in-lieu fee programs is provided in § 332.8(d)(6)(ii)(A) [§ 230.98(d)(6)(ii)(A)] of the final rule. The service area may be based on watersheds, ecoregions, physiogeographic regions, or other types of geographic area deemed appropriate by the district engineer, after consulting with the IRT. The service area must be appropriately sized to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area. In addition, the economic viability of the bank or in-lieu fee program may also be considered in determining the size of the service area. We believe it is necessary to allow economic factors to be taken into account, so that the environmental benefits of third-party mitigation discussed in §§ 332.3(a) and (b) [§§ 230.93(a) and (b)] can be realized. Banks will only be established if the prospective sponsor believes that there will be enough business to justify the initial investment of time and financial resources. And in-lieu fee programs will only be successful if they can collect enough fees to finance viable mitigation

projects. We do not believe it is practical to require watershed plans prior to establishing service areas for mitigation banks. There are few watershed plans available that would provide concrete information for establishing service areas for mitigation banks. The Corps believes that ecologically-suitable service area sizes can be established through the review processes required for mitigation banks even in the absence of a formal watershed plan, though district engineers must use a watershed approach in making this determination to the extent practicable. As for in-lieu fee programs, the compensation planning framework is itself a type of watershed plan, specifically tailored to the types of information needed to define an appropriate service area for the in-lieu fee program and guide site and project selection within that area.

Several commenters stated that the size of the mitigation bank service area specified in the proposed rule is too large. One commenter said that a 6- or 8-digit HUC is too large to guide appropriate ecological replacement of lost functions. Two commenters argued that the size of a mitigation bank’s service area should be based on the local watershed area. Several other commenters, however, believed that the service areas suggested in the proposed rule are too small. Some of these commenters noted that certain states have over 50 (e.g., North Dakota) or 100 (e.g., Alaska) 8-digit HUCs, and that developing a mitigation bank for each HUC would be difficult. One commenter noted that the size of a service area should be driven by environmental factors, and that there should not be different sizes for urban areas versus rural areas. Three commenters agreed that, as proposed in the preamble, single-user mitigation banks (e.g., those sponsored by state departments of transportation) should be given additional flexibility for the size of the service area. Two commenters, however, disagreed with this provision and argued that the size of the service area should not be based on the characteristics of the bank sponsor.

In the final rule, we have retained the examples of service area based on 8- or 6-digit hydrologic unit codes for urban and rural areas. It is important to remember that these are examples, and that the district engineer, in consultation with the IRT, will determine the appropriate service area(s) for mitigation banks and in-lieu fee programs. District engineers can take into account the sponsor’s needs and capabilities (as well as relevant statutory or regulatory authorities if the sponsor

is a government agency) when determining service areas for a third-party mitigation operation.

Two commenters said that § 332.8(c)(5)(iii) [§ 230.98(c)(5)(iii)] of the proposed rule is inconsistent with the proposed § 332.8(j) [§ 230.98(j)]. One commenter stated that this provision should address that fact that most mitigation banks will need to sell some initial credits to fund site acquisition and construction associated with starting a new mitigation bank. Another commenter suggested that the agencies provide a credit release schedule template in the final rule.

The two provisions cited in the previous paragraph are not inconsistent with each other. The provision concerning the credit release schedule for a mitigation bank is at § 332.8(d)(6)(iii)(B) [§ 230.98(d)(6)(iii)(B)] of the final rule. This provision requires the achievement of specific milestones for credit releases to occur. The initial credit release (initial debiting) for mitigation banks provided by § 332.8(m) [§ 230.98(m)] of the final rule requires achievement of appropriate milestones, such as approval of the mitigation banking instrument mitigation plan, securing the mitigation bank site, and establishing appropriate financial assurances. The initial debiting allows the mitigation bank sponsor to obtain some capital that will be used to fund subsequent operations at the mitigation bank. We do not believe it would be appropriate to provide a credit release schedule template in the final rule, because credit release schedules are likely to vary from project to project.

Two commenters asked whether the requirement to include accounting procedures in a mitigation banking instrument is linked to the ledger account in § 332.8(l)(1) [§ 230.98(l)(1)] of the proposed rule, or to the financial assurance requirements of mitigation plans in general.

The requirements for a ledger account are stipulated in § 332.8(q)(1) [§ 230.98(q)(1)] of the final rule. Ledger reports are required for both mitigation banks and in-lieu fee programs. The draft instrument must describe the accounting procedures that will be used for the mitigation bank or in-lieu fee program. Additional requirements for mitigation bank or in-lieu fee program accounting procedures are provided in § 332.8(p) [§ 230.98(p)] of the final rule. In § 332.8(q)(3) [§ 230.98(q)(3)] of the final rule, we have added a requirement for an annual report showing the activities for any financial assurances accounts and long-term management funding accounts.

One commenter said that the agencies should provide more guidance on mitigation bank closure procedures.

Default and closure provisions for the mitigation bank or in-lieu fee program must be described in the instrument (see § 332.8(d)(ii)(D) [§ 230.98(d)(ii)(D)]). The instrument must also describe the site protection and long-term management for the mitigation bank. For umbrella mitigation bank sites or in-lieu fee project sites, the site protection and long-term management will normally be addressed in the approved mitigation plans. Specific closure procedures for mitigation banks are at the discretion of the district engineer.

(d)(7) *IRT review.* One commenter recommended that the IRT's review of the draft prospectus and mitigation banking instrument be concurrent with the Corps review to help streamline the approval process. One commenter noted that the rule does not provide a funding mechanism for Corps staff to spend more time in the review of mitigation banking proposals. Several commenters suggested that the rule establish a method earlier in the review process for rejecting poor mitigation banking proposals. One commenter said that the rule should clarify that the Corps has the authority to reject reviewing agency suggestions that exceed the Corps' statutory authority, are insufficiently related to the purposes of the mitigation bank, or are excessive in scope or scale.

The preliminary review of a draft prospectus provided in § 332.8(d)(3) [§ 230.98(d)(3)] will be conducted concurrently by the Corps and the IRT. As for the review of draft instruments, we believe it is more efficient for the district engineer to evaluate whether the draft instrument is complete before providing copies to the IRT members for their review. Funding for the Corps review of third-party mitigation instruments will be provided through Regulatory Program appropriations. We have added § 332.8(d)(5) [§ 230.98(d)(5)] to provide for an initial evaluation of proposed mitigation banks or in-lieu fee programs, to allow early notification to sponsors of proposed third-party mitigation operations that are unlikely to be acceptable for providing compensatory mitigation for DA permits. As stated in § 332.8(b)(4) [§ 230.98(b)(4)], the district engineer will give full consideration to any timely comments and advice provided by the IRT, but the district engineer alone retains final authority for approval of instruments for mitigation banks or in-lieu fee programs used to provide compensatory mitigation for DA permits.

To facilitate IRT review of draft instruments or amendments, § 332.8(d)(7) [§ 230.98(d)(7)] of the final rule states that the sponsor must provide the district engineer with a sufficient number of copies of those documents. The district engineer will promptly distribute copies of those documents to the IRT members for a 30-day comment period, which will begin five days later. The five day waiting period will ensure that the IRT members will have a full 30 days to review the draft instrument or amendment. This paragraph was also changed, where appropriate, to include amendments of approved instruments.

We have also modified this paragraph to make it clear that the district engineer will seek to resolve concerns raised by IRT members using a consensus based approach, to the extent practicable, but that this cannot be allowed to jeopardize meeting the time frames in the rule. The rule provides 90 days from the time the complete draft instrument is distributed to IRT members for the district engineer to notify the sponsor whether it is generally acceptable, and if so, what changes are needed for the final instrument. Alternately, within this same time frame (90 days), the district engineer must notify the sponsor if there are significant unresolved concerns that may lead to disapproval of the final instrument, or to a formal objection by one or more IRT members. Use of a consensus-based approach does not alter the responsibility of the district engineer to make a final determination regarding the draft instrument within the specified time frames.

(d)(8) *Final instrument.* Many commenters supported the proposed process for mitigation bank approval. Two commenters specifically supported the provision that gives the district engineer the final authority to approve a mitigation banking instrument. One commenter said that the final rule should require the sponsor to address any comments provided as a result of the IRT review process. One commenter said that if the district engineer does not make a decision on a final mitigation banking instrument as provided, the instrument should be considered to be approved by default. Two commenters encouraged the agencies to establish a process to appeal a district engineer's decision not to approve a mitigation banking instrument.

We have modified this paragraph to require the sponsor to submit supporting documentation with the final instrument. This supporting documentation must explain how the final instrument addresses the comments provided by the IRT. As

stated in § 332.8(a)(1) [§ 230.98(a)(1)], for a mitigation bank or in-lieu fee program to be able to provide compensatory mitigation for DA permits, it must have an instrument approved by the district engineer. Allowing approval by default would be inappropriate as there would be no assurance that compensatory mitigation provided by the bank or in-lieu fee program would meet the requirements of the Clean Water Act and this part. Therefore, this final rule does not include a default approval provision. We do not believe it is necessary to establish an appeal process for third-party mitigation instruments. District engineers have the discretion to determine whether a proposed mitigation bank or in-lieu fee program will be suitable for providing compensatory mitigation for DA permits. When the district engineer disapproves an instrument, he must provide comments to the sponsor indicating the deficiencies that formed the basis for the disapproval. If a proposed mitigation bank or in-lieu fee program is not approved, a prospective sponsor can modify that proposal to correct these deficiencies and resubmit it for consideration.

(e) *Dispute resolution process.* Three commenters supported the dispute resolution process as outlined in the proposed rule. Two commenters asserted that the dispute resolution process will slow mitigation bank development. Two commenters said that resource agency staff should be granted full involvement in decision-making over the development of mitigation banking instruments, instead of elevating their concerns over proposed instruments to headquarters. One commenter recommended that each district develop a mitigation bank template in coordination with federal and state agencies, and that the use of this template will reduce the need to go through a dispute resolution process. One commenter stated that the higher level review in this process may only drive it farther away from any perceived watershed or biologically-based approach.

We have modified § 332.8(e) [§ 230.98(e)] to include amendments of approved mitigation banking instruments and in-lieu fee program instruments. We do not agree that the dispute resolution process will slow the decision-making process for third-party mitigation instruments. On the contrary, the dispute resolution process will facilitate decision-making through the involvement of higher level agency personnel. The decision to approve a mitigation bank or in-lieu fee program to

provide compensatory mitigation for DA permits lies solely with the district engineer. As explained in § 332.8(b) [§ 230.98(b)], the role of the IRT is to provide comments and advice on the establishment and use of mitigation banks and in-lieu fee programs.

Although district engineers are encouraged to develop templates for mitigation banking and in-lieu fee program instruments, the development of such templates does not need to be addressed in this rule. The dispute resolution process is not expected to conflict with a watershed approach, since it is an administrative process intended to resolve objections to proposed instruments.

One commenter said that the milestones and time frames established in the proposed rule are adequate to move the process along, while giving time for appropriate comment. One commenter expressed concern that 15 days for the Interagency Review Team to initiate the dispute resolution process is too short.

We have retained the time frames in the dispute resolution process. We believe that 15 days is sufficient for a member agency of the IRT to initiate the dispute resolution process. The IRT members will have already thoroughly reviewed the draft instrument, and had the proposed final instrument for 30 days before this 15-day time period begins. Any remaining issues should already have been identified by that time and evaluated to determine whether they warrant elevation to the agency's headquarters. In § 332.8(e)(3) [§ 230.98(e)(3)], we have added electronic mail as an acceptable means for notifying district engineers that an issue has been forwarded to Headquarters for review.

Two commenters recommended that the dispute resolution process include procedures to address disputes when they are with a co-chair from a tribal, state, or local program. One commenter said a mitigation banking instrument should not be approved over the objections of the state in which the mitigation bank is located. Another commenter suggested that the rule should allow for coordination with states that have separate appeals procedures.

This process is intended to resolve disputes that are within the purview of the Corps to address. If there is a co-chair involved in the approval process, and there is an IRT objection that is solely under the authority of the tribal, state, or local co-chair to address, then the co-chair should address those objections. The co-chair also has the option of not approving the instrument,

so that the mitigation bank or in-lieu fee program cannot be used to provide compensatory mitigation for tribal, state, or local authorizations. District engineers should try to address state objections to proposed mitigation banks and in-lieu fee programs, but final decisions must be based on federal interests, including applicable federal laws, regulations, and executive orders. State appeals procedures do not apply to federal decisions regarding mitigation banks and in-lieu fee programs. A state can choose not to approve a mitigation bank or in-lieu fee program to provide compensatory mitigation for its authorizations.

(f) *Extension of deadlines.* One commenter said that deadlines should be established for review and response, but that these deadlines should have built-in flexibility for extenuating circumstances.

We have revised this paragraph to account for the potential issues that may warrant allowing additional time to reach decisions on third-party mitigation instruments. In § 332.8(f)(1)(i) [§ 230.98(f)(1)(i)], we have added consultation under section 7 of the Endangered Species Act or section 106 of the National Historic Preservation Act as potential reasons for needing more time to process mitigation banking or in-lieu fee program instrument proposals. We have added § 332.8(f)(1)(ii) [§ 230.98(f)(1)(ii)] to include government-to-government consultation with Indian tribes, since it may be necessary to conduct such consultation if a proposed mitigation bank or in-lieu fee program may affect an Indian tribe's interests, such as protected tribal resources, tribal rights, or Indian lands. In § 332.8(f)(1)(ii) [§ 230.98(f)(1)(ii)], in-lieu fee programs and proposed instrument modifications have been added to include these actions as potentially needed deadline extensions.

(g) *Modification of instruments.* Two commenters stated that the proposed mechanism for modifying mitigation banking instruments is a fair and effective way of addressing the grandfathering of operational mitigation banks. Another commenter suggested that the Corps establish an administrative appeal process for mitigation banking instrument modifications.

Since in-lieu fee programs have been added to this rule, we have included the modification of in-lieu fee program instruments in § 332.8(g) [§ 230.98(g)]. We do not believe it is necessary to establish an administrative appeal process for modifications of third-party mitigation instruments.

Several commenters supported the streamlined mitigation bank permit modification process proposed in the rule. One commenter said that the process will not sufficiently reduce permitting burdens and time frames to justify elimination of in-lieu fee programs. One commenter believed that the time frame for IRT review in this process is too long and has the potential to delay decision-making for simple changes to an instrument. One commenter requested that the agencies provide examples of "non-significant" changes that would allow use of the streamlined review process to modify an instrument.

We have retained in-lieu fee programs in this final rule, and the streamlined review process for instrument modifications also applies to certain actions pertaining to in-lieu fee programs. Examples of such actions include adaptive management, credit releases, and changes in credit release schedules. We believe that IRT review of proposed instrument modifications is necessary, and that the time frames are sufficient to ensure that substantive comments can be provided in a timely manner. District engineers have the discretion to determine what changes that are not listed in § 332.8(g) [§ 230.98(g)] warrant use of the streamlined review process. Examples might include minor changes to a mitigation project plan that do not substantively change the character of the project or its ability to provide appropriate mitigation for DA permits. The addition and approval of umbrella mitigation bank sites and in-lieu fee project sites, or the expansion of previously approved mitigation bank or in-lieu fee project sites, must be evaluated through the full instrument amendment process in § 332.8(d) [§ 230.98(d)].

(h) *Umbrella mitigation banking instruments.* Four commenters supported development of umbrella mitigation banking instruments. One commenter did not support the authorization of umbrella mitigation banking instruments, because they usually cover sites that are in different geographic locations and have different site conditions. Several commenters suggested that the rule require the entity proposing an umbrella agreement have at least one site in place, and limit credit releases to sites that have been reviewed and permitted. Several commenters opposed the provision in the rule that requires a major modification to the instrument for additional umbrella mitigation bank sites. These commenters said that this requirement will impede project

development schedules. One commenter stated that the sponsor of an umbrella mitigation banking instrument should not be able to sell credits until the site has been acquired, the mitigation plan approved, and the financial assurances are in place.

In this paragraph, we have clarified that adding more mitigation bank sites to an umbrella mitigation banking instrument requires following the procedures at § 332.8(g)(1) [§ 230.98(g)(1)] for amending an approved instrument. In response to a proposal to add a new site to an umbrella mitigation banking instrument, the district engineer and the IRT will review the proposed mitigation plan. The district engineer, in consultation with the IRT, will determine whether the proposed site is acceptable for providing compensatory mitigation for DA permits within the service area governed by that instrument. The proposed rule, as well as the final rule, requires a mitigation bank site to be included in the initial mitigation banking instrument. The mitigation banking instrument becomes an umbrella instrument when additional compensatory mitigation project sites are added (see § 332.8(h) [§ 230.98(h)]). We have added a sentence to this paragraph that requires credit withdrawal from umbrella mitigation bank sites to be consistent with § 332.8(m) [§ 230.98(m)]. In particular, any additional projects must have an approved plan, a secured site, and appropriate financial assurances in place before any credits can be sold or transferred. After the initial credit release, further releases are tied to achievement of milestones and performance standards in accordance with an approved credit release schedule.

(i) *In-lieu fee project account.* We have added this provision to require in-lieu fee program sponsors to establish program accounts at financial institutions that are a member of the Federal Deposit Insurance Corporation (FDIC). The purpose of the program account is to ensure that the funds collected from permittees by the in-lieu fee program sponsor are used within a reasonable time period to provide compensatory mitigation for DA permits, instead of other activities. Requiring the sponsor to establish the account with a member of the FDIC is intended to protect those funds from being lost through default. The interest and other earnings accruing to the account must remain in the account, to fund in-lieu fee projects. The funds placed into the in-lieu fee program account may only be used for the

selection, design, acquisition, implementation, and management of in-lieu fee projects, with a small percentage being allowed for administrative costs. The percentage that can be used for administrative costs will be determined by the district engineer, in consultation with the IRT. If the sponsor conducts activities, such as educational programs, in addition to aquatic resource restoration, establishment, enhancement, and/or preservation activities that are used to provide compensatory mitigation for DA permits, the in-lieu fee program account must be separate from the accounts that fund those supplemental activities.

Section 332.8(i)(2) [§ 230.98(i)(2)] requires in-lieu fee program sponsors to submit proposed in-lieu fee projects to the district engineer for funding approval. Disbursements from the in-lieu fee program account can only be made after the district engineer provides written approval of a proposed in-lieu fee project. The district engineer's decision will occur after consultation with the IRT. The district engineer does not need to authorize each individual disbursement from the account, but must provide written approval for the project, based on a review of the project mitigation plan, which will include a description of activities and projected costs. Once the project is authorized, funds disbursed from the account must be spent for the project in a manner consistent with the approved project mitigation plan. The terms of the in-lieu fee program account must specify that the district engineer has the authority to direct those funds to alternative compensatory mitigation projects if the sponsor does not provide the compensatory mitigation in accordance with required time frames. As with financial assurances, the Corps lacks statutory authority to accept directly, retain, and draw upon funds that are in the in-lieu fee program account, because of the requirements of the Miscellaneous Receipts Statute (31 U.S.C. 3302(b)). Therefore, the terms of the in-lieu fee program instrument must be carefully crafted to ensure that the district engineer can direct the funds deposited in the in-lieu fee program account to be used for providing compensatory mitigation for DA permits, without the Corps directly accepting or disbursing the funds.

The in-lieu fee program sponsor is also required to provide annual reports to the district engineer and the IRT regarding the in-lieu fee program account (see § 332.8(i)(3) [§ 230.98(i)(3)]). The district engineer may audit the records for the in-lieu fee

program account, to ensure compliance with this rule.

(j) *In-lieu fee project approval.* We added § 332.8(j) [§ 230.98(j)] to provide a process for the review and approval of in-lieu fee projects. The mitigation plans for in-lieu fee projects must include the information required by § 332.4(c)(2) through (c)(14) [§ 230.94(c)(2) through (c)(14)]. The mitigation plan must also include a credit release schedule, which is similar to the credit release schedule required for mitigation banks. The review and approval of in-lieu fee projects will be conducted as instrument modifications in accordance with the procedures at § 332.8(g)(1) [§ 230.98(g)(1)]. In-lieu fee projects may be conducted by other parties on behalf of the in-lieu fee program sponsor, but the project must still be approved by the district engineer and the sponsor remains responsible for compliance with the terms of the instrument and the approved mitigation plan.

Section 332.8(j)(2) [§ 230.98(j)(2)] states that if a DA permit is required for the in-lieu fee project, then the permit should not be issued until the relevant provisions of the mitigation plan have been substantively determined. This will help ensure that the special conditions of the DA permit reflect the provisions of the mitigation plan, including the ecological performance standards, site protection mechanisms, and financial assurances.

(k) *Coordination of mitigation banking instruments and DA permit issuance.* Two commenters supported the provision in the rule that prohibits district engineers from issuing a permit authorizing the construction of a mitigation bank until all relevant provisions of the mitigation banking instrument have been substantively determined. One commenter suggested that this provision be modified so that the section 404 permit process could be concurrent with the review of the mitigation banking instrument. Another commenter said that delaying construction of mitigation banks would exacerbate financial problems that often occur shortly after the mitigation banking instrument is approved.

We have revised this paragraph to include the development of new compensatory mitigation project sites under an umbrella mitigation banking instrument. We have also modified this paragraph to state that the DA permit should not be issued until all relevant provisions of the mitigation plan have been substantively determined, including the ecological performance standards. District engineers are encouraged to conduct the evaluation for a DA permit to construct a mitigation

bank concurrently with the review process for the mitigation banking instrument. Delaying issuance of the DA permit until the content of the mitigation plan has been determined should help reduce costs by avoiding the need to modify the permit and its special conditions to accurately reflect the approved mitigation plan.

(l) *Project implementation.* We added a new § 332.8(l)(1) [§ 230.98(l)(1)] to clarify that a third-party mitigation sponsor must have an approved instrument before collecting funds from permittees to satisfy compensatory mitigation requirements for DA permits.

Section 332.8(l)(2) [§ 230.98(l)(2)] contains the text from the proposed rule, and it has been modified to include in-lieu fee programs. We have added § 332.8(l)(3) [§ 230.98(l)(3)] to stipulate that in-lieu fee program sponsors are responsible for the implementation, long-term management, and any required remediation of in-lieu fee projects, even in cases where those projects are conducted by other parties through requests for proposals or other contracting mechanisms.

(m) *Credit withdrawal from mitigation banks.* One commenter said that the rule should make it clear that for initial debiting of a percentage of the mitigation bank credits to occur, the mitigation bank needs to be constructed within a short time frame. Another commenter stated that if the rule allows mitigation banks to pre-sell credits with appropriate financial securities in place, the mitigation banks will be able to produce more environmental benefits. One commenter recommended adding a provision to limit the number of credits provided through establishment (creation) to no more than 25 percent of the total credits that will be produced by the mitigation bank, because establishment activities are less likely to succeed.

We have added a provision requiring initial implementation of the approved mitigation plan no later than the first full growing season after the date the first credit transaction occurs, to ensure timely construction of the mitigation bank. A purpose of the initial debiting is to provide a source of funds for conducting activities that support the continued development of the mitigation bank. We do not believe it would be appropriate to place a limit on the percentage of credits that can be produced through aquatic resource establishment activities. Such decisions should be made on a case by case basis by the district engineer, after consulting with the IRT. Likelihood of success is one of the factors that the district

engineer and the IRT will consider in making such decisions.

(n) *Advance credits for in-lieu fee programs.* We have added § 332.8(n) [§ 230.98(n)] to provide an analogous standard to the initial debiting for mitigation banks that is provided by § 332.8(m) [§ 230.98(m)]. The limitations in § 332.8(n) [§ 230.98(n)] are also intended to reduce risk and uncertainty for in-lieu fee programs and to ensure timely implementation of in-lieu fee projects. The goal of the requirements in this paragraph is not to place an arbitrary limit on the availability of advance credits within a service area, but rather to ensure that in-lieu fee programs do not sell more advance credits than they can reasonably deliver in the time frame specified in § 332.8(n)(4) [§ 230.98(n)(4)], generally 3 years.

This does not mean that the number of advance credits will necessarily be small. The number of advance credits authorized for an in-lieu fee program will be limited by service area, and specified in the in-lieu fee program instrument. District engineers will determine the number of advance credits allowed per service area, after consulting with the IRT in accordance with the procedures in § 332.8(d) [§ 230.98(d)]. The number of advance credits will be based on an evaluation of the compensation planning framework; the sponsor's past performance for implementing aquatic resource restoration, establishment, enhancement, and/or preservation activities in the proposed service area or other areas; and the projected financing necessary to begin planning and implementation of in-lieu fee projects. For example, in service areas with larger numbers of permitted impacts, and where a sponsor with demonstrated past successes is likely to produce a substantial amount of compensatory mitigation within the time frame specified in § 332.8(n)(4) [§ 230.98(n)(4)], district engineers can authorize a higher number of advance credits. As another example, if an in-lieu fee program is being established by a sponsor that does not have a history of successfully implementing aquatic resource restoration, establishment, enhancement, and/or preservation projects, the district engineer may authorize a smaller number of advance credits to address potential risks. If an in-lieu fee program sells all of its advance credits and it appears likely that it can fulfill a higher number of advance credits within the required time frame, it may apply for an instrument modification to increase the number of available advance credits.

Section 332.8(n)(2) [§ 230.98(n)(2)] allows the district engineer to require the sponsor to provide confidential supporting information to determine an appropriate limit for advance credits. Such confidential supporting information may include locations of potential in-lieu fee project sites that have been identified by the sponsor. It may be necessary to keep this information confidential to lessen the risk of land speculation activities that could drive up the price of prospective in-lieu fee project sites before the sponsor can collect sufficient fees to secure those sites.

Each approved in-lieu fee project will have an approved mitigation plan, with a credit release schedule. As in-lieu fee projects are implemented by the in-lieu fee sponsor in accordance with approved mitigation plans, credits will be released as milestones in the credit release schedule are achieved. As released credits are produced, these must first be used to fulfill any advance credits that have been sold in the service area, after which any remaining released credits may also be sold. Once advance credits are fulfilled, an equivalent number of new advance credits will become available, which the sponsor may sell as advance credits. Therefore, the advance credit account is a rolling account, and when released credits are produced and previously sold advance credits are fulfilled, the advance credit account will have new advance credits available for sale, but not more than the advance credit limit specified in the instrument (see § 332.8(n)(3) [§ 230.98(n)(3)]).

Within a particular service area, § 332.8(n)(4) [§ 230.98(n)(4)] requires in-lieu fee program sponsors to secure in-lieu fee project sites and conduct the initial physical and biological improvements (e.g., grading and planting) by the third full growing season after the first advance credit for that service area is secured by a permittee. District engineers have the discretion to allow more time to plan and initiate in-lieu fee projects. An example of where this discretion may be appropriate would be a service area where credit demand is lower than expected, and the in-lieu fee program has not been able to collect enough funds to secure an in-lieu fee project site and plan and implement the compensatory mitigation project within the three growing season time period. The district engineer also has the discretion to direct the sponsor to use the funds in the in-lieu fee program account required by § 332.8(i) [§ 230.98(i)] to provide alternative compensatory mitigation to fulfill the

obligations created through the sale or transfer of advance credits. In rare circumstances, the district engineer may allow an in-lieu fee program to fulfill advance credits sold in one service area with released credits from a different service area. This should only occur in situations where the number of unfulfilled advance credits is small, the prospects for collecting more fees in the service area are poor, and the district engineer determines that fulfilling the advance credits in another service area will provide adequate compensation for the previously authorized impacts represented by the advance credits. This may happen in the case of state-wide in-lieu fee programs that have some remote service areas with very small numbers of authorized impacts.

We have added § 332.8(n)(5) [§ 230.98(n)(5)] to address compliance with in-lieu fee program instruments. District engineers will review the operations of approved in-lieu fee programs, to assess their performance. If an in-lieu fee program is not complying with the terms of its instrument, the district engineer may suspend credit sales or take other appropriate action until the sponsor complies with the terms of the instrument. This paragraph also makes it clear that permittees who secure credits from in-lieu fee programs are not responsible for in-lieu fee program compliance.

(o) *Determining credits.* (1) *Units of measure.* Several commenters said that credits should not be expressed as acres or linear feet, because those units do not adequately account for functions and values. Several commenters suggested that the agencies revise this section to relate back to the functional approach provided by the definition of "credit" in § 332.2 [§ 230.92]. Two commenters recommended that the agencies develop appropriate means for quantifying debits for stream impacts and compensatory mitigation credits for stream mitigation. One commenter suggested that the rule establish specific alternative quantitative measures other than acres or stream length units, and provide methods for tracking each of the wetland functions and values that result in credits or debits. Another commenter said that all mitigation bank credit transactions should be based on the accrual of functions, not on areal measures. One commenter stated that all functional assessment studies should be standardized within a watershed, and preferably across regions, districts, or states.

It is not always possible to quantify credits by functional or condition assessments, so there is a need to use other metrics, such as acres or linear

feet. The requirements in § 332.8(o) [§ 230.98(o)] are consistent with the definition of credit in § 332.2 [§ 230.92]. We have modified § 332.8(o)(1) [§ 230.98(o)(1)] to include "other suitable metrics" as potential units for quantifying credits or debits. Appropriate units for quantifying credits and debits will be determined by district engineers on a case-by-case basis. District engineers are encouraged to use science-based assessment methods for determining aquatic habitat condition, such as the index of biological integrity, where practicable. District engineers and other entities, such as scientists, may develop assessment methods for stream impacts and compensatory mitigation that could be used to quantify debits and credits. Stream assessment methods are likely to vary by geographic region, and may be developed locally. The development of an automated information system to track specific aquatic resource functions that are lost as a result of permitted activities, or are produced by compensatory mitigation projects, is outside the scope of this rule, however the Corps is working to improve its tracking of permitted impacts and compensatory mitigation. In many areas of the country, and for certain types of wetlands, there may not be functional or condition assessment methods available, so other measures such as acres, may need to be used to quantify credits and debits. We do not agree that functional assessment methods should be standardized within watershed, districts, or states. Functional assessment methods will vary among resource type, and sometimes by regional categories, such as ecoregion or physiographic region.

(o)(2) *Assessment.* Several commenters supported the use of functional assessments to determine credits. One commenter recommended that functional assessments should be required for all mitigation banks. Another commenter said that functional assessments are just one tool that could be used. Two commenters recommended that the rule prescribe specific methods for conducting functional assessments. One commenter supported the use of functional assessments for both credits and debits. According to one commenter, the agencies have had considerable difficulty successfully tracking compensatory mitigation by type and location (e.g., in-kind, on-site), and functional assessments would greatly increase the complexity of this process. One commenter stated that the district engineer should incorporate the most

current information on restoration and creation techniques and success rates, functional assessment, and other relevant factors when determining the number of credits a mitigation bank will provide. Another commenter recommended that value or socio-economic services should be included in mitigation crediting.

We have modified this paragraph by changing the heading to refer to "assessment" since we have amended the rule to include the use of other suitable metrics, such as condition assessments. The term "condition" is defined in § 332.2 [§ 230.92]. An index of biological integrity is an example of another type of assessment method that can be used to assess and describe the aquatic resource types that will be restored, established, enhanced, and/or preserved by mitigation banks or in-lieu fee programs.

We cannot revise this rule to require the use of functional assessments for all mitigation banks or in-lieu fee programs. In some areas of the country, appropriate functional assessments are not available. Condition assessments or other types of assessment methods may be more appropriate in some regions. The new automated information system being used in the Corps Regulatory Program (ORM 2.0) will help improve the tracking of compensatory mitigation projects by type and location. This automated information system is a spatially-enabled system that will allow tracking of the locations of impact sites and compensatory mitigation sites, as well as the aquatic resource types that are present at impact sites or are required as compensatory mitigation. District engineers, in consultation with the IRT, will evaluate compensatory mitigation proposals for mitigation banks and in-lieu fee programs, to determine the number of credits that are likely to be provided. This evaluation should include the type of compensatory mitigation being conducted (e.g., reestablishment, rehabilitation), the potential for success, the type of aquatic resource being provided, and other relevant aspects of the mitigation bank or in-lieu fee project. Although the services provided by aquatic resource functions are important to consider when determining the type and location of compensatory mitigation projects, there are few methods available for assessing services. Therefore, in most cases consideration of services will be conducted through best professional judgment. As discussed elsewhere in this preamble, there are numerous difficulties in assessing aquatic resource values, and

this rule focuses on functions and services.

(o)(3) *Credit production.* We have modified this paragraph to refer to pre- and post-compensatory mitigation project site conditions, since this section applies to mitigation banks and in-lieu fee projects. We have also changed this paragraph to require the use of functional or condition assessments, or other suitable metrics, to determine the number of credits produced by a mitigation bank or in-lieu fee project. In areas where appropriate assessment methods are not available, or practicable to use, other suitable metrics such as acres or linear feet may be used. We have removed the last two sentences of the proposed text of this paragraph, which stated that, for enhancement activities, the number of credits should only reflect those enhancements produced by the construction of the mitigation bank. These two sentences are no longer necessary, because of the other changes to this paragraph. However, it is still the case that credits for enhancement activities should only include the “functional lift” generated by the activity.

(o)(4) *Credit value.* We have not changed this paragraph in the final rule.

(o)(5) *Credit costs.* We added this provision to clarify that the cost of compensatory mitigation credits provided by a mitigation bank or an in-lieu fee program shall be determined by the sponsor. Section 332.8(o)(5)(ii) [§ 230.98(o)(5)(ii)] requires in-lieu fee programs to use full cost accounting methods, so that the cost per unit credit includes the expected costs associated with the restoration, establishment, enhancement, and/or preservation of aquatic resources in the service area. This paragraph also states that the cost per unit credit for in-lieu fee programs should factor in contingency costs, to address uncertainties in construction and real estate expenses. The cost per unit credit must also reflect resources needed for long-term management and protection of the in-lieu fee project site, as well as any financial assurances that may be necessary to ensure successful completion of those projects. District engineers can evaluate the fee structure of an in-lieu fee program to determine whether the sponsor is complying with this provision. Compliance with these requirements is necessary to ensure that an in-lieu fee program generates sufficient funds so that it can select and implement compensatory mitigation projects in a timely manner. One concern raised about in-lieu fee programs in the past is that they have sometimes underpriced credits, with the result that they may not be able to

deliver the required mitigation. This provision is intended to ensure that in-lieu fee programs develop realistic price schedules, while still leaving determination of credit prices to the program sponsor, rather than the Corps.

(o)(6) *Credits provided by preservation.* One commenter said that preservation and/or enhancement should only be considered in combination with restoration, to ensure no net loss on an acreage basis. A commenter said that credits associated with preservation should be released as soon as possible, since functional capacity is not an issue. One commenter stated that preservation credits should be sparingly granted and should never allow preservation of landscape features of a different type than those adversely affected by the permitted activity.

The regulations governing the use of preservation as compensatory mitigation are provided in § 332.3(h) [§ 230.93(h)]. The use of aquatic resource preservation to provide compensatory mitigation will be determined by the district engineer in accordance with § 332.3 [§ 230.93]. When evaluating the Corps Regulatory Program’s contribution to the Administration’s wetlands goals, it is important to consider the compensatory mitigation requirements imposed on permittees, since the compensatory mitigation requirements for a specific DA permit may consist of a package of compensation activities. In other words, a permittee could provide the required compensatory mitigation through more than one compensation type. When a permittee proposes to use preservation to provide compensatory mitigation, § 332.3(h)(2) [§ 230.98(h)(2)] requires that the preservation be done, to the extent appropriate and practicable, in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. For example, a permittee may provide some of the required compensatory mitigation through a permittee-responsible restoration project, and provide the remaining compensatory mitigation by securing preservation credits from an in-lieu fee program or a mitigation bank. Preservation may also be used as the only form of compensatory mitigation, at the discretion of the district engineer, but this should only be allowed where preservation of specific resources has been identified as a high priority using a watershed approach, and in this case higher compensation ratios should be required.

When using a watershed approach, the district engineer may determine that preservation of out-of-kind aquatic resources is an appropriate means of providing compensatory mitigation.

Two commenters said that the proposed rule is unclear whether preservation is to be applied to an entire mitigation bank, above and beyond any establishment, enhancement, or restoration that is conducted to produce credits at that mitigation bank, or whether it only applies to those areas of the mitigation bank where preservation of existing aquatic resources will occur.

The long-term protection of compensatory mitigation project sites, including mitigation banks and in-lieu fee programs is addressed in § 332.7(a) [§ 230.97(a)]. This is a different issue that the use of preservation as compensatory mitigation. As defined in § 332.2 [§ 230.92], preservation is the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. If there are existing aquatic resources on a mitigation bank site or an in-lieu fee project site, and those aquatic resources will not be enhanced or rehabilitated to produce enhancement or restoration credits, then the district engineer may determine that there are preservation credits being provided, once the appropriate site protection mechanisms are implemented.

We have modified § 332.8(o)(6) [§ 230.98(o)(6)] of the final rule to include other suitable metrics as a means of quantifying preservation credits. We have also added in-lieu fee programs to this paragraph, since the final rule includes those programs as a form of third-party mitigation. We have removed the reference to § 332.3(c) [§ 230.93(c)] because the subsection on the watershed approach does not explicitly discuss watershed functions.

(o)(7) *Credits provided by riparian areas, buffers, and uplands.* Several commenters supported the use of riparian areas, buffers, and uplands to provide credits. One commenter said that buffer credits should only be included if the minimum one-to-one mitigation ratio is increased and the proportion of enhancement and rehabilitation as a component of mitigation is strictly limited. One commenter suggested that buffers in and of themselves should not be used to generate mitigation credits unless they are above and beyond what is required and will contribute substantially to habitat connectivity. Several commenters suggested that the agencies revise this section to relate back to the functional approach provided by the definition of the term “credit” in § 332.2 [§ 230.92]. Several commenters stated that mitigation credits provided through riparian areas, buffers, or uplands should not be expressed as acres or linear feet because those units do not

adequately account for their associated functions and values. Three commenters requested more detailed guidance regarding how and when mitigation credits can be given for buffers.

Section 332.3(f)(1) [§ 230.93(f)(1)] states that the amount of the required compensatory mitigation must be, to the extent appropriate and practicable, sufficient to replace lost aquatic resource functions. In cases where a mitigation bank or in-lieu fee project has released riparian area, buffer, or upland credits, district engineers will determine the appropriateness of those credits in fulfilling the requirements of § 332.3(f)(1) [§ 230.93(f)(1)]. In general, third-party mitigation credits provided by riparian areas, buffers, and uplands will supplement the credits produced through aquatic resource restoration, establishment, enhancement, and/or preservation activities, to provide a compensatory mitigation package that is appropriate for offsetting the permitted losses of aquatic resource functions. As stated in § 332.8(o)(7) [§ 230.98(o)(7)], non-aquatic resources can only be used for compensatory mitigation when they are essential for maintaining the ecological viability of adjoining aquatic resources.

Riparian areas are critical components of stream ecosystems, as well as other open waters. Riparian areas provide important ecological functions, and directly influence the functions of streams, especially in terms of habitat quality and water quality. Therefore, it is important for mitigation banks and in-lieu fee projects containing streams and other open waters to include riparian areas as part of the overall compensatory mitigation project. In such cases, compensatory mitigation credits should also be awarded to those riparian areas. Buffers next to wetlands, and uplands that provide habitat connectivity and other ecological functions, may also generate compensatory mitigation credits because of their contribution to the ecological functions of the overall mitigation bank or in-lieu fee project site.

We have revised the definition of "credit" in § 332.2 [§ 230.92] to be consistent with this paragraph. Although the definition of "credit" refers to the accrual or attainment of aquatic functions at a compensatory mitigation site, riparian areas, buffers, and uplands are often critical for maintaining the integrity and sustainability of aquatic resource functions. Therefore, compensatory mitigation credits can be produced through the restoration, establishment, enhancement, and/or preservation of

riparian areas, buffers, and uplands that support aquatic resources.

In areas where there are no appropriate assessment methods available, or the available methods are impractical to use, acreage and linear measures may be the only means for quantifying the credits produced through the restoration, establishment, enhancement, and/or preservation of riparian areas, buffers, and uplands. District engineers will determine on a case-by-case basis when buffers are essential to maintaining the ecological viability of adjoining aquatic resources, and thus eligible to produce compensatory mitigation credits.

We have modified § 332.8(o)(7) [§ 230.98(o)(7)] of the final rule to include other suitable metrics as a means of quantifying credits for buffers, riparian areas and uplands. We have also added in-lieu fee programs to this paragraph, since the final rule includes those programs as a form of third-party mitigation. We have removed the reference to § 332.3(c) [§ 230.93(c)] because the subsection on the watershed approach does not explicitly discuss watershed functions.

(o)(8) *Credit release schedule.* One commenter recommended that the rule include a provision to ensure that mitigation credit releases are equivalent for all mitigation providers. One commenter said that § 332.8(k)(7)–(8) [§ 230.98(k)(7)–(8)] of the proposed rule should be revised to apply equivalent credit release standards for all sources of mitigation, not just mitigation banks. This commenter also recommended that the rule specify an initial release amount so that the amount does not vary significantly across the country as it does today. One commenter suggested that credit releases prior to the achievement of any performance standards should be restricted to no more than 15 percent of the total estimated credits to be generated by a mitigation bank. Another commenter recommended that the agencies remove the provision that district engineers must approve credit releases because the Corps has the monitoring period to ensure compliance with performance standards and has the ability to prevent future credit sales until satisfactory remediation takes place.

In the final rule, we have developed similar standards for credit releases for mitigation banks and in-lieu fee programs that take into account the fundamental differences between these two forms of third party mitigation. Similar to the credit release schedule for a mitigation bank site, each approved in-lieu fee project will have a credit release schedule. The credit release

schedule for an in-lieu fee project will be based on its approved mitigation plan. In terms of credit release schedules, the difference between mitigation banks and in-lieu fee programs lies with the initial debiting for mitigation banks provided under § 332.8(m) [§ 230.98(m)] and the advance credits allowed for in-lieu fee programs under § 332.8(n) [§ 230.98(n)]. For permittee-responsible mitigation, it is usually not feasible or practicable to require advance compensatory mitigation, although we are reducing the risks associated with permittee-responsible mitigation by requiring, to the maximum extent practicable, implementation of those compensatory mitigation projects in advance or concurrent with the activity causing the authorized impacts (see § 332.3(m) [§ 230.93(m)]). We are also allowing district engineers to not require additional compensation for temporal losses when project sponsors initiate compensation prior to or concurrent with permitted impacts, as a further incentive for timely mitigation.

We do not believe it would be appropriate to specify a particular amount for the initial debiting for mitigation banks. There are a variety of factors that can affect the initial debiting, such as the type of compensatory mitigation being done at the mitigation bank and the assurances that are required to be in place for the initial debiting to occur. It is necessary for district engineers to approve credit releases, to ensure that all applicable criteria are met, and that those credits are acceptable for providing compensatory mitigation for DA permits.

One commenter supported the principle underlying § 332.8(k)(7) [§ 230.98(k)(7)] of the proposed rule, which ties credit release to performance-based milestones, but has experienced disparate practices across the country.

The performance-based milestones that will be used to establish credit release schedules will be based on the specific attributes of the aquatic resource restoration, establishment, enhancement, and/or preservation activity that is being conducted to generate credits at the mitigation bank or in-lieu fee project. Section 332.1(e) [§ 230.91(d)] states that where appropriate, district engineers shall account for regional characteristics when determining performance standards for compensatory mitigation projects. This principle applies to mitigation banks and in-lieu fee projects, as well as permittee-responsible mitigation.

We have revised § 332.8(o)(8) [§ 230.98(o)(8)] to clarify the requirements for credit release schedules. Subparagraph (i) discusses general considerations for credit release schedules. We have removed considerations of initial capital costs needed to establish a mitigation bank, since the credit release schedule is to be based on an approved mitigation plan and its ecological performance standards. We have added subparagraph (ii) to this subsection to describe the credit release schedule for a single-site mitigation bank. We have added subparagraph (iii) to this subsection to address credit release schedules for in-lieu fee projects and umbrella mitigation bank sites, since in-lieu fee projects and umbrella mitigation bank sites are usually identified after the instrument is approved.

In the second sentence of § 332.8(o)(8)(i) [§ 230.98(o)(8)(i)], the final rule states that the credit release schedule should reserve a significant share of the total credits for release only after full achievement of ecological performance standards. What constitutes a significant share is at the discretion of the district engineer, after consulting with the IRT and may vary depending on the nature of the mitigation compensatory project and the risks and uncertainty associated with successful completion of that mitigation project. “Significant share” does not necessarily mean a majority. Rather, for the purposes of this paragraph, the term “significant share” refers to a proportion of projected credits that will provide the sponsor with a significant incentive to complete a mitigation bank or in-lieu fee project and ensure that all performance standards are achieved.

(o)(9) Credit release approval. Two commenters recommended that § 332.8(k)(8) [§ 230.98(k)(8)] of the proposed rule establish a time frame for the district engineer to make a final decision on credit release. One commenter said that 45 to 60 days is a more appropriate time frame for the IRT to review a request for credit release. According to another commenter, if the district engineer fails to approve or deny the release of credits within 45 days of submittal of appropriate documentation, the credit release should be deemed approved. One commenter stated that the Corps does not have enough staff to make site visits to determine if the appropriate milestones for a release of credits have been achieved.

We have added a time frame for district engineers to make decisions on requests for credit releases. The time frame is based on the date the comment period for the IRT ends. The last

sentence of § 332.8(o)(9) [§ 230.98(o)(9)] states that district engineers shall make decisions within 30 days of the end of the comment period. The IRT must provide comments within 15 days of receiving documentation showing that appropriate milestones have been achieved, unless the district engineer determines that a site visit is necessary to approve credit releases. In this case, the IRT members have 15 days from the date of the site visit to provide their comments. The timing for site visits may be affected by a variety of factors, such as seasonal conditions that may impair the ability of the district engineer and the IRT members to evaluate the ecological conditions at the mitigation bank site or the in-lieu fee project site. We have revised § 332.8(o)(9) [§ 230.98(o)(9)] to require district engineers to schedule site visits as soon as it is practicable to do so. The need to conduct site visits to evaluate requests for credit releases is at the discretion of the district engineer. The rule allows a total of 45 days for the district engineer to make a decision after distributing documentation to the IRT, or after the site visit, whichever is later. We believe this is a reasonable time frame that appropriately balances the need of the project sponsor for timely credit releases with the need to ensure that performance based milestones have indeed been met before credits are released.

Two commenters said that credits should not be released from a mitigation bank until it is functioning in a manner that replaces the functions and values of the impacted aquatic resource. One commenter said that limiting the time and availability of releases of credits significantly diminishes the value of the mitigation bank and provides significant disincentives to investing in mitigation banks. One commenter suggested that, if projected mitigation credits are released before a performance milestone is reached, the purchaser of the credits should agree to assume responsibility for providing the compensatory mitigation, in the event of a default by the sponsor of the mitigation bank.

As stated in § 332.8(o)(8) [§ 230.98(o)(8)], credit releases are to be tied to performance based milestones, and a significant share of credits should not be released until the ecological performance standards are fully achieved. Linking credit release approval to the functions and values of the aquatic resources impacted by activities authorized by DA permits is impractical to implement. Credit releases must be tied to achievement of the performance based milestones of a mitigation bank site or an in-lieu fee

program site. The number and type of credits that a permittee is required to secure from a mitigation bank or in-lieu fee program sponsor is to be determined by the district engineer at the time of permit issuance, after considering the functions that will be lost as a result of the permitted activity.

The responsibility for providing the required compensatory mitigation is transferred from the permittee to the third-party mitigation sponsor after the permittee takes the necessary steps to secure those credits and the district engineer has received the appropriate documentation in accordance with § 332.3(l) [§ 290.93(l)]. If the mitigation bank or in-lieu fee project does not achieve its performance milestones or standards, the district engineer will take appropriate action, which may include suspending credit sales or terminating the instrument (see § 332.8(o)(10) [§ 230.98(o)(10)]).

Adjustments to credit totals and release schedules. In § 332.8(k)(9)(i) [§ 230.98(k)(9)(i)] of the proposed rule, we had a provision that would have allowed a sponsor to submit documentation to the district engineer to request adjustments to credit totals and credit release schedules for mitigation banks that develop aquatic resource functions substantially in excess of the credit totals and credit release schedules specified in the original approved instrument.

Two commenters objected to this proposed provision, stating that it could create an incentive for setting low performance standards and result in credits from the same acreage being sold as compensatory mitigation for more than one project. Two commenters did not agree that there could be a reasonable circumstance in which “excess” credits could be generated by a mitigation bank. According to one commenter, this provision would be difficult to apply fairly since the assessment of whether a compensatory mitigation project site has merely met its anticipated aquatic functions or substantially exceeded them could be quite contentious and subjective. Two commenters recommended that “acres and linear feet” not “functions” should be the basis of credit adjustments because most areas of the country have not developed function assessment methodologies. One commenter said that an administrative appeals process should be available for any adjustments of credits.

In response to these comments, and after considering the potential difficulties in implementation, we have removed this provision from the final rule. In general, the performance

standards for a mitigation bank or in-lieu fee project should reflect high functioning resources. Thus, it is unlikely that the functional lift provided at a site will “exceed” what is required to meet performance standards. The agencies agree that trying to identify “excess” functional lift would be contentious and potentially arbitrary. If a mitigation bank site or an in-lieu fee project site results in substantially more acres or linear feet of established, enhanced, restored or preserved aquatic resource than was originally anticipated when the mitigation plan and associated credit release schedule were approved, the sponsor can request a modification in accordance with the procedures at § 332.8(g) [§ 230.98(g)]. As discussed elsewhere in this preamble, we have not provided an administrative appeal process for third-party mitigation activities.

(o)(10) Suspension and termination. Two commenters said that the district engineer should not suspend credit sales for credits already released. One commenter stated that if a mitigation bank is not meeting performance standards or is not in compliance with monitoring requirements, reduction or suspension of credits should be a mandatory penalty, to provide an incentive for mitigation bank sponsors to monitor their sites.

We have modified the proposed § 332.8(k)(9)(ii) [§ 230.98(k)(9)(ii)] so that it applies to mitigation banks and in-lieu fee programs. We have also amended this paragraph to state that the district engineer will take appropriate action if the mitigation bank or in-lieu fee program is not meeting performance standards or complying with the terms of its instrument. Appropriate action may include suspending credit sales, adaptive management, decreasing available credits, utilizing financial assurances, or terminating the instrument.

Except for advance credits for in-lieu fee programs, credit releases should not occur unless the mitigation bank or in-lieu fee project is meeting the applicable milestones specified in the credit release schedule. If those milestones are not being satisfied, the credits do not become available for fulfilling the compensatory mitigation requirements for DA permits. In such cases, adaptive management or other measures may be required to achieve the performance that will result in a credit release. The district engineer needs some flexibility to determine the appropriate response when performance standards are not being met on schedule. In some cases, a little more time may be adequate, in other cases more active adaptive

management may be needed. District engineers will take appropriate action to ensure compliance with monitoring requirements, which, unlike ecological performance standards, are under the full control of the project sponsor. We believe that the provisions at § 332.8(o)(10) [§ 230.98(o)(10)] contain appropriate incentives to ensure performance of third-party mitigation and associated requirements (e.g., monitoring).

(p) Accounting procedures. To help clarify the requirements for tracking credit production and credit transactions among sponsors and permittees, we have added a new paragraph to this section. Section 332.8(p)(1) [§ 230.98(p)(1)] contains the requirements that were in § 332.8(l)(1) [§ 230.98(l)(1)] of the proposed rule. It requires mitigation bank sponsors to establish and maintain ledgers to account for all credit transactions. As each approved credit transaction occurs, the sponsor must notify the district engineer. This will help ensure that a mitigation bank credit is not sold or transferred to more than one permittee.

Since this rule includes in-lieu fee programs, we have added § 332.8(p)(2) [§ 230.98(p)(2)] to require in-lieu fee program sponsors to establish and maintain annual report ledgers, as well as individual ledgers for tracking released credits provided by in-lieu fee projects. Annual report ledgers must be done in accordance with the requirements for in-lieu fee program accounts at § 332.8(i)(3) [§ 230.98(i)(3)].

(q) Reporting. (1) Ledger account. Two commenters requested that the rule clarify: (1) The information included in the annual report compared to the information included in the updated ledger, and (2) the role of the IRT in reviewing the annual report. One commenter suggested that the ledger account include a description of the type and location of wetlands filled for all credit transactions. One commenter said that ledger accounts should be standardized for easy comparison across mitigation banks.

To assist in the accounting procedures required by § 332.8(p) [§ 230.98(p)], § 332.8(q)(1) [§ 230.98(q)(1)] describes the information required for ledger reports. Ledger reports must show the beginning and ending balances of available credits and permitted impacts (i.e., debits) for each resource type, all credit additions and subtractions, and other changes in credit availability, such as the release of additional credits or the suspension of credit sales. Members of an IRT can review ledger reports, and if they have concerns over the use of credits, they may invoke the procedures

in § 332.8(s) [§ 230.98(s)]. This rule addresses the minimum requirements for ledgers. District engineers can develop ledger templates for use in their districts.

(q)(2) Monitoring reports. Three commenters stated that the rule should require annual monitoring reports. One commenter believed that monitoring reports for mitigation banks should be required at least after one, three, and five years. Several commenters suggested that monitoring reports should be made available for public review. Other commenters stated the need for built-in, agreed-upon enforcement penalties for failure to submit accurate, timely, and complete reports as required by the plan and the permit. One commenter asked for clarification for the actions taken in the event of a bankruptcy. One commenter supported the standardization of monitoring reports, including attachments of the raw data so that results can be verified, or more easily checked in the field.

Monitoring requirements, including the frequency for providing monitoring reports to the district engineer and the IRT, will be determined on a case-by-case basis and specified in either the instrument or approved mitigation plans. As stated in § 332.6(c)(3) [§ 230.96(c)(3)], monitoring reports must be provided to interested agencies and the public upon request. Failure to submit required monitoring reports may result in suspension of credit sales or termination of the instrument (see § 332.8(o)(10) [§ 230.98(o)(10)]). The required content of monitoring reports for mitigation banks and in-lieu fee projects will be determined by district engineers, in consultation with the IRTs. Monitoring report templates can be developed by district engineers, to provide a standard format for those documents.

(q)(3) Financial assurance and long-term management funding report. To improve the oversight of financial assurances and long-term management funding, we have added a provision to this rule that allows district engineers to require sponsors to provide annual reports showing balances of accounts for financial assurances and long-term management. These reports should also document the status of financial assurances, including when they might expire.

(r) Use of credits. Two commenters recommended that the rule include language clarifying that credits that are withdrawn from a mitigation bank, but are not used because the permitted impacts did not occur, may be reinstated into the mitigation bank. One

commenter did not agree that any authorized activity should be eligible to use a mitigation bank to compensate for unavoidable impacts to aquatic resources. One commenter said that selling mitigation credits by wetland type does not provide any additional environmental benefit and will lead to confusion.

We have revised this paragraph to clarify that it is the district engineer's decision whether to allow the use of credits from mitigation banks or in-lieu fee programs to provide compensatory mitigation for a particular activity authorized by a DA permit. If a permittee secures third-party credits from a sponsor, but decides not to proceed with the authorized work, he or she should notify the district engineer. It is at the sponsor's discretion whether to buy back any unused credits. Any such transactions should be documented in the ledger reports required by § 332.8(q)(1) [§ 230.98(q)(1)]. Categorizing credits by aquatic resource type helps account for in-kind mitigation versus out-of-kind mitigation. Other metrics can also be used to track credit types. The instrument should specify how credits are to be categorized for accounting purposes for a mitigation bank or in-lieu fee program.

(s) IRT concerns with use of credits. We have modified this paragraph to include in-lieu fee programs. We have added a sentence to the end of this paragraph to stipulate that nothing in these regulations governing mitigation banks and in-lieu programs limits the authorities designated to IRT agencies under existing statutes or regulations.

(t) Site protection. One commenter stated that the rule should not require aquatic resources replaced by the mitigation bank to be afforded long-term protection through "real estate instruments." Another commenter said that all compensatory mitigation projects that require a real property protection instrument should also require a long-term funding mechanism to ensure compliance monitoring of the long-term protection instrument.

The goal of the rule is to ensure permanent protection of all compensatory mitigation project sites. Specifically the rule states that the aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project must be provided long-term protection through real estate instruments or other available mechanisms. As stated in the rule, any provisions necessary for long-term management, including compliance monitoring, must be addressed in the original permit or instrument.

We added this section to the final rule to clarify that real estate instruments, management plans, or other long-term protection mechanisms used for long-term protection must be finalized before any mitigation bank credits can be released. For in-lieu fee programs, real estate instruments, management plans, or other long-term protection mechanisms used for long-term protection must become finalized before any credits can be released for individual projects and used to fulfill advance credits or sold to permittees.

(u) Long-term management. One commenter noted that many long-term management organizations will not commit to managing a compensatory mitigation site until the site is well established, which may be five years after the instrument is signed. Therefore, the party responsible for the long-term management may not be known at the time the instrument is approved. This commenter said that the rule should include a sentence that allows for flexibility in when this party is identified.

Section 332.8(u)(2) [§ 230.98(u)(2)] states that the instrument may contain provisions allowing the sponsor to transfer long-term management responsibilities to another party, such as a public agency, non-governmental organization, or private land manager, with approval from the district engineer. Therefore, this rule provides the flexibility to change the party responsible for the required long-term management.

In § 332.8(u)(1) [§ 230.98(u)(1)] we have added language clarifying that for umbrella mitigation banks and in-lieu fee programs, the legal mechanism and the party responsible for long-term management of the compensatory mitigation project site must be documented in the approved mitigation plans. We have also added a sentence to the end of this paragraph to state that the long-term management plan should include a description of long-term management needs and identify the funding mechanism that will be used to meet those needs.

We have added § 332.8(u)(3) [§ 230.98(u)(3)], which stipulates that funding mechanisms for long-term management must be described in the instrument or approved mitigation plan. Section 332.8(u)(4) [§ 230.98(u)(4)] addresses the acquisition and protection of water rights. For umbrella mitigation banks and in-lieu fee projects, the acquisition and protection of water rights is to be documented in the approved mitigation plans.

(v) Grandfathering of existing instruments. Two commenters

supported the proposed grandfathering for existing mitigation banks. Four commenters, however, said that the rule should provide a schedule whereby all existing mitigation banks will be brought into compliance with the new guidelines. According to one commenter, five years may be too short a time period for in-lieu fee programs to effectively transition to a mitigation bank. Another commenter said that the timeline is too restrictive and requests that it be extended.

For mitigation banks, § 332.8(v)(1) [§ 230.98(v)(1)] states that mitigation banks approved before July 9, 2008 may continue to operate under the terms of their existing instruments. However, any modification of that instrument must be consistent with the terms of this part. Such modifications include the expansion of an existing mitigation bank site or the addition of another type of credits to a mitigation bank.

For in-lieu fee programs, § 332.8(v)(2) [§ 230.98(v)(2)] requires that all in-lieu fee programs approved on or after July 9, 2008 must meet the requirements of this part. For in-lieu fee programs operating under instruments approved before July 9, 2008, those programs may continue to operate under their instruments for two years after the effective date of this rule. The purpose of the grandfathering period is to allow time for the in-lieu fee program to conform its instrument to the requirements of today's rule. The district engineer may, in consultation with the IRT, extend the grandfathering period by up to an additional three years where there is good cause, and the in-lieu fee program is providing appropriate compensatory mitigation in a timely manner. An example of good cause would be an extension to allow an existing in-lieu fee program that supports a programmatic general permit or a regional general permit to continue to operate until that general permit expires. We have also added a provision allowing a project constructed under the terms of a previous instrument to continue operating under those terms indefinitely, provided the district engineer determines that the project is providing appropriate mitigation substantially consistent with the terms of this part. This provision is parallel to the grandfathering allowed for existing mitigation banks. The agencies see no value in requiring the terms for a previously constructed in-lieu project to be revised in this situation.

Proposed Elimination of In-Lieu Fee Programs

Many commenters, including the representatives of 29 states, stated that

in-lieu fee programs should not be eliminated. A number of commenters said that elimination of in-lieu fee programs would decrease the number of mitigation options and thus lead to less compensatory mitigation. Many commenters stated that in certain areas, especially in rural and coastal regions, the West, and Alaska, there are few mitigation banks and little incentive to establish mitigation banks. In these areas, in-lieu fee programs are the only available option for compensatory mitigation. Many commenters said that in-lieu fee programs offer more flexibility in site selection and can target specific resources, enhancing functions that are outside of a real estate boundary. One commenter also noted that if compensatory mitigation is to be based on a watershed approach, in-lieu fee programs will always be needed in watersheds that do not have mitigation banks. Several commenters said that the under-performance of many current in-lieu fee programs is the result of the structure of existing policies rather than the compensatory mitigation mechanism, and that these problems could be alleviated by making specific and targeted improvements and establishing and enforcing consistent program standards. Some commenters stated that by eliminating in-lieu fee programs, the proposed rule is inappropriately promoting for-profit mitigation banking. Instead of eliminating in-lieu fee programs, these commenters said that equivalent standards should be established that are based on ensuring successful and sustainable aquatic resource functions, not economic viability. Five commenters suggested that the rule stipulate that where the service areas of an in-lieu fee program and a mitigation bank overlap, the mitigation bank should have preference as a credit provider.

After carefully considering the comments received in response to the proposed rule, including the responses to the questions we posed in the preamble to the proposal, we have retained in-lieu fee programs as a separate mechanism for providing compensatory mitigation for DA permits. Several commenters provided suggested regulations for in-lieu fee programs, and we have evaluated that language as we developed this final rule. Where the in-lieu fee program regulations differ from the rules for mitigation banks, we believe we have adopted standards and criteria that will result in successful in-lieu fee programs that will provide compensatory mitigation in a timely manner, with a

high level of accountability. We also recognize that in-lieu fee programs can actively support a watershed approach to compensatory mitigation, and can help advance goals for protecting and restoring aquatic resources within watersheds, especially in areas where there are no mitigation banks. To further this goal, we have added a requirement for in-lieu fee programs to develop a compensation planning framework as part of their instrument that identifies watershed needs and priorities and explains how the in-lieu fee program will target its mitigation activities to those needs and priorities. In § 332.3(b) [§ 230.93(b)], we have established a hierarchy for district engineers to consider compensatory mitigation options, with a preference for mitigation bank credits because those credits are usually more developed at the time the impacts to waters of the United States authorized by the DA permit are expected to occur.

Other commenters supported the elimination of in-lieu fee programs as proposed in the rule. Several commenters said that in-lieu fee arrangements should not have different standards than mitigation banks and permittee-responsible mitigation. One commenter suggested that mitigation providers currently operating under in-lieu fee arrangements should be required to submit applications to become mitigation banks within one year of the final rule. Those in-lieu fee programs that do not submit a proposal on time could no longer accept fees; those that do submit a proposal could continue to operate until two years after the promulgation of the final rule. Some commenters also noted that, unlike in-lieu fee programs, mitigation banks are self-implementing and have a financial incentive to perform. One commenter stated that mitigation banks are more suitable to handle compensatory mitigation needs and have a more sufficient mechanism to ensure accountability and adequate financial assurances and measurable performance standards. Others said that the quality of land used in in-lieu fee programs is poor and that the suspension of such programs would improve the performance and accountability of the mitigation program. Some commenters stated that in-lieu fee programs are not adequately capitalized to complete meaningful projects and must use funds for administrative and operations costs. Another commenter stated that cost estimates for in-lieu fee programs are almost always too conservative and seldom cover additional expenses incurred in the administration of the in-

lieu fee program, maintenance, and management of aquatic resources, or correction of failures.

After evaluating the comments received in response to the proposed rule, we have determined that it is not appropriate to require in-lieu fee programs to be modified to comply with exactly the same standards as mitigation banks. The fundamental difference between mitigation banks and in-lieu fee programs is timing, and the difference in timing is due to the need for in-lieu fee programs to accumulate funds before they can secure sites, design and plan aquatic resource restoration, establishment, enhancement, and/or preservation activities, and implement those activities. Unlike commercial mitigation bank sponsors, in-lieu fee program sponsors usually do not have funds available to secure and develop prospective compensatory mitigation projects. Because mitigation bank projects are usually further along in implementation than in-lieu fee programs or permittee-responsible mitigation, we have established a preference for the use of mitigation bank credits at § 332.3(b)(2) [§ 230.98(b)(2)]. However, in-lieu fee programs can provide other benefits that we believe justify allowing them to operate under slightly different requirements. In particular, they can perform more thorough watershed planning than is often done by banks, and may be able to better target their activities to watershed needs and priorities. There is no basis for the assertion that land used for in-lieu fee projects is of poor quality. There are successful in-lieu fee programs operating in different areas of the country, and we have looked at how those programs are structured when writing this final rule. To provide greater accountability in the use of funds collected in advance of project approval and construction, we have added a provision requiring in-lieu fee programs to segregate funds collected from permittees in a program account, with provisions in the instrument that will allow the district engineer to redirect those funds to other mitigation activities if the program does not provide the required mitigation in a timely manner. This rule acknowledges that there are administrative costs associated with operating in-lieu fee programs, and a small percentage of fees collected from permittees (to be determined by the district engineer and specified in the instrument) can be used to defray those administrative costs.

Commenters suggested various time frames for the proposed phase-out of in-lieu fee programs: One year, two years,

three years, and five years. One commenter said current in-lieu fee program instruments should be allowed to continue as long as is necessary to fully fund already established and approved projects. Another commenter stated that stream in-lieu fee programs should take longer to phase out. Another commenter proposed that the phase-out period include a proportional reduction of activity of in-lieu fee programs on the basis of the percentage of money collected as the time nears for the program to end.

Section 332.8(v)(2) [§ 230.98(v)(2)] addresses the transition for current in-lieu fee programs to the requirements in this rule. It provides 2 years, with a possible extension of up to 3 additional years, for in-lieu fee programs to obtain an approved instrument that meets the requirements of this rule. It also allows projects already constructed under the terms of a prior instrument to continue operating under those terms, provided the project is providing appropriate mitigation that is substantially consistent with the requirements of the rule. We are retaining in-lieu fee programs, so § 332.9 [§ 230.99] has not been included in this final rule.

One commenter proposed that the rule include provisions requiring data collection on the part of in-lieu fee programs so regulators can determine if these programs are functioning in an equitable manner.

The rule significantly expands the tracking and reporting requirements for in-lieu fee programs in order to improve in-lieu fee program performance and accountability (see § 332.8(i) [§ 230.98(i)]).

EPA Regulations at 40 CFR Part 230

40 CFR 230.12 Findings of Compliance or Non-Compliance With the Restrictions on Discharge Referencing New Subpart J

We received no comments, and therefore this provision is adopted as proposed.

40 CFR Part 230 Subpart H—Actions To Minimize Adverse Effects

We received no comments, and therefore this provision is adopted as proposed.

40 CFR 230.75 Actions Affecting Plant and Animal Populations, Conforming Changes Referencing New Subpart J

We received no comments, and therefore this provision is adopted as proposed.

Comments on Administrative Requirements

One commenter stated that if the rule adopts a broad definition of watershed plan, it would allow guidance documents that may not have been through a regulatory review process to become federal permit requirements. The commenter believes that this would violate the Administrative Procedure Act (APA).

Watershed plans prepared for the purpose of implementing a watershed approach to compensatory mitigation are not a federal permit requirement, either because of this rule, or through special conditions of DA permits. The final rule states that district engineers will use the watershed approach to guide compensatory mitigation decisions, to the extent appropriate and practicable. Mitigation decisions are based on a number of factors in addition to the watershed approach, and the specific compensatory mitigation option required by the district engineer will be determined in accordance with the requirements of this part and other applicable regulations, and will be included as part of the special conditions of the DA permit. Any watershed plan that was used to help guide the selection, however, is not a permit condition.

Environmental Assessment/Regulatory Analysis

Two commenters said that the draft Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) prepared for this rule fail to assess the potentially significant adverse environmental effects of the new rule, and fail to consider a reasonable range of alternatives. One commenter requested that an environmental impact statement be prepared on this proposed rule because it will have a significant adverse impact on the environment by allowing more filling of existing wetlands. Two other commenters requested that an environmental impact statement be prepared to address the long-term cumulative loss of existing wetlands due to the Corps' regulatory program and its reliance on mitigation banking to compensate for wetland losses from non-water dependent activities. However, one commenter stated that the implementation of the rule as proposed does not have environmental impacts, and the draft environmental assessment seems to stretch to find changes in the physical and human environment that may result from implementation of the proposed rule. This commenter also said that the draft environmental assessment relies

too heavily on the watershed approach as the factor that may improve the performance of wetland mitigation. It would be more accurate to identify the "level playing field" aspect of the proposed rule as the key change from current practices. Another commenter noted that the draft environmental assessment for the proposed rule does not include any data on the number of stream impacts permitted or the amount of stream compensatory mitigation required.

We believe that the environmental assessment addresses a sufficient number of alternatives. This rule is intended to improve the performance of compensatory mitigation required for DA permits, which will reduce cumulative wetland losses. Since this rule was developed by examining existing practices, and adopting measures to improve those practices, there are unlikely to be substantive changes to the physical and human environment, other than improved performance of aquatic resource restoration, establishment, enhancement, and preservation activities. By developing, to the extent practicable, equivalent standards for permittee-responsible mitigation, mitigation banks, and in-lieu fee programs, and using a watershed approach, we believe that this rule will improve performance. The Corps has not collected data on stream impacts and compensatory mitigation, so we did not have such data to use in the environmental assessment.

E.O. 13132—Federalism

One commenter stated that the proposed rule has federalism impacts that were not addressed in the preamble, as it would seriously limit state authority regarding mitigation.

We do not agree that the final rule limits any state's authority regarding compensatory mitigation. States may continue to apply any compensatory mitigation requirements for state regulatory programs that they determine to be appropriate. This rule establishes requirements for permittees who must perform compensatory mitigation for DA permits, including mitigation banks and in-lieu fee programs. All section 404 permits, including their mitigation requirements, remain subject to state review and approval through the water quality certification required under section 401 of the CWA.

Unfunded Mandates Reform Act

One commenter said that the cost of developing a comprehensive watershed assessment and plan is much higher than described in the draft

environmental assessment. This commenter noted that the rule increases flexibility because of the increased number of compensatory mitigation opportunities that are identified, but also increases the costs because of the increased number of sites that must be evaluated to see if they will satisfy the goals and technical parameters for successful compensatory mitigation. This commenter also recommended that this rule be re-evaluated for its compliance with the Unfunded Mandates Reform Act. Another commenter supported additional funding for agencies that will be members of the Interagency Review Team (IRT).

This rule does not require the development of watershed plans. If there is an existing watershed plan, the district engineer may determine that it is appropriate for use in the watershed approach. Requiring more careful consideration of potential compensatory mitigation sites does not constitute an unfunded mandate. Instead, it is merely a means to achieve compliance with permit conditions and third-party mitigation instruments. Although this rule encourages the participation of other agencies on IRTs, such participation is not required, and therefore does not constitute an unfunded mandate.

E.O. 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

One commenter stated that it is not clear that the proposed regulations do not have the potential to have an “adverse effect on energy supply, distribution, or use.” The commenter believes that this particular rule will result in additional consultation and reporting obligations for the applicant, as well as an additional burden to an already strained Corps review staff and resources. Another commenter argued that the proposed rule could significantly impact the viability of energy exploration and development in Alaska by increasing costs of compensatory mitigation, requiring specific kinds of financial assurances, and in general removing the flexibility needed to work effectively in the state.

The final rule does not significantly alter permitting processes for energy projects. It has been developed from existing practices, and does not change the circumstances under which compensatory mitigation is required. This rule provides requirements to help ensure that the required compensatory mitigation meets its objectives and successfully replaces aquatic resource functions that are lost as a result of the

permitted impacts. District engineers still have the flexibility to tailor compensatory mitigation requirements to permit-specific circumstances.

National Technology Transfer and Advancement Act

One commenter identified a typographical error in the preamble description of the National Technology Transfer and Advancement Act, which we have corrected.

VII. Administrative Requirements

Plain Language

In compliance with the principles in the President’s Memorandum of June 1, 1998 (63 FR 31855), regarding plain language, this preamble is written using plain language. The use of “we” in this notice refers to the Corps and EPA. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Paperwork Reduction Act

This action will impose a new information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Applicants for Clean Water Act section 404 permits will be required, under 33 CFR 325.1(d)(7) of the final rule, to submit a statement explaining how impacts associated with the proposed activity are to be avoided and minimized. This statement must also describe any proposed compensatory mitigation for impacts to waters of the United States, or include an explanation of why compensatory mitigation should not be required. In addition, in-lieu fee program sponsors must provide additional information as part of their application for an instrument, beyond what was previously required. Specifically, they must include a compensation planning framework, and information describing their program account. Both in-lieu fee programs and mitigation banks are also subject to new annual reporting requirements, including a ledger report and, at the discretion of the district engineer, reporting on financial assurances and long-term management. Some other reporting requirements, such as monitoring reports and most of the information required to apply for an instrument, are substantially the same as existing requirements.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under section 10 of

the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710–0003, which expires on April 30, 2008). As a result of the new information collection requirement in the final rule, we will modify our standard permit application form in accordance with the requirements of the Paperwork Reduction Act. The Corps is currently preparing a revised ICR that includes the new requirements in this final rule, along with an estimate of their associated burden. The new burden associated with this rule includes the estimated number of hours needed to: (1) Prepare a compensation planning framework for a proposed in-lieu fee program, (2) provide a description of the in-lieu fee program account, (3) prepare annual reports required for mitigation banks and in-lieu fee programs, such as financial assurance and long-term management funding reports, and (4) provide annual monitoring reports for mitigation banks and in-lieu fee projects.

We estimate that it will take approximately 80 hours for a prospective in-lieu fee sponsor to develop a compensation planning framework. A description of a proposed in-lieu fee program account will take approximately 12 hours to complete. We estimate that, over the next three years, there will be eight existing in-lieu fee programs per year that will convert to the requirements of this rule and two new in-lieu fee programs proposed per year, resulting in an annual burden of 920 hours to produce those documents. We estimate that an average of 8 hours will be needed to produce an annual report for a mitigation bank or in-lieu fee program. To produce a monitoring report for a mitigation bank or in-lieu fee project, we estimate that 80 hours will be needed. We also estimate that there will be 391 existing mitigation banks, 25 new mitigation banks, 58 existing in-lieu fee programs, and 2 new in-lieu fee programs that would be required to produce annual reports and monitoring reports each year. Based on an estimate of the number of existing and new mitigation banks and in-lieu fee programs, we estimate that the annual burden for producing these annual reports and monitoring reports will be 42,000 hours.

We are in the process of preparing a new information collection request that will include the information collection burden associated with the approval

and oversight of mitigation banks and in-lieu fee programs. These requirements to do not become effective until approved by OMB.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is “significant” and therefore subject to review by OMB and the requirements of the Executive Order. The Executive Order defines “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, we have determined that the final rule is a “significant regulatory action” and the draft was submitted to OMB for review.

The regulatory analysis required by E.O. 12866 has been prepared for this final rule. The regulatory analysis is available on the internet at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/citizen.htm>. It is also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW., Washington, DC 20314–1000.

Executive Order 13132

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires the Corps 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.” The final rule does not have Federalism implications. We do not believe that the final rule will have substantial direct effects on the states, on the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government. The final rule does not impose new substantive

requirements. In addition, the final rule will not impose any additional substantive obligations on state or local governments. State and local governments that administer in-lieu fee programs to provide compensatory mitigation for impacts to wetlands and other aquatic resources can modify their in-lieu fee programs to conform with the requirements of this final rule. Therefore, Executive Order 13132 does not apply to this final rule. However, in the spirit of Executive Order 13132, we specifically requested comment from state and local officials on the proposed rule, and fully considered those comments when preparing this final rule.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act 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 this final rule on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The statutory basis for the final rule is section 314 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136), which is discussed above. After considering the economic impacts of the final rule on small entities, we certify that this action will not have a significant impact on a substantial number of small entities. Small entities subject to the final rule include those small entities that need to obtain DA permits pursuant to section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899.

This rulemaking will not significantly change compensatory mitigation requirements, or change the number of permitted activities that require compensatory mitigation. This rule

further clarifies mitigation requirements established by Corps and EPA, and is generally consistent with current agency practices. Some provisions of the rule may result in increases in compliance costs, other provisions may result in decreases in compliance costs, but most of the provisions in the rule are expected to result in little or no changes in compliance costs. To the extent that it promotes mitigation banking and in-lieu fee programs, the rule may lower compensatory mitigation costs for small projects by making credits more widely available. For a more detailed analysis of potential economic impacts of this rule, please see the regulatory analysis in the Environmental Assessment prepared for the final rule.

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, the agencies 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 a rule for which a written statement is needed, section 205 of the UMRA generally requires the agencies 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 an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed, under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising

small governments on compliance with the regulatory requirements.

The final rule is generally consistent with current agency practice and we have therefore determined that it 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. Therefore, the final rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reasons, we have determined that the final rule contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the final rule is not subject to the requirements of section 203 of UMRA.

Executive Order 13045

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 we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The final rule is not subject to this Executive Order because it is not economically significant as defined in Executive Order 12866. In addition, it does not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

Executive Order 13175

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." The phrase "policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the federal government and the tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

The final rule does not have tribal implications. It is generally consistent with current agency practice and will

not have substantial direct effects on tribal governments, on the relationship between the federal government and the tribes, or on the distribution of power and responsibilities between the federal government and tribes. Therefore, Executive Order 13175 does not apply to this final rule. However, in the spirit of Executive Order 13175, we specifically requested comment from tribal officials on the proposed rule, and have fully considered those comments when preparing the final rule.

Environmental Documentation

The Corps has prepared a final Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI) for the final rule. The final EA and the FONSI are available at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/citizen.htm>. It is also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW., Washington, DC 20314-1000.

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. We 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.

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The final rule is not expected to negatively impact any community, and therefore is not expected to cause any

disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211

The final rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

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 us 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, business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through the Office of Management and Budget (OMB), explanations when we decide not to use available and applicable voluntary consensus standards.

This action does not require the use of any particular technical standards. To the extent that functional and condition assessment methods are used to assess impacts to aquatic resources and determine appropriate compensation, district engineers are encouraged to use voluntary consensus methods where available.

List of Subjects

33 CFR Part 325

Administrative practice and procedure, Intergovernmental relations, Environmental protection, Navigation, Water pollution control, Waterways.

33 CFR Part 332

Administrative practice and procedure, Intergovernmental relations, Navigation (water), Water pollution control, Water resources, Watersheds, Waterways.

40 CFR Part 230

Environmental Protection, Water pollution control.

Corps of Engineers

33 CFR Chapter II

■ For the reasons stated in the preamble, the Corps amends 33 CFR chapter II as set forth below:

PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

■ 1. The authority citation for part 325 continues to read as follows:

Authority: 33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; 33 U.S.C. 1413.

■ 2. Amend § 325.1 by redesignating paragraphs (d)(7), (d)(8), and (d)(9) as paragraphs (d)(8), (d)(9), and (d)(10), respectively, and adding new paragraph (d)(7) as follows:

§ 325.1 Applications for permits.

* * * * *

(d) * * *

(7) For activities involving discharges of dredged or fill material into waters of the United States, the application must include a statement describing how impacts to waters of the United States are to be avoided and minimized. The application must also include either a statement describing how impacts to waters of the United States are to be compensated for or a statement explaining why compensatory mitigation should not be required for the proposed impacts. (See § 332.4(b)(1) of this chapter.)

* * * * *

■ 3. Add part 332 to read as follows:

PART 332—COMPENSATORY MITIGATION FOR LOSSES OF AQUATIC RESOURCES

Sec.

332.1 Purpose and general considerations.

332.2 Definitions.

332.3 General compensatory mitigation requirements.

332.4 Planning and documentation.

332.5 Ecological performance standards.

332.6 Monitoring.

332.7 Management.

332.8 Mitigation banks and in-lieu fee programs.

Authority: 33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; and Pub. L. 108–136.

§ 332.1 Purpose and general considerations.

(a) *Purpose.* (1) The purpose of this part is to establish standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the United States authorized through the issuance of

Department of the Army (DA) permits pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344) and/or sections 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401, 403). This part implements section 314(b) of the 2004 National Defense Authorization Act (Pub. L. 108–136), which directs that the standards and criteria shall, to the maximum extent practicable, maximize available credits and opportunities for mitigation, provide for regional variations in wetland conditions, functions, and values, and apply equivalent standards and criteria to each type of compensatory mitigation. This part is intended to further clarify mitigation requirements established under U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (U.S. EPA) regulations at 33 CFR part 320 and 40 CFR part 230, respectively.

(2) This part has been jointly developed by the Secretary of the Army, acting through the Chief of Engineers, and the Administrator of the Environmental Protection Agency. From time to time guidance on interpreting and implementing this part may be prepared jointly by U.S. EPA and the Corps at the national or regional level. No modifications to the basic application, meaning, or intent of this part will be made without further joint rulemaking by the Secretary of the Army, acting through the Chief of Engineers and the Administrator of the Environmental Protection Agency, pursuant to the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

(b) *Applicability.* This part does not alter the regulations at § 320.4(r) of this title, which address the general mitigation requirements for DA permits. In particular, it does not alter the circumstances under which compensatory mitigation is required or the definitions of “waters of the United States” or “navigable waters of the United States,” which are provided at parts 328 and 329 of this chapter, respectively. Use of resources as compensatory mitigation that are not otherwise subject to regulation under section 404 of the Clean Water Act and/or sections 9 or 10 of the Rivers and Harbors Act of 1899 does not in and of itself make them subject to such regulation.

(c) *Sequencing.* (1) Nothing in this section affects the requirement that all DA permits subject to section 404 of the Clean Water Act comply with applicable provisions of the Section 404(b)(1) Guidelines at 40 CFR part 230.

(2) Pursuant to these requirements, the district engineer will issue an individual section 404 permit only upon

a determination that the proposed discharge complies with applicable provisions of 40 CFR part 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States. Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines.

(3) Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines. During the 404(b)(1) Guidelines compliance analysis, the district engineer may determine that a DA permit for the proposed activity cannot be issued because of the lack of appropriate and practicable compensatory mitigation options.

(d) *Public interest.* Compensatory mitigation may also be required to ensure that an activity requiring authorization under section 404 of the Clean Water Act and/or sections 9 or 10 of the Rivers and Harbors Act of 1899 is not contrary to the public interest.

(e) *Accounting for regional variations.* Where appropriate, district engineers shall account for regional characteristics of aquatic resource types, functions and services when determining performance standards and monitoring requirements for compensatory mitigation projects.

(f) *Relationship to other guidance documents.* (1) This part applies instead of the “Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks,” which was issued on November 28, 1995, the “Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act,” which was issued on November 7, 2000, and Regulatory Guidance Letter 02–02, “Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899” which was issued on December 24, 2002. These guidance documents are no longer to be used as compensatory mitigation policy in the Corps Regulatory Program.

(2) In addition, this part also applies instead of the provisions relating to the amount, type, and location of compensatory mitigation projects,

including the use of preservation, in the February 6, 1990, Memorandum of Agreement (MOA) between the Department of the Army and the Environmental Protection Agency on the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines. All other provisions of this MOA remain in effect.

§ 332.2 Definitions.

For the purposes of this part, the following terms are defined:

Adaptive management means the development of a management strategy that anticipates likely challenges associated with compensatory mitigation projects and provides for the implementation of actions to address those challenges, as well as unforeseen changes to those projects. It requires consideration of the risk, uncertainty, and dynamic nature of compensatory mitigation projects and guides modification of those projects to optimize performance. It includes the selection of appropriate measures that will ensure that the aquatic resource functions are provided and involves analysis of monitoring results to identify potential problems of a compensatory mitigation project and the identification and implementation of measures to rectify those problems.

Advance credits means any credits of an approved in-lieu fee program that are available for sale prior to being fulfilled in accordance with an approved mitigation project plan. Advance credit sales require an approved in-lieu fee program instrument that meets all applicable requirements including a specific allocation of advance credits, by service area where applicable. The instrument must also contain a schedule for fulfillment of advance credit sales.

Buffer means an upland, wetland, and/or riparian area that protects and/or enhances aquatic resource functions associated with wetlands, rivers, streams, lakes, marine, and estuarine systems from disturbances associated with adjacent land uses.

Compensatory mitigation means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Compensatory mitigation project means compensatory mitigation implemented by the permittee as a requirement of a DA permit (i.e., permittee-responsible mitigation), or by

a mitigation bank or an in-lieu fee program.

Condition means the relative ability of an aquatic resource to support and maintain a community of organisms having a species composition, diversity, and functional organization comparable to reference aquatic resources in the region.

Credit means a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the accrual or attainment of aquatic functions at a compensatory mitigation site. The measure of aquatic functions is based on the resources restored, established, enhanced, or preserved.

DA means Department of the Army.

Days means calendar days.

Debit means a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the loss of aquatic functions at an impact or project site. The measure of aquatic functions is based on the resources impacted by the authorized activity.

Enhancement means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Establishment (creation) means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area and functions.

Fulfillment of advance credit sales of an in-lieu fee program means application of credits released in accordance with a credit release schedule in an approved mitigation project plan to satisfy the mitigation requirements represented by the advance credits. Only after any advance credit sales within a service area have been fulfilled through the application of released credits from an in-lieu fee project (in accordance with the credit release schedule for an approved mitigation project plan), may additional released credits from that project be sold or transferred to permittees. When advance credits are fulfilled, an equal number of new advance credits is restored to the program sponsor for sale or transfer to permit applicants.

Functional capacity means the degree to which an area of aquatic resource performs a specific function.

Functions means the physical, chemical, and biological processes that occur in ecosystems.

Impact means adverse effect.

In-kind means a resource of a similar structural and functional type to the impacted resource.

In-lieu fee program means a program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for DA permits. Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor. However, the rules governing the operation and use of in-lieu fee programs are somewhat different from the rules governing operation and use of mitigation banks. The operation and use of an in-lieu fee program are governed by an in-lieu fee program instrument.

In-lieu fee program instrument means the legal document for the establishment, operation, and use of an in-lieu fee program.

Instrument means mitigation banking instrument or in-lieu fee program instrument.

Interagency Review Team (IRT) means an interagency group of federal, tribal, state, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the district engineer on, the establishment and management of a mitigation bank or an in-lieu fee program.

Mitigation bank means a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by DA permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument.

Mitigation banking instrument means the legal document for the establishment, operation, and use of a mitigation bank.

Off-site means an area that is neither located on the same parcel of land as the impact site, nor on a parcel of land contiguous to the parcel containing the impact site.

On-site means an area located on the same parcel of land as the impact site,

or on a parcel of land contiguous to the impact site.

Out-of-kind means a resource of a different structural and functional type from the impacted resource.

Performance standards are observable or measurable physical (including hydrological), chemical and/or biological attributes that are used to determine if a compensatory mitigation project meets its objectives.

Permittee-responsible mitigation means an aquatic resource restoration, establishment, enhancement, and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to provide compensatory mitigation for which the permittee retains full responsibility.

Preservation means the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Reference aquatic resources are a set of aquatic resources that represent the full range of variability exhibited by a regional class of aquatic resources as a result of natural processes and anthropogenic disturbances.

Rehabilitation means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Release of credits means a determination by the district engineer, in consultation with the IRT, that credits associated with an approved mitigation plan are available for sale or transfer, or in the case of an in-lieu fee program, for fulfillment of advance credit sales. A proportion of projected credits for a specific mitigation bank or in-lieu fee project may be released upon approval of the mitigation plan, with additional credits released as milestones specified in the credit release schedule are achieved.

Restoration means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Riparian areas are lands adjacent to streams, rivers, lakes, and estuarine-marine shorelines. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality.

Service area means the geographic area within which impacts can be mitigated at a specific mitigation bank or an in-lieu fee program, as designated in its instrument.

Services mean the benefits that human populations receive from functions that occur in ecosystems.

Sponsor means any public or private entity responsible for establishing, and in most circumstances, operating a mitigation bank or in-lieu fee program.

Standard permit means a standard, individual permit issued under the authority of section 404 of the Clean Water Act and/or sections 9 or 10 of the Rivers and Harbors Act of 1899.

Temporal loss is the time lag between the loss of aquatic resource functions caused by the permitted impacts and the replacement of aquatic resource functions at the compensatory mitigation site. Higher compensation ratios may be required to compensate for temporal loss. When the compensatory mitigation project is initiated prior to, or concurrent with, the permitted impacts, the district engineer may determine that compensation for temporal loss is not necessary, unless the resource has a long development time.

Watershed means a land area that drains to a common waterway, such as a stream, lake, estuary, wetland, or ultimately the ocean.

Watershed approach means an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed. It involves consideration of watershed needs, and how locations and types of compensatory mitigation projects address those needs. A landscape perspective is used to identify the types and locations of compensatory mitigation projects that will benefit the watershed and offset losses of aquatic resource functions and services caused by activities authorized by DA permits. The watershed approach may involve consideration of landscape scale, historic and potential aquatic

resource conditions, past and projected aquatic resource impacts in the watershed, and terrestrial connections between aquatic resources when determining compensatory mitigation requirements for DA permits.

Watershed plan means a plan developed by federal, tribal, state, and/or local government agencies or appropriate non-governmental organizations, in consultation with relevant stakeholders, for the specific goal of aquatic resource restoration, establishment, enhancement, and preservation. A watershed plan addresses aquatic resource conditions in the watershed, multiple stakeholder interests, and land uses. Watershed plans may also identify priority sites for aquatic resource restoration and protection. Examples of watershed plans include special area management plans, advance identification programs, and wetland management plans.

§ 332.3 General compensatory mitigation requirements.

(a) *General considerations.* (1) The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits. The district engineer must determine the compensatory mitigation to be required in a DA permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. When evaluating compensatory mitigation options, the district engineer will consider what would be environmentally preferable. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project. In many cases, the environmentally preferable compensatory mitigation may be provided through mitigation banks or in-lieu fee programs because they usually involve consolidating compensatory mitigation projects where ecologically appropriate, consolidating resources, providing financial planning and scientific expertise (which often is not practical for permittee-responsible compensatory mitigation projects), reducing temporal losses of functions, and reducing uncertainty over project success. Compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular DA permit. Permit applicants are responsible for proposing an

appropriate compensatory mitigation option to offset unavoidable impacts.

(2) Compensatory mitigation may be performed using the methods of restoration, enhancement, establishment, and in certain circumstances preservation. Restoration should generally be the first option considered because the likelihood of success is greater and the impacts to potentially ecologically important uplands are reduced compared to establishment, and the potential gains in terms of aquatic resource functions are greater, compared to enhancement and preservation.

(3) Compensatory mitigation projects may be sited on public or private lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. All compensatory mitigation projects must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.

(b) *Type and location of compensatory mitigation.* (1) When considering options for successfully providing the required compensatory mitigation, the district engineer shall consider the type and location options in the order presented in paragraphs (b)(2) through (b)(6) of this section. In general, the required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses. When compensating for impacts to marine resources, the location of the compensatory mitigation site should be chosen to replace lost functions and services within the same marine ecological system (e.g., reef complex, littoral drift cell). Compensation for impacts to aquatic resources in coastal watersheds (watersheds that include a tidal water body) should also be located in a coastal watershed where practicable. Compensatory mitigation projects should not be located where they will increase risks to aviation by attracting

wildlife to areas where aircraft-wildlife strikes may occur (e.g., near airports).

(2) *Mitigation bank credits.* When permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Since an approved instrument (including an approved mitigation plan and appropriate real estate and financial assurances) for a mitigation bank is required to be in place before its credits can begin to be used to compensate for authorized impacts, use of a mitigation bank can help reduce risk and uncertainty, as well as temporal loss of resource functions and services. Mitigation bank credits are not released for debiting until specific milestones associated with the mitigation bank site's protection and development are achieved, thus use of mitigation bank credits can also help reduce risk that mitigation will not be fully successful. Mitigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. Also, development of a mitigation bank requires site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu fee programs. For these reasons, the district engineer should give preference to the use of mitigation bank credits when these considerations are applicable. However, these same considerations may also be used to override this preference, where appropriate, as, for example, where an in-lieu fee program has released credits available from a specific approved in-lieu fee project, or a permittee-responsible project will restore an outstanding resource based on rigorous scientific and technical analysis.

(3) *In-lieu fee program credits.* Where permitted impacts are located within the service area of an approved in-lieu fee program, and the sponsor has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Where permitted impacts are not located in the service area of an approved mitigation bank, or the approved mitigation bank does not have the appropriate number and resource type of credits available to offset those impacts, in-lieu fee mitigation, if available, is generally preferable to permittee-responsible

mitigation. In-lieu fee projects typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. They also devote significant resources to identifying and addressing high-priority resource needs on a watershed scale, as reflected in their compensation planning framework. For these reasons, the district engineer should give preference to in-lieu fee program credits over permittee-responsible mitigation, where these considerations are applicable. However, as with the preference for mitigation bank credits, these same considerations may be used to override this preference where appropriate. Additionally, in cases where permittee-responsible mitigation is likely to successfully meet performance standards before advance credits secured from an in-lieu fee program are fulfilled, the district engineer should also give consideration to this factor in deciding between in-lieu fee mitigation and permittee-responsible mitigation.

(4) *Permittee-responsible mitigation under a watershed approach.* Where permitted impacts are not in the service area of an approved mitigation bank or in-lieu fee program that has the appropriate number and resource type of credits available, permittee-responsible mitigation is the only option. Where practicable and likely to be successful and sustainable, the resource type and location for the required permittee-responsible compensatory mitigation should be determined using the principles of a watershed approach as outlined in paragraph (c) of this section.

(5) *Permittee-responsible mitigation through on-site and in-kind mitigation.* In cases where a watershed approach is not practicable, the district engineer should consider opportunities to offset anticipated aquatic resource impacts by requiring on-site and in-kind compensatory mitigation. The district engineer must also consider the practicability of on-site compensatory mitigation and its compatibility with the proposed project.

(6) *Permittee-responsible mitigation through off-site and/or out-of-kind mitigation.* If, after considering opportunities for on-site, in-kind compensatory mitigation as provided in paragraph (b)(5) of this section, the district engineer determines that these compensatory mitigation opportunities are not practicable, are unlikely to compensate for the permitted impacts, or will be incompatible with the proposed project, and an alternative,

practicable off-site and/or out-of-kind mitigation opportunity is identified that has a greater likelihood of offsetting the permitted impacts or is environmentally preferable to on-site or in-kind mitigation, the district engineer should require that this alternative compensatory mitigation be provided.

(c) *Watershed approach to compensatory mitigation.* (1) The district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practicable. Where a watershed plan is available, the district engineer will determine whether the plan is appropriate for use in the watershed approach for compensatory mitigation. In cases where the district engineer determines that an appropriate watershed plan is available, the watershed approach should be based on that plan. Where no such plan is available, the watershed approach should be based on information provided by the project sponsor or available from other sources. The ultimate goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites.

(2) *Considerations.* (i) A watershed approach to compensatory mitigation considers the importance of landscape position and resource type of compensatory mitigation projects for the sustainability of aquatic resource functions within the watershed. Such an approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape. It also considers the habitat requirements of important species, habitat loss or conversion trends, sources of watershed impairment, and current development trends, as well as the requirements of other regulatory and non-regulatory programs that affect the watershed, such as storm water management or habitat conservation programs. It includes the protection and maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, when those resources contribute to or improve the overall ecological functioning of aquatic resources in the watershed. Compensatory mitigation requirements determined through the watershed approach should not focus exclusively on specific functions (e.g., water quality or habitat for certain species), but should provide, where practicable, the suite of functions typically provided by the affected aquatic resource.

(ii) Locational factors (e.g., hydrology, surrounding land use) are important to the success of compensatory mitigation for impacted habitat functions and may lead to siting of such mitigation away from the project area. However, consideration should also be given to functions and services (e.g., water quality, flood control, shoreline protection) that will likely need to be addressed at or near the areas impacted by the permitted impacts.

(iii) A watershed approach may include on-site compensatory mitigation, off-site compensatory mitigation (including mitigation banks or in-lieu fee programs), or a combination of on-site and off-site compensatory mitigation.

(iv) A watershed approach to compensatory mitigation should include, to the extent practicable, inventories of historic and existing aquatic resources, including identification of degraded aquatic resources, and identification of immediate and long-term aquatic resource needs within watersheds that can be met through permittee-responsible mitigation projects, mitigation banks, or in-lieu fee programs. Planning efforts should identify and prioritize aquatic resource restoration, establishment, and enhancement activities, and preservation of existing aquatic resources that are important for maintaining or improving ecological functions of the watershed. The identification and prioritization of resource needs should be as specific as possible, to enhance the usefulness of the approach in determining compensatory mitigation requirements.

(v) A watershed approach is not appropriate in areas where watershed boundaries do not exist, such as marine areas. In such cases, an appropriate spatial scale should be used to replace lost functions and services within the same ecological system (e.g., reef complex, littoral drift cell).

(3) *Information Needs.* (i) In the absence of a watershed plan determined by the district engineer under paragraph (c)(1) of this section to be appropriate for use in the watershed approach, the district engineer will use a watershed approach based on analysis of information regarding watershed conditions and needs, including potential sites for aquatic resource restoration activities and priorities for aquatic resource restoration and preservation. Such information includes: current trends in habitat loss or conversion; cumulative impacts of past development activities, current development trends, the presence and

needs of sensitive species; site conditions that favor or hinder the success of compensatory mitigation projects; and chronic environmental problems such as flooding or poor water quality.

(ii) This information may be available from sources such as wetland maps; soil surveys; U.S. Geological Survey topographic and hydrologic maps; aerial photographs; information on rare, endangered and threatened species and critical habitat; local ecological reports or studies; and other information sources that could be used to identify locations for suitable compensatory mitigation projects in the watershed.

(iii) The level of information and analysis needed to support a watershed approach must be commensurate with the scope and scale of the proposed impacts requiring a DA permit, as well as the functions lost as a result of those impacts.

(4) *Watershed scale.* The size of watershed addressed using a watershed approach should not be larger than is appropriate to ensure that the aquatic resources provided through compensation activities will effectively compensate for adverse environmental impacts resulting from activities authorized by DA permits. The district engineer should consider relevant environmental factors and appropriate locally developed standards and criteria when determining the appropriate watershed scale in guiding compensation activities.

(d) *Site selection.* (1) The compensatory mitigation project site must be ecologically suitable for providing the desired aquatic resource functions. In determining the ecological suitability of the compensatory mitigation project site, the district engineer must consider, to the extent practicable, the following factors:

(i) Hydrological conditions, soil characteristics, and other physical and chemical characteristics;

(ii) Watershed-scale features, such as aquatic habitat diversity, habitat connectivity, and other landscape scale functions;

(iii) The size and location of the compensatory mitigation site relative to hydrologic sources (including the availability of water rights) and other ecological features;

(iv) Compatibility with adjacent land uses and watershed management plans;

(v) Reasonably foreseeable effects the compensatory mitigation project will have on ecologically important aquatic or terrestrial resources (e.g., shallow sub-tidal habitat, mature forests), cultural sites, or habitat for federally- or

state-listed threatened and endangered species; and

(vi) Other relevant factors including, but not limited to, development trends, anticipated land use changes, habitat status and trends, the relative locations of the impact and mitigation sites in the stream network, local or regional goals for the restoration or protection of particular habitat types or functions (e.g., re-establishment of habitat corridors or habitat for species of concern), water quality goals, floodplain management goals, and the relative potential for chemical contamination of the aquatic resources.

(2) District engineers may require on-site, off-site, or a combination of on-site and off-site compensatory mitigation to replace permitted losses of aquatic resource functions and services.

(3) Applicants should propose compensation sites adjacent to existing aquatic resources or where aquatic resources previously existed.

(e) *Mitigation type.* (1) In general, in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to compensate for the functions and services lost at the impact site. For example, tidal wetland compensatory mitigation projects are most likely to compensate for unavoidable impacts to tidal wetlands, while perennial stream compensatory mitigation projects are most likely to compensate for unavoidable impacts to perennial streams. Thus, except as provided in paragraph (e)(2) of this section, the required compensatory mitigation shall be of a similar type to the affected aquatic resource.

(2) If the district engineer determines, using the watershed approach in accordance with paragraph (c) of this section that out-of-kind compensatory mitigation will serve the aquatic resource needs of the watershed, the district engineer may authorize the use of such out-of-kind compensatory mitigation. The basis for authorization of out-of-kind compensatory mitigation must be documented in the administrative record for the permit action.

(3) For difficult-to-replace resources (e.g., bogs, fens, springs, streams, Atlantic white cedar swamps) if further avoidance and minimization is not practicable, the required compensation should be provided, if practicable, through in-kind rehabilitation, enhancement, or preservation since there is greater certainty that these methods of compensation will successfully offset permitted impacts.

(f) *Amount of compensatory mitigation.* (1) If the district engineer determines that compensatory

mitigation is necessary to offset unavoidable impacts to aquatic resources, the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required. If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used.

(2) The district engineer must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site. The rationale for the required replacement ratio must be documented in the administrative record for the permit action.

(3) If an in-lieu fee program will be used to provide the required compensatory mitigation, and the appropriate number and resource type of released credits are not available, the district engineer must require sufficient compensation to account for the risk and uncertainty associated with in-lieu fee projects that have not been implemented before the permitted impacts have occurred.

(g) *Use of mitigation banks and in-lieu fee programs.* Mitigation banks and in-lieu fee programs may be used to compensate for impacts to aquatic resources authorized by general permits and individual permits, including after-the-fact permits, in accordance with the preference hierarchy in paragraph (b) of this section.

(h) *Preservation.* (1) Preservation may be used to provide compensatory mitigation for activities authorized by DA permits when all the following criteria are met:

(i) The resources to be preserved provide important physical, chemical, or biological functions for the watershed;

(ii) The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability

of the watershed, the district engineer must use appropriate quantitative assessment tools, where available;

(iii) Preservation is determined by the district engineer to be appropriate and practicable;

(iv) The resources are under threat of destruction or adverse modifications; and

(v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust).

(2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach described in paragraph (c) of this section, but compensation ratios shall be higher.

(i) *Buffers.* District engineers may require the restoration, establishment, enhancement, and preservation, as well as the maintenance, of riparian areas and/or buffers around aquatic resources where necessary to ensure the long-term viability of those resources. Buffers may also provide habitat or corridors necessary for the ecological functioning of aquatic resources. If buffers are required by the district engineer as part of the compensatory mitigation project, compensatory mitigation credit will be provided for those buffers.

(j) *Relationship to other federal, tribal, state, and local programs.* (1) Compensatory mitigation projects for DA permits may also be used to satisfy the environmental requirements of other programs, such as tribal, state, or local wetlands regulatory programs, other federal programs such as the Surface Mining Control and Reclamation Act, Corps civil works projects, and Department of Defense military construction projects, consistent with the terms and requirements of these programs and subject to the following considerations:

(i) The compensatory mitigation project must include appropriate compensation required by the DA permit for unavoidable impacts to aquatic resources authorized by that permit.

(ii) Under no circumstances may the same credits be used to provide mitigation for more than one permitted activity. However, where appropriate, compensatory mitigation projects, including mitigation banks and in-lieu fee projects, may be designed to

holistically address requirements under multiple programs and authorities for the same activity.

(2) Except for projects undertaken by federal agencies, or where federal funding is specifically authorized to provide compensatory mitigation, federally-funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by DA permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefits of the restoration or conservation project.

(3) Compensatory mitigation projects may also be used to provide compensatory mitigation under the Endangered Species Act or for Habitat Conservation Plans, as long as they comply with the requirements of paragraph (j)(1) of this section.

(k) *Permit conditions.* (1) The compensatory mitigation requirements for a DA permit, including the amount and type of compensatory mitigation, must be clearly stated in the special conditions of the individual permit or general permit verification (see 33 CFR 325.4 and 330.6(a)). The special conditions must be enforceable.

(2) For an individual permit that requires permittee-responsible mitigation, the special conditions must:

(i) Identify the party responsible for providing the compensatory mitigation;

(ii) Incorporate, by reference, the final mitigation plan approved by the district engineer;

(iii) State the objectives, performance standards, and monitoring required for the compensatory mitigation project, unless they are provided in the approved final mitigation plan; and

(iv) Describe any required financial assurances or long-term management provisions for the compensatory mitigation project, unless they are specified in the approved final mitigation plan.

(3) For a general permit activity that requires permittee-responsible compensatory mitigation, the special conditions must describe the compensatory mitigation proposal, which may be either conceptual or detailed. The general permit verification must also include a special condition that states that the permittee cannot commence work in waters of the United

States until the district engineer approves the final mitigation plan, unless the district engineer determines that such a special condition is not practicable and not necessary to ensure timely completion of the required compensatory mitigation. To the extent appropriate and practicable, special conditions of the general permit verification should also address the requirements of paragraph (k)(2) of this section.

(4) If a mitigation bank or in-lieu fee program is used to provide the required compensatory mitigation, the special conditions must indicate whether a mitigation bank or in-lieu fee program will be used, and specify the number and resource type of credits the permittee is required to secure. In the case of an individual permit, the special condition must also identify the specific mitigation bank or in-lieu fee program that will be used. For general permit verifications, the special conditions may either identify the specific mitigation bank or in-lieu fee program, or state that the specific mitigation bank or in-lieu fee program used to provide the required compensatory mitigation must be approved by the district engineer before the credits are secured.

(l) *Party responsible for compensatory mitigation.* (1) For permittee-responsible mitigation, the special conditions of the DA permit must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project.

(2) For mitigation banks and in-lieu fee programs, the instrument must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project(s). The instrument must also contain a provision expressing the sponsor's agreement to assume responsibility for a permittee's compensatory mitigation requirements, once that permittee has secured the appropriate number and resource type of credits from the sponsor and the district engineer has received the documentation described in paragraph (l)(3) of this section.

(3) If use of a mitigation bank or in-lieu fee program is approved by the district engineer to provide part or all of the required compensatory mitigation for a DA permit, the permittee retains responsibility for providing the compensatory mitigation until the appropriate number and resource type of credits have been secured from a sponsor and the district engineer has received documentation that confirms that the sponsor has accepted the

responsibility for providing the required compensatory mitigation. This documentation may consist of a letter or form signed by the sponsor, with the permit number and a statement indicating the number and resource type of credits that have been secured from the sponsor. Copies of this documentation will be retained in the administrative records for both the permit and the instrument. If the sponsor fails to provide the required compensatory mitigation, the district engineer may pursue measures against the sponsor to ensure compliance.

(m) *Timing.* Implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts. The district engineer shall require, to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity.

(n) *Financial assurances.* (1) The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority) the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project.

(2) The amount of the required financial assurances must be determined by the district engineer, in consultation with the project sponsor, and must be based on the size and complexity of the compensatory mitigation project, the degree of completion of the project at the time of project approval, the likelihood of success, the past performance of the project sponsor, and any other factors the district engineer deems appropriate. Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments, subject to the approval of the district engineer. The rationale for determining the amount of the required financial assurances must be documented in the administrative record for either the DA permit or the instrument. In determining the assurance amount, the district engineer shall consider the cost of providing

replacement mitigation, including costs for land acquisition, planning and engineering, legal fees, mobilization, construction, and monitoring.

(3) If financial assurances are required, the DA permit must include a special condition requiring the financial assurances to be in place prior to commencing the permitted activity.

(4) Financial assurances shall be phased out once the compensatory mitigation project has been determined by the district engineer to be successful in accordance with its performance standards. The DA permit or instrument must clearly specify the conditions under which the financial assurances are to be released to the permittee, sponsor, and/or other financial assurance provider, including, as appropriate, linkage to achievement of performance standards, adaptive management, or compliance with special conditions.

(5) A financial assurance must be in a form that ensures that the district engineer will receive notification at least 120 days in advance of any termination or revocation. For third-party assurance providers, this may take the form of a contractual requirement for the assurance provider to notify the district engineer at least 120 days before the assurance is revoked or terminated.

(6) Financial assurances shall be payable at the direction of the district engineer to his designee or to a standby trust agreement. When a standby trust is used (e.g., with performance bonds or letters of credit) all amounts paid by the financial assurance provider shall be deposited directly into the standby trust fund for distribution by the trustee in accordance with the district engineer's instructions.

(o) *Compliance with applicable law.* The compensatory mitigation project must comply with all applicable federal, state, and local laws. The DA permit, mitigation banking instrument, or in-lieu fee program instrument must not require participation by the Corps or any other federal agency in project management, including receipt or management of financial assurances or long-term financing mechanisms, except as determined by the Corps or other agency to be consistent with its statutory authority, mission, and priorities.

§ 332.4 Planning and documentation.

(a) *Pre-application consultations.* Potential applicants for standard permits are encouraged to participate in pre-application meetings with the Corps and appropriate agencies to discuss potential mitigation requirements and information needs.

(b) *Public review and comment.* (1) For an activity that requires a standard DA permit pursuant to section 404 of the Clean Water Act, the public notice for the proposed activity must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. This explanation shall address, to the extent that such information is provided in the mitigation statement required by § 325.1(d)(7) of this chapter, the proposed avoidance and minimization and the amount, type, and location of any proposed compensatory mitigation, including any out-of-kind compensation, or indicate an intention to use an approved mitigation bank or in-lieu fee program. The level of detail provided in the public notice must be commensurate with the scope and scale of the impacts. The notice shall not include information that the district engineer and the permittee believe should be kept confidential for business purposes, such as the exact location of a proposed mitigation site that has not yet been secured. The permittee must clearly identify any information being claimed as confidential in the mitigation statement when submitted. In such cases, the notice must still provide enough information to enable the public to provide meaningful comment on the proposed mitigation.

(2) For individual permits, district engineers must consider any timely comments and recommendations from other federal agencies; tribal, state, or local governments; and the public.

(3) For activities authorized by letters of permission or general permits, the review and approval process for compensatory mitigation proposals and plans must be conducted in accordance with the terms and conditions of those permits and applicable regulations including the applicable provisions of this part.

(c) *Mitigation plan.* (1) *Preparation and Approval.* (i) For individual permits, the permittee must prepare a draft mitigation plan and submit it to the district engineer for review. After addressing any comments provided by the district engineer, the permittee must prepare a final mitigation plan, which must be approved by the district engineer prior to issuing the individual permit. The approved final mitigation plan must be incorporated into the individual permit by reference. The final mitigation plan must include the items described in paragraphs (c)(2) through (c)(14) of this section, but the level of detail of the mitigation plan should be commensurate with the scale and scope of the impacts. As an

alternative, the district engineer may determine that it would be more appropriate to address any of the items described in paragraphs (c)(2) through (c)(14) of this section as permit conditions, instead of components of a compensatory mitigation plan. For permittees who intend to fulfill their compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu fee programs, their mitigation plans need include only the items described in paragraphs (c)(5) and (c)(6) of this section, and the name of the specific mitigation bank or in-lieu fee program to be used.

(ii) For general permits, if compensatory mitigation is required, the district engineer may approve a conceptual or detailed compensatory mitigation plan to meet required time frames for general permit verifications, but a final mitigation plan incorporating the elements in paragraphs (c)(2) through (c)(14) of this section, at a level of detail commensurate with the scale and scope of the impacts, must be approved by the district engineer before the permittee commences work in waters of the United States. As an alternative, the district engineer may determine that it would be more appropriate to address any of the items described in paragraphs (c)(2) through (c)(14) of this section as permit conditions, instead of components of a compensatory mitigation plan. For permittees who intend to fulfill their compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu fee programs, their mitigation plans need include only the items described in paragraphs (c)(5) and (c)(6) of this section, and either the name of the specific mitigation bank or in-lieu fee program to be used or a statement indicating that a mitigation bank or in-lieu fee program will be used (contingent upon approval by the district engineer).

(iii) Mitigation banks and in-lieu fee programs must prepare a mitigation plan including the items in paragraphs (c)(2) through (c)(14) of this section for each separate compensatory mitigation project site. For mitigation banks and in-lieu fee programs, the preparation and approval process for mitigation plans is described in § 332.8.

(2) *Objectives.* A description of the resource type(s) and amount(s) that will be provided, the method of compensation (i.e., restoration, establishment, enhancement, and/or preservation), and the manner in which the resource functions of the compensatory mitigation project will address the needs of the watershed,

ecoregion, physiographic province, or other geographic area of interest.

(3) *Site selection.* A description of the factors considered during the site selection process. This should include consideration of watershed needs, on-site alternatives where applicable, and the practicability of accomplishing ecologically self-sustaining aquatic resource restoration, establishment, enhancement, and/or preservation at the compensatory mitigation project site. (See § 332.3(d).)

(4) *Site protection instrument.* A description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site (see § 332.7(a)).

(5) *Baseline information.* A description of the ecological characteristics of the proposed compensatory mitigation project site and, in the case of an application for a DA permit, the impact site. This may include descriptions of historic and existing plant communities, historic and existing hydrology, soil conditions, a map showing the locations of the impact and mitigation site(s) or the geographic coordinates for those site(s), and other site characteristics appropriate to the type of resource proposed as compensation. The baseline information should also include a delineation of waters of the United States on the proposed compensatory mitigation project site. A prospective permittee planning to secure credits from an approved mitigation bank or in-lieu fee program only needs to provide baseline information about the impact site, not the mitigation bank or in-lieu fee project site.

(6) *Determination of credits.* A description of the number of credits to be provided, including a brief explanation of the rationale for this determination. (See § 332.3(f).)

(i) For permittee-responsible mitigation, this should include an explanation of how the compensatory mitigation project will provide the required compensation for unavoidable impacts to aquatic resources resulting from the permitted activity.

(ii) For permittees intending to secure credits from an approved mitigation bank or in-lieu fee program, it should include the number and resource type of credits to be secured and how these were determined.

(7) *Mitigation work plan.* Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods,

timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures. For stream compensatory mitigation projects, the mitigation work plan may also include other relevant information, such as planform geometry, channel form (e.g., typical channel cross-sections), watershed size, design discharge, and riparian area plantings.

(8) *Maintenance plan.* A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed.

(9) *Performance standards.* Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives. (See § 332.5.)

(10) *Monitoring requirements.* A description of parameters to be monitored in order to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results to the district engineer must be included. (See § 332.6.)

(11) *Long-term management plan.* A description of how the compensatory mitigation project will be managed after performance standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for long-term management. (See § 332.7(d).)

(12) *Adaptive management plan.* A management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures. The adaptive management plan will guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success. (See § 332.7(c).)

(13) *Financial assurances.* A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards (see § 332.3(n)).

(14) *Other information.* The district engineer may require additional

information as necessary to determine the appropriateness, feasibility, and practicability of the compensatory mitigation project.

§ 332.5 Ecological performance standards.

(a) The approved mitigation plan must contain performance standards that will be used to assess whether the project is achieving its objectives. Performance standards should relate to the objectives of the compensatory mitigation project, so that the project can be objectively evaluated to determine if it is developing into the desired resource type, providing the expected functions, and attaining any other applicable metrics (e.g., acres).

(b) Performance standards must be based on attributes that are objective and verifiable. Ecological performance standards must be based on the best available science that can be measured or assessed in a practicable manner. Performance standards may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position. The use of reference aquatic resources to establish performance standards will help ensure that those performance standards are reasonably achievable, by reflecting the range of variability exhibited by the regional class of aquatic resources as a result of natural processes and anthropogenic disturbances. Performance standards based on measurements of hydrology should take into consideration the hydrologic variability exhibited by reference aquatic resources, especially wetlands. Where practicable, performance standards should take into account the expected stages of the aquatic resource development process, in order to allow early identification of potential problems and appropriate adaptive management.

§ 332.6 Monitoring.

(a) *General.* (1) Monitoring the compensatory mitigation project site is necessary to determine if the project is meeting its performance standards, and to determine if measures are necessary to ensure that the compensatory mitigation project is accomplishing its objectives. The submission of monitoring reports to assess the development and condition of the compensatory mitigation project is required, but the content and level of detail for those monitoring reports must be commensurate with the scale and scope of the compensatory mitigation

project, as well as the compensatory mitigation project type. The mitigation plan must address the monitoring requirements for the compensatory mitigation project, including the parameters to be monitored, the length of the monitoring period, the party responsible for conducting the monitoring, the frequency for submitting monitoring reports to the district engineer, and the party responsible for submitting those monitoring reports to the district engineer.

(2) The district engineer may conduct site inspections on a regular basis (e.g., annually) during the monitoring period to evaluate mitigation site performance.

(b) *Monitoring period.* The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs). Following project implementation, the district engineer may reduce or waive the remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. Conversely the district engineer may extend the original monitoring period upon a determination that performance standards have not been met or the compensatory mitigation project is not on track to meet them. The district engineer may also revise monitoring requirements when remediation and/or adaptive management is required.

(c) *Monitoring reports.* (1) The district engineer must determine the information to be included in monitoring reports. This information must be sufficient for the district engineer to determine how the compensatory mitigation project is progressing towards meeting its performance standards, and may include plans (such as as-built plans), maps, and photographs to illustrate site conditions. Monitoring reports may also include the results of functional, condition, or other assessments used to provide quantitative or qualitative measures of the functions provided by the compensatory mitigation project site.

(2) The permittee or sponsor is responsible for submitting monitoring reports in accordance with the special conditions of the DA permit or the terms of the instrument. Failure to submit monitoring reports in a timely manner may result in compliance action by the district engineer.

(3) Monitoring reports must be provided by the district engineer to interested federal, tribal, state, and local resource agencies, and the public, upon request.

§ 332.7 Management.

(a) *Site protection.* (1) The aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project must be provided long-term protection through real estate instruments or other available mechanisms, as appropriate. Long-term protection may be provided through real estate instruments such as conservation easements held by entities such as federal, tribal, state, or local resource agencies, non-profit conservation organizations, or private land managers; the transfer of title to such entities; or by restrictive covenants. For government property, long-term protection may be provided through federal facility management plans or integrated natural resources management plans. When approving a method for long-term protection of non-government property other than transfer of title, the district engineer shall consider relevant legal constraints on the use of conservation easements and/or restrictive covenants in determining whether such mechanisms provide sufficient site protection. To provide sufficient site protection, a conservation easement or restrictive covenant should, where practicable, establish in an appropriate third party (e.g., governmental or non-profit resource management agency) the right to enforce site protections and provide the third party the resources necessary to monitor and enforce these site protections.

(2) The real estate instrument, management plan, or other mechanism providing long-term protection of the compensatory mitigation site must, to the extent appropriate and practicable, prohibit incompatible uses (e.g., clear cutting or mineral extraction) that might otherwise jeopardize the objectives of the compensatory mitigation project. Where appropriate, multiple instruments recognizing compatible uses (e.g., fishing or grazing rights) may be used.

(3) The real estate instrument, management plan, or other long-term protection mechanism must contain a provision requiring 60-day advance notification to the district engineer before any action is taken to void or modify the instrument, management plan, or long-term protection mechanism, including transfer of title to, or establishment of any other legal claims over, the compensatory mitigation site.

(4) For compensatory mitigation projects on public lands, where federal facility management plans or integrated natural resources management plans are used to provide long-term protection, and changes in statute, regulation, or agency needs or mission results in an incompatible use on public lands originally set aside for compensatory mitigation, the public agency authorizing the incompatible use is responsible for providing alternative compensatory mitigation that is acceptable to the district engineer for any loss in functions resulting from the incompatible use.

(5) A real estate instrument, management plan, or other long-term protection mechanism used for site protection of permittee-responsible mitigation must be approved by the district engineer in advance of, or concurrent with, the activity causing the authorized impacts.

(b) *Sustainability.* Compensatory mitigation projects shall be designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. This includes minimization of active engineering features (e.g., pumps) and appropriate siting to ensure that natural hydrology and landscape context will support long-term sustainability. Where active long-term management and maintenance are necessary to ensure long-term sustainability (e.g., prescribed burning, invasive species control, maintenance of water control structures, easement enforcement), the responsible party must provide for such management and maintenance. This includes the provision of long-term financing mechanisms where necessary. Where needed, the acquisition and protection of water rights must be secured and documented in the permit conditions or instrument.

(c) *Adaptive management.* (1) If the compensatory mitigation project cannot be constructed in accordance with the approved mitigation plans, the permittee or sponsor must notify the district engineer. A significant modification of the compensatory mitigation project requires approval from the district engineer.

(2) If monitoring or other information indicates that the compensatory mitigation project is not progressing towards meeting its performance standards as anticipated, the responsible party must notify the district engineer as soon as possible. The district engineer will evaluate and pursue measures to address deficiencies in the compensatory mitigation project. The district engineer will consider whether the compensatory mitigation project is

providing ecological benefits comparable to the original objectives of the compensatory mitigation project.

(3) The district engineer, in consultation with the responsible party (and other federal, tribal, state, and local agencies, as appropriate), will determine the appropriate measures. The measures may include site modifications, design changes, revisions to maintenance requirements, and revised monitoring requirements. The measures must be designed to ensure that the modified compensatory mitigation project provides aquatic resource functions comparable to those described in the mitigation plan objectives.

(4) Performance standards may be revised in accordance with adaptive management to account for measures taken to address deficiencies in the compensatory mitigation project. Performance standards may also be revised to reflect changes in management strategies and objectives if the new standards provide for ecological benefits that are comparable or superior to the approved compensatory mitigation project. No other revisions to performance standards will be allowed except in the case of natural disasters.

(d) *Long-term management.* (1) The permit conditions or instrument must identify the party responsible for ownership and all long-term management of the compensatory mitigation project. The permit conditions or instrument may contain provisions allowing the permittee or sponsor to transfer the long-term management responsibilities of the compensatory mitigation project site to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager, after review and approval by the district engineer. The land stewardship entity need not be identified in the original permit or instrument, as long as the future transfer of long-term management responsibility is approved by the district engineer.

(2) A long-term management plan should include a description of long-term management needs, annual cost estimates for these needs, and identify the funding mechanism that will be used to meet those needs.

(3) Any provisions necessary for long-term financing must be addressed in the original permit or instrument. The district engineer may require provisions to address inflationary adjustments and other contingencies, as appropriate. Appropriate long-term financing mechanisms include non-wasting endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial

instruments. In cases where the long-term management entity is a public authority or government agency, that entity must provide a plan for the long-term financing of the site.

(4) For permittee-responsible mitigation, any long-term financing mechanisms must be approved in advance of the activity causing the authorized impacts.

§ 332.8 Mitigation banks and in-lieu fee programs.

(a) *General considerations.* (1) All mitigation banks and in-lieu fee programs must have an approved instrument signed by the sponsor and the district engineer prior to being used to provide compensatory mitigation for DA permits.

(2) To the maximum extent practicable, mitigation banks and in-lieu fee project sites must be planned and designed to be self-sustaining over time, but some active management and maintenance may be required to ensure their long-term viability and sustainability. Examples of acceptable management activities include maintaining fire-dependent habitat communities in the absence of natural fire and controlling invasive exotic plant species.

(3) All mitigation banks and in-lieu fee programs must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.

(b) *Interagency Review Team.* (1) The district engineer will establish an Interagency Review Team (IRT) to review documentation for the establishment and management of mitigation banks and in-lieu fee programs. The district engineer or his designated representative serves as Chair of the IRT. In cases where a mitigation bank or in-lieu fee program is proposed to satisfy the requirements of another federal, tribal, state, or local program, in addition to compensatory mitigation requirements of DA permits, it may be appropriate for the administering agency to serve as co-Chair of the IRT.

(2) In addition to the Corps, representatives from the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, NOAA Fisheries, the Natural Resources Conservation Service, and other federal agencies, as appropriate, may participate in the IRT. The IRT may also include representatives from tribal, state, and local regulatory and resource

agencies, where such agencies have authorities and/or mandates directly affecting, or affected by, the establishment, operation, or use of the mitigation bank or in-lieu fee program. The district engineer will seek to include all public agencies with a substantive interest in the establishment of the mitigation bank or in-lieu fee program on the IRT, but retains final authority over its composition.

(3) The primary role of the IRT is to facilitate the establishment of mitigation banks or in-lieu fee programs through the development of mitigation banking or in-lieu fee program instruments. The IRT will review the prospectus, instrument, and other appropriate documents and provide comments to the district engineer. The district engineer and the IRT should use a watershed approach to the extent practicable in reviewing proposed mitigation banks and in-lieu fee programs. Members of the IRT may also sign the instrument, if they so choose. By signing the instrument, the IRT members indicate their agreement with the terms of the instrument. As an alternative, a member of the IRT may submit a letter expressing concurrence with the instrument. The IRT will also advise the district engineer in assessing monitoring reports, recommending remedial or adaptive management measures, approving credit releases, and approving modifications to an instrument. In order to ensure timely processing of instruments and other documentation, comments from IRT members must be received by the district engineer within the time limits specified in this section. Comments received after these deadlines will only be considered at the discretion of the district engineer to the extent that doing so does not jeopardize the deadlines for district engineer action.

(4) The district engineer will give full consideration to any timely comments and advice of the IRT. The district engineer alone retains final authority for approval of the instrument in cases where the mitigation bank or in-lieu fee program is used to satisfy compensatory mitigation requirements of DA permits.

(5) *MOAs with other agencies.* The district engineer and members of the IRT may enter into a memorandum of agreement (MOA) with any other federal, state or local government agency to perform all or some of the IRT review functions described in this section. Such MOAs must include provisions for appropriate federal oversight of the review process. The district engineer retains sole authority for final approval of instruments and

other documentation required under this section.

(c) *Compensation planning framework for in-lieu fee programs.* (1) The approved instrument for an in-lieu fee program must include a compensation planning framework that will be used to select, secure, and implement aquatic resource restoration, establishment, enhancement, and/or preservation activities. The compensation planning framework must support a watershed approach to compensatory mitigation. All specific projects used to provide compensation for DA permits must be consistent with the approved compensation planning framework. Modifications to the framework must be approved as a significant modification to the instrument by the district engineer, after consultation with the IRT.

(2) The compensation planning framework must contain the following elements:

(i) The geographic service area(s), including a watershed-based rationale for the delineation of each service area;

(ii) A description of the threats to aquatic resources in the service area(s), including how the in-lieu fee program will help offset impacts resulting from those threats;

(iii) An analysis of historic aquatic resource loss in the service area(s);

(iv) An analysis of current aquatic resource conditions in the service area(s), supported by an appropriate level of field documentation;

(v) A statement of aquatic resource goals and objectives for each service area, including a description of the general amounts, types and locations of aquatic resources the program will seek to provide;

(vi) A prioritization strategy for selecting and implementing compensatory mitigation activities;

(vii) An explanation of how any preservation objectives identified in paragraph (c)(2)(v) of this section and addressed in the prioritization strategy in paragraph (c)(2)(vi) satisfy the criteria for use of preservation in § 332.3(h);

(viii) A description of any public and private stakeholder involvement in plan development and implementation, including, where appropriate, coordination with federal, state, tribal and local aquatic resource management and regulatory authorities;

(ix) A description of the long-term protection and management strategies for activities conducted by the in-lieu fee program sponsor;

(x) A strategy for periodic evaluation and reporting on the progress of the program in achieving the goals and objectives in paragraph (c)(2)(v) of this

section, including a process for revising the planning framework as necessary; and

(xi) Any other information deemed necessary for effective compensation planning by the district engineer.

(3) The level of detail necessary for the compensation planning framework is at the discretion of the district engineer, and will take into account the characteristics of the service area(s) and the scope of the program. As part of the in-lieu fee program instrument, the compensation planning framework will be reviewed by the IRT, and will be a major factor in the district engineer's decision on whether to approve the instrument.

(d) *Review process.* (1) The sponsor is responsible for preparing all documentation associated with establishment of the mitigation bank or in-lieu fee program, including the prospectus, instrument, and other appropriate documents, such as mitigation plans for a mitigation bank. The prospectus provides an overview of the proposed mitigation bank or in-lieu fee program and serves as the basis for public and initial IRT comment. For a mitigation bank, the mitigation plan, as described in § 332.4(c), provides detailed plans and specifications for the mitigation bank site. For in-lieu fee programs, mitigation plans will be prepared as in-lieu fee project sites are identified after the instrument has been approved and the in-lieu fee program becomes operational. The instrument provides the authorization for the mitigation bank or in-lieu fee program to provide credits to be used as compensatory mitigation for DA permits.

(2) *Prospectus.* The prospectus must provide a summary of the information regarding the proposed mitigation bank or in-lieu fee program, at a sufficient level of detail to support informed public and IRT comment. The review process begins when the sponsor submits a complete prospectus to the district engineer. For modifications of approved instruments, submittal of a new prospectus is not required; instead, the sponsor must submit a written request for an instrument modification accompanied by appropriate documentation. The district engineer must notify the sponsor within 30 days whether or not a submitted prospectus is complete. A complete prospectus includes the following information:

(i) The objectives of the proposed mitigation bank or in-lieu fee program.

(ii) How the mitigation bank or in-lieu fee program will be established and operated.

(iii) The proposed service area.

(iv) The general need for and technical feasibility of the proposed mitigation bank or in-lieu fee program.

(v) The proposed ownership arrangements and long-term management strategy for the mitigation bank or in-lieu fee project sites.

(vi) The qualifications of the sponsor to successfully complete the type(s) of mitigation project(s) proposed, including information describing any past such activities by the sponsor.

(vii) For a proposed mitigation bank, the prospectus must also address:

(A) The ecological suitability of the site to achieve the objectives of the proposed mitigation bank, including the physical, chemical, and biological characteristics of the bank site and how that site will support the planned types of aquatic resources and functions; and

(B) Assurance of sufficient water rights to support the long-term sustainability of the mitigation bank.

(viii) For a proposed in-lieu fee program, the prospectus must also include:

(A) The compensation planning framework (see paragraph (c) of this section); and

(B) A description of the in-lieu fee program account required by paragraph (i) of this section.

(3) *Preliminary review of prospectus.* Prior to submitting a prospectus, the sponsor may elect to submit a draft prospectus to the district engineer for comment and consultation. The district engineer will provide copies of the draft prospectus to the IRT and will provide comments back to the sponsor within 30 days. Any comments from IRT members will also be forwarded to the sponsor. This preliminary review is optional but is strongly recommended. It is intended to identify potential issues early so that the sponsor may attempt to address those issues prior to the start of the formal review process.

(4) *Public review and comment.* Within 30 days of receipt of a complete prospectus or an instrument modification request that will be processed in accordance with paragraph (g)(1) of this section, the district engineer will provide public notice of the proposed mitigation bank or in-lieu fee program, in accordance with the public notice procedures at 33 CFR 325.3. The public notice must, at a minimum, include a summary of the prospectus and indicate that the full prospectus is available to the public for review upon request. For modifications of approved instruments, the public notice must instead summarize, and make available to the public upon request, whatever documentation is appropriate for the modification (e.g., a

new or revised mitigation plan). The comment period for public notice will be 30 days, unless the district engineer determines that a longer comment period is appropriate. The district engineer will notify the sponsor if the comment period is extended beyond 30 days, including an explanation of why the longer comment period is necessary. Copies of all comments received in response to the public notice must be distributed to the other IRT members and to the sponsor within 15 days of the close of the public comment period. The district engineer and IRT members may also provide comments to the sponsor at this time, and copies of any such comments will also be distributed to all IRT members. If the construction of a mitigation bank or an in-lieu fee program project requires a DA permit, the public notice requirement may be satisfied through the public notice provisions of the permit processing procedures, provided all of the relevant information is provided.

(5) *Initial evaluation.* (i) After the end of the comment period, the district engineer will review the comments received in response to the public notice, and make a written initial evaluation as to the potential of the proposed mitigation bank or in-lieu fee program to provide compensatory mitigation for activities authorized by DA permits. This initial evaluation letter must be provided to the sponsor within 30 days of the end of the public notice comment period.

(ii) If the district engineer determines that the proposed mitigation bank or in-lieu fee program has potential for providing appropriate compensatory mitigation for activities authorized by DA permits, the initial evaluation letter will inform the sponsor that he/she may proceed with preparation of the draft instrument (see paragraph (d)(6) of this section).

(iii) If the district engineer determines that the proposed mitigation bank or in-lieu fee program does not have potential for providing appropriate compensatory mitigation for DA permits, the initial evaluation letter must discuss the reasons for that determination. The sponsor may revise the prospectus to address the district engineer's concerns, and submit the revised prospectus to the district engineer. If the sponsor submits a revised prospectus, a revised public notice will be issued in accordance with paragraph (d)(4) of this section.

(iv) This initial evaluation procedure does not apply to proposed modifications of approved instruments.

(6) *Draft instrument.* (i) After considering comments from the district engineer, the IRT, and the public, if the

sponsor chooses to proceed with establishment of the mitigation bank or in-lieu fee program, he must prepare a draft instrument and submit it to the district engineer. In the case of an instrument modification, the sponsor must prepare a draft amendment (e.g., a specific instrument provision, a new or modified mitigation plan), and submit it to the district engineer. The district engineer must notify the sponsor within 30 days of receipt, whether the draft instrument or amendment is complete. If the draft instrument or amendment is incomplete, the district engineer will request from the sponsor the information necessary to make the draft instrument or amendment complete. Once any additional information is submitted, the district engineer must notify the sponsor as soon as he determines that the draft instrument or amendment is complete. The draft instrument must be based on the prospectus and must describe in detail the physical and legal characteristics of the mitigation bank or in-lieu fee program and how it will be established and operated.

(ii) For mitigation banks and in-lieu fee programs, the draft instrument must include the following information:

(A) A description of the proposed geographic service area of the mitigation bank or in-lieu fee program. The service area is the watershed, ecoregion, physiographic province, and/or other geographic area within which the mitigation bank or in-lieu fee program is authorized to provide compensatory mitigation required by DA permits. The service area must be appropriately sized to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area. For example, in urban areas, a U.S. Geological Survey 8-digit hydrologic unit code (HUC) watershed or a smaller watershed may be an appropriate service area. In rural areas, several contiguous 8-digit HUCs or a 6-digit HUC watershed may be an appropriate service area. Delineation of the service area must also consider any locally-developed standards and criteria that may be applicable. The economic viability of the mitigation bank or in-lieu fee program may also be considered in determining the size of the service area. The basis for the proposed service area must be documented in the instrument. An in-lieu fee program or umbrella mitigation banking instrument may have multiple service areas governed by its instrument (e.g., each watershed within a state or Corps district may be a separate service area under the instrument); however, all

impacts and compensatory mitigation must be accounted for by service area;

(B) Accounting procedures;

(C) A provision stating that legal responsibility for providing the compensatory mitigation lies with the sponsor once a permittee secures credits from the sponsor;

(D) Default and closure provisions;

(E) Reporting protocols; and

(F) Any other information deemed necessary by the district engineer.

(iii) For a mitigation bank, a complete draft instrument must include the following additional information:

(A) Mitigation plans that include all applicable items listed in § 332.4(c)(2) through (14); and

(B) A credit release schedule, which is tied to achievement of specific milestones. All credit releases must be approved by the district engineer, in consultation with the IRT, based on a determination that required milestones have been achieved. The district engineer, in consultation with the IRT, may modify the credit release schedule, including reducing the number of available credits or suspending credit sales or transfers altogether, where necessary to ensure that all credit sales or transfers remain tied to compensatory mitigation projects with a high likelihood of meeting performance standards;

(iv) For an in-lieu fee program, a complete draft instrument must include the following additional information:

(A) The compensation planning framework (see paragraph (c) of this section);

(B) Specification of the initial allocation of advance credits (see paragraph (n) of this section) and a draft fee schedule for these credits, by service area, including an explanation of the basis for the allocation and draft fee schedule;

(C) A methodology for determining future project-specific credits and fees; and

(D) A description of the in-lieu fee program account required by paragraph (i) of this section.

(7) *IRT review.* Upon receipt of notification by the district engineer that the draft instrument or amendment is complete, the sponsor must provide the district engineer with a sufficient number of copies of the draft instrument or amendment to distribute to the IRT members. The district engineer will promptly distribute copies of the draft instrument or amendment to the IRT members for a 30-day comment period. The 30-day comment period begins 5 days after the district engineer distributes the copies of the draft instrument or amendment to the IRT.

Following the comment period, the district engineer will discuss any comments with the appropriate agencies and with the sponsor. The district engineer will seek to resolve issues using a consensus based approach, to the extent practicable, while still meeting the decision-making time frames specified in this section. Within 90 days of receipt of the complete draft instrument or amendment by the IRT members, the district engineer must notify the sponsor of the status of the IRT review. Specifically, the district engineer must indicate to the sponsor if the draft instrument or amendment is generally acceptable and what changes, if any, are needed. If there are significant unresolved concerns that may lead to a formal objection from one or more IRT members to the final instrument or amendment, the district engineer will indicate the nature of those concerns.

(8) *Final instrument.* The sponsor must submit a final instrument to the district engineer for approval, with supporting documentation that explains how the final instrument addresses the comments provided by the IRT. For modifications of approved instruments, the sponsor must submit a final amendment to the district engineer for approval, with supporting documentation that explains how the final amendment addresses the comments provided by the IRT. The final instrument or amendment must be provided directly by the sponsor to all members of the IRT. Within 30 days of receipt of the final instrument or amendment, the district engineer will notify the IRT members whether or not he intends to approve the instrument or amendment. If no IRT member objects, by initiating the dispute resolution process in paragraph (e) of this section within 45 days of receipt of the final instrument or amendment, the district engineer will notify the sponsor of his final decision and, if the instrument or amendment is approved, arrange for it to be signed by the appropriate parties. If any IRT member initiates the dispute resolution process, the district engineer will notify the sponsor. Following conclusion of the dispute resolution process, the district engineer will notify the sponsor of his final decision, and if the instrument or amendment is approved, arrange for it to be signed by the appropriate parties. For mitigation banks, the final instrument must contain the information items listed in paragraphs (d)(6)(ii), and (iii) of this section. For in-lieu fee programs, the final instrument must contain the information items listed in paragraphs

(d)(6)(ii) and (iv) of this section. For the modification of an approved instrument, the amendment must contain appropriate information, as determined by the district engineer. The final instrument or amendment must be made available to the public upon request.

(e) *Dispute resolution process.* (1) Within 15 days of receipt of the district engineer's notification of intent to approve an instrument or amendment, the Regional Administrator of the U.S. EPA, the Regional Director of the U.S. Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service, and/or other senior officials of agencies represented on the IRT may notify the district engineer and other IRT members by letter if they object to the approval of the proposed final instrument or amendment. This letter must include an explanation of the basis for the objection and, where feasible, offer recommendations for resolving the objections. If the district engineer does not receive any objections within this time period, he may proceed to final action on the instrument or amendment.

(2) The district engineer must respond to the objection within 30 days of receipt of the letter. The district engineer's response may indicate an intent to disapprove the instrument or amendment as a result of the objection, an intent to approve the instrument or amendment despite the objection, or may provide a modified instrument or amendment that attempts to address the objection. The district engineer's response must be provided to all IRT members.

(3) Within 15 days of receipt of the district engineer's response, if the Regional Administrator or Regional Director is not satisfied with the response he may forward the issue to the Assistant Administrator for Water of the U.S. EPA, the Assistant Secretary for Fish and Wildlife and Parks of the U.S. FWS, or the Undersecretary for Oceans and Atmosphere of NOAA, as appropriate, for review and must notify the district engineer by letter via electronic mail or facsimile machine (with copies to all IRT members) that the issue has been forwarded for Headquarters review. This step is available only to the IRT members representing these three federal agencies, however other IRT members who do not agree with the district engineer's final decision do not have to sign the instrument or amendment or recognize the mitigation bank or in-lieu fee program for purposes of their own programs and authorities. If an IRT member other than the one filing the original objection has a new objection

based on the district engineer's response, he may use the first step in this procedure (paragraph (e)(1) of this section) to provide that objection to the district engineer.

(4) If the issue has not been forwarded to the objecting agency's Headquarters, then the district engineer may proceed with final action on the instrument or amendment. If the issue has been forwarded to the objecting agency's Headquarters, the district engineer must hold in abeyance the final action on the instrument or amendment, pending Headquarters level review described below.

(5) Within 20 days from the date of the letter requesting Headquarters level review, the Assistant Administrator for Water, the Assistant Secretary for Fish and Wildlife and Parks, or the Undersecretary for Oceans and Atmosphere must either notify the Assistant Secretary of the Army (Civil Works) (ASA(CW)) that further review will not be requested, or request that the ASA(CW) review the final instrument or amendment.

(6) Within 30 days of receipt of the letter from the objecting agency's Headquarters request for ASA(CW)'s review of the final instrument, the ASA(CW), through the Director of Civil Works, must review the draft instrument or amendment and advise the district engineer on how to proceed with final action on that instrument or amendment. The ASA(CW) must immediately notify the Assistant Administrator for Water, the Assistant Secretary for Fish and Wildlife and Parks, and/or the Undersecretary for Oceans and Atmosphere of the final decision.

(7) In cases where the dispute resolution procedure is used, the district engineer must notify the sponsor of his final decision within 150 days of receipt of the final instrument or amendment.

(f) *Extension of deadlines.* (1) The deadlines in paragraphs (d) and (e) of this section may be extended by the district engineer at his sole discretion in cases where:

(i) Compliance with other applicable laws, such as consultation under section 7 of the Endangered Species Act or section 106 of the National Historic Preservation Act, is required;

(ii) It is necessary to conduct government-to-government consultation with Indian tribes;

(iii) Timely submittal of information necessary for the review of the proposed mitigation bank or in-lieu fee program or the proposed modification of an approved instrument is not accomplished by the sponsor; or

(iv) Information that is essential to the district engineer's decision cannot be reasonably obtained within the specified time frame.

(2) In such cases, the district engineer must promptly notify the sponsor in writing of the extension and the reason for it. Such extensions shall be for the minimum time necessary to resolve the issue necessitating the extension.

(g) *Modification of instruments.* (1) *Approval of an amendment to an approved instrument.* Modification of an approved instrument, including the addition and approval of umbrella mitigation bank sites or in-lieu fee project sites or expansions of previously approved mitigation bank or in-lieu fee project sites, must follow the appropriate procedures in paragraph (d) of this section, unless the district engineer determines that the streamlined review process described in paragraph (g)(2) of this section is warranted.

(2) *Streamlined review process.* The streamlined modification review process may be used for the following modifications of instruments: changes reflecting adaptive management of the mitigation bank or in-lieu fee program, credit releases, changes in credit releases and credit release schedules, and changes that the district engineer determines are not significant. If the district engineer determines that the streamlined review process is warranted, he must notify the IRT members and the sponsor of this determination and provide them with copies of the proposed modification. IRT members and the sponsor have 30 days to notify the district engineer if they have concerns with the proposed modification. If IRT members or the sponsor notify the district engineer of such concerns, the district engineer shall attempt to resolve those concerns. Within 60 days of providing the proposed modification to the IRT, the district engineer must notify the IRT members of his intent to approve or disapprove the proposed modification. If no IRT member objects, by initiating the dispute resolution process in paragraph (e) of this section, within 15 days of receipt of this notification, the district engineer will notify the sponsor of his final decision and, if the modification is approved, arrange for it to be signed by the appropriate parties. If any IRT member initiates the dispute resolution process, the district engineer will so notify the sponsor. Following conclusion of the dispute resolution process, the district engineer will notify the sponsor of his final decision, and if the modification is approved, arrange

for it to be signed by the appropriate parties.

(h) *Umbrella mitigation banking instruments.* A single mitigation banking instrument may provide for future authorization of additional mitigation bank sites. As additional sites are selected, they must be included in the mitigation banking instrument as modifications, using the procedures in paragraph (g)(1) of this section. Credit withdrawal from the additional bank sites shall be consistent with paragraph (m) of this section.

(i) *In-lieu fee program account.* (1) The in-lieu fee program sponsor must establish a program account after the instrument is approved by the district engineer, prior to accepting any fees from permittees. If the sponsor accepts funds from entities other than permittees, those funds must be kept in separate accounts. The program account must be established at a financial institution that is a member of the Federal Deposit Insurance Corporation. All interests and earnings accruing to the program account must remain in that account for use by the in-lieu fee program for the purposes of providing compensatory mitigation for DA permits. The program account may only be used for the selection, design, acquisition, implementation, and management of in-lieu fee compensatory mitigation projects, except for a small percentage (as determined by the district engineer in consultation with the IRT and specified in the instrument) that can be used for administrative costs.

(2) The sponsor must submit proposed in-lieu fee projects to the district engineer for funding approval. Disbursements from the program account may only be made upon receipt of written authorization from the district engineer, after the district engineer has consulted with the IRT. The terms of the program account must specify that the district engineer has the authority to direct those funds to alternative compensatory mitigation projects in cases where the sponsor does not provide compensatory mitigation in accordance with the time frame specified in paragraph (n)(4) of this section.

(3) The sponsor must provide annual reports to the district engineer and the IRT. The annual reports must include the following information:

(i) All income received, disbursements, and interest earned by the program account;

(ii) A list of all permits for which in-lieu fee program funds were accepted. This list shall include: The Corps permit number (or the state permit number if

there is no corresponding Corps permit number, in cases of state programmatic general permits or other regional general permits), the service area in which the authorized impacts are located, the amount of authorized impacts, the amount of required compensatory mitigation, the amount paid to the in-lieu fee program, and the date the funds were received from the permittee;

(iii) A description of in-lieu fee program expenditures from the account, such as the costs of land acquisition, planning, construction, monitoring, maintenance, contingencies, adaptive management, and administration;

(iv) The balance of advance credits and released credits at the end of the report period for each service area; and

(v) Any other information required by the district engineer.

(4) The district engineer may audit the records pertaining to the program account. All books, accounts, reports, files, and other records relating to the in-lieu fee program account shall be available at reasonable times for inspection and audit by the district engineer.

(j) *In-lieu fee project approval.* (1) As in-lieu fee project sites are identified and secured, the sponsor must submit mitigation plans to the district engineer that include all applicable items listed in § 332.4(c)(2) through (14). The mitigation plan must also include a credit release schedule consistent with paragraph (o)(8) of this section that is tied to achievement of specific performance standards. The review and approval of in-lieu fee projects will be conducted in accordance with the procedures in paragraph (g)(1) of this section, as modifications of the in-lieu fee program instrument. This includes compensatory mitigation projects conducted by another party on behalf of the sponsor through requests for proposals and awarding of contracts.

(2) If a DA permit is required for an in-lieu fee project, the permit should not be issued until all relevant provisions of the mitigation plan have been substantively determined, to ensure that the DA permit accurately reflects all relevant provisions of the approved mitigation plan, such as performance standards.

(k) *Coordination of mitigation banking instruments and DA permit issuance.* In cases where initial establishment of the mitigation bank, or the development of a new project site under an umbrella banking instrument, involves activities requiring DA authorization, the permit should not be issued until all relevant provisions of the mitigation plan have been substantively determined. This is to

ensure that the DA permit accurately reflects all relevant provisions of the final instrument, such as performance standards.

(1) *Project implementation.* (1) The sponsor must have an approved instrument prior to collecting funds from permittees to satisfy compensatory mitigation requirements for DA permits.

(2) Authorization to sell credits to satisfy compensatory mitigation requirements in DA permits is contingent on compliance with all of the terms of the instrument. This includes constructing a mitigation bank or in-lieu fee project in accordance with the mitigation plan approved by the district engineer and incorporated by reference in the instrument. If the aquatic resource restoration, establishment, enhancement, and/or preservation activities cannot be implemented in accordance with the approved mitigation plan, the district engineer must consult with the sponsor and the IRT to consider modifications to the instrument, including adaptive management, revisions to the credit release schedule, and alternatives for providing compensatory mitigation to satisfy any credits that have already been sold.

(3) An in-lieu fee program sponsor is responsible for the implementation, long-term management, and any required remediation of the restoration, establishment, enhancement, and/or preservation activities, even though those activities may be conducted by other parties through requests for proposals or other contracting mechanisms.

(m) *Credit withdrawal from mitigation banks.* The mitigation banking instrument may allow for an initial debiting of a percentage of the total credits projected at mitigation bank maturity, provided the following conditions are satisfied: the mitigation banking instrument and mitigation plan have been approved, the mitigation bank site has been secured, appropriate financial assurances have been established, and any other requirements determined to be necessary by the district engineer have been fulfilled. The mitigation banking instrument must provide a schedule for additional credit releases as appropriate milestones are achieved (see paragraph (o)(8) of this section). Implementation of the approved mitigation plan shall be initiated no later than the first full growing season after the date of the first credit transaction.

(n) *Advance credits for in-lieu fee programs.* (1) The in-lieu fee program instrument may make a limited number of advance credits available to

permittees when the instrument is approved. The number of advance credits will be determined by the district engineer, in consultation with the IRT, and will be specified for each service area in the instrument. The number of advance credits will be based on the following considerations:

(i) The compensation planning framework;

(ii) The sponsor's past performance for implementing aquatic resource restoration, establishment, enhancement, and/or preservation activities in the proposed service area or other areas; and

(iii) The projected financing necessary to begin planning and implementation of in-lieu fee projects.

(2) To determine the appropriate number of advance credits for a particular service area, the district engineer may require the sponsor to provide confidential supporting information that will not be made available to the general public. Examples of confidential supporting information may include prospective in-lieu fee project sites.

(3) As released credits are produced by in-lieu fee projects, they must be used to fulfill any advance credits that have already been provided within the project service area before any remaining released credits can be sold or transferred to permittees. Once previously provided advance credits have been fulfilled, an equal number of advance credits is re-allocated to the sponsor for sale or transfer to fulfill new mitigation requirements, consistent with the terms of the instrument. The number of advance credits available to the sponsor at any given time to sell or transfer to permittees in a given service area is equal to the number of advance credits specified in the instrument, minus any that have already been provided but not yet fulfilled.

(4) Land acquisition and initial physical and biological improvements must be completed by the third full growing season after the first advance credit in that service area is secured by a permittee, unless the district engineer determines that more or less time is needed to plan and implement an in-lieu fee project. If the district engineer determines that there is a compensatory mitigation deficit in a specific service area by the third growing season after the first advance credit in that service area is sold, and determines that it would not be in the public interest to allow the sponsor additional time to plan and implement an in-lieu fee project, the district engineer must direct the sponsor to disburse funds from the in-lieu fee program account to provide

alternative compensatory mitigation to fulfill those compensation obligations.

(5) The sponsor is responsible for complying with the terms of the in-lieu fee program instrument. If the district engineer determines, as a result of review of annual reports on the operation of the in-lieu fee program (see paragraphs (p)(2) and (q)(1) of this section), that it is not performing in compliance with its instrument, the district engineer will take appropriate action, which may include suspension of credit sales, to ensure compliance with the in-lieu fee program instrument (see paragraph (o)(10) of this section). Permittees that secured credits from the in-lieu fee program are not responsible for in-lieu fee program compliance.

(o) *Determining credits.* (1) *Units of measure.* The principal units for credits and debits are acres, linear feet, functional assessment units, or other suitable metrics of particular resource types. Functional assessment units or other suitable metrics may be linked to acres or linear feet.

(2) *Assessment.* Where practicable, an appropriate assessment method (e.g., hydrogeomorphic approach to wetlands functional assessment, index of biological integrity) or other suitable metric must be used to assess and describe the aquatic resource types that will be restored, established, enhanced and/or preserved by the mitigation bank or in-lieu fee project.

(3) *Credit production.* The number of credits must reflect the difference between pre- and post-compensatory mitigation project site conditions, as determined by a functional or condition assessment or other suitable metric.

(4) *Credit value.* Once a credit is debited (sold or transferred to a permittee), its value cannot change.

(5) *Credit costs.* (i) The cost of compensatory mitigation credits provided by a mitigation bank or in-lieu fee program is determined by the sponsor.

(ii) For in-lieu fee programs, the cost per unit of credit must include the expected costs associated with the restoration, establishment, enhancement, and/or preservation of aquatic resources in that service area. These costs must be based on full cost accounting, and include, as appropriate, expenses such as land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, and remediation or adaptive management activities, as well as administration of the in-lieu fee program. The cost per unit credit must also take into account contingency costs appropriate to the stage of project planning, including uncertainties in

construction and real estate expenses. The cost per unit of credit must also take into account the resources necessary for the long-term management and protection of the in-lieu fee project. In addition, the cost per unit credit must include financial assurances that are necessary to ensure successful completion of in-lieu fee projects.

(6) *Credits provided by preservation.* These credits should be specified as acres, linear feet, or other suitable metrics of preservation of a particular resource type. In determining the compensatory mitigation requirements for DA permits using mitigation banks or in-lieu fee programs, the district engineer should apply a higher mitigation ratio if the requirements are to be met through the use of preservation credits. In determining this higher ratio, the district engineer must consider the relative importance of both the impacted and the preserved aquatic resources in sustaining watershed functions.

(7) *Credits provided by riparian areas, buffers, and uplands.* These credits should be specified as acres, linear feet, or other suitable metrics of riparian area, buffer, and uplands, respectively. Non-aquatic resources can only be used as compensatory mitigation for impacts to aquatic resources authorized by DA permits when those resources are essential to maintaining the ecological viability of adjoining aquatic resources. In determining the compensatory mitigation requirements for DA permits using mitigation banks and in-lieu fee programs, the district engineer may authorize the use of riparian area, buffer, and/or upland credits if he determines that these areas are essential to sustaining aquatic resource functions in the watershed and are the most appropriate compensation for the authorized impacts.

(8) *Credit release schedule.* (i) *General considerations.* Release of credits must be tied to performance-based milestones (e.g., construction, planting, establishment of specified plant and animal communities). The credit release schedule should reserve a significant share of the total credits for release only after full achievement of ecological performance standards. When determining the credit release schedule, factors to be considered may include, but are not limited to: The method of providing compensatory mitigation credits (e.g., restoration), the likelihood of success, the nature and amount of work needed to generate the credits, and the aquatic resource type(s) and function(s) to be provided by the mitigation bank or in-lieu fee project. The district engineer will determine the

credit release schedule, including the share to be released only after full achievement of performance standards, after consulting with the IRT. Once released, credits may only be used to satisfy compensatory mitigation requirements of a DA permit if the use of credits for a specific permit has been approved by the district engineer.

(ii) For single-site mitigation banks, the terms of the credit release schedule must be specified in the mitigation banking instrument. The credit release schedule may provide for an initial debiting of a limited number of credits once the instrument is approved and other appropriate milestones are achieved (see paragraph (m) of this section).

(iii) For in-lieu fee projects and umbrella mitigation bank sites, the terms of the credit release schedule must be specified in the approved mitigation plan. When an in-lieu fee project or umbrella mitigation bank site is implemented and is achieving the performance-based milestones specified in the credit release schedule, credits are generated in accordance with the credit release schedule for the approved mitigation plan. If the in-lieu fee project or umbrella mitigation bank site does not achieve those performance-based milestones, the district engineer may modify the credit release schedule, including reducing the number of credits.

(9) *Credit release approval.* Credit releases for mitigation banks and in-lieu fee projects must be approved by the district engineer. In order for credits to be released, the sponsor must submit documentation to the district engineer demonstrating that the appropriate milestones for credit release have been achieved and requesting the release. The district engineer will provide copies of this documentation to the IRT members for review. IRT members must provide any comments to the district engineer within 15 days of receiving this documentation. However, if the district engineer determines that a site visit is necessary, IRT members must provide any comments to the district engineer within 15 days of the site visit. The district engineer must schedule the site visit so that it occurs as soon as it is practicable, but the site visit may be delayed by seasonal considerations that affect the ability of the district engineer and the IRT to assess whether the applicable credit release milestones have been achieved. After full consideration of any comments received, the district engineer will determine whether the milestones have been achieved and the credits can be released. The district engineer shall

make a decision within 30 days of the end of that comment period, and notify the sponsor and the IRT.

(10) *Suspension and termination.* If the district engineer determines that the mitigation bank or in-lieu fee program is not meeting performance standards or complying with the terms of the instrument, appropriate action will be taken. Such actions may include, but are not limited to, suspending credit sales, adaptive management, decreasing available credits, utilizing financial assurances, and terminating the instrument.

(p) *Accounting procedures.* (1) For mitigation banks, the instrument must contain a provision requiring the sponsor to establish and maintain a ledger to account for all credit transactions. Each time an approved credit transaction occurs, the sponsor must notify the district engineer.

(2) For in-lieu fee programs, the instrument must contain a provision requiring the sponsor to establish and maintain an annual report ledger in accordance with paragraph (i)(3) of this section, as well as individual ledgers that track the production of released credits for each in-lieu fee project.

(q) *Reporting.* (1) *Ledger account.* The sponsor must compile an annual ledger report showing the beginning and ending balance of available credits and permitted impacts for each resource type, all additions and subtractions of credits, and any other changes in credit availability (e.g., additional credits released, credit sales suspended). The ledger report must be submitted to the district engineer, who will distribute copies to the IRT members. The ledger report is part of the administrative record for the mitigation bank or in-lieu fee program. The district engineer will make the ledger report available to the public upon request.

(2) *Monitoring reports.* The sponsor is responsible for monitoring the mitigation bank site or the in-lieu fee project site in accordance with the approved monitoring requirements to determine the level of success and identify problems requiring remedial action or adaptive management measures. Monitoring must be conducted in accordance with the requirements in § 332.6, and at time intervals appropriate for the particular project type and until such time that the district engineer, in consultation with the IRT, has determined that the performance standards have been attained. The instrument must include requirements for periodic monitoring reports to be submitted to the district engineer, who will provide copies to other IRT members.

(3) *Financial assurance and long-term management funding report.* The district engineer may require the sponsor to provide an annual report showing beginning and ending balances, including deposits into and any withdrawals from, the accounts providing funds for financial assurances and long-term management activities. The report should also include information on the amount of required financial assurances and the status of those assurances, including their potential expiration.

(r) *Use of credits.* Except as provided below, all activities authorized by DA permits are eligible, at the discretion of the district engineer, to use mitigation banks or in-lieu fee programs to fulfill compensatory mitigation requirements for DA permits. The district engineer will determine the number and type(s) of credits required to compensate for the authorized impacts. Permit applicants may propose to use a particular mitigation bank or in-lieu fee program to provide the required compensatory mitigation. In such cases, the sponsor must provide the permit applicant with a statement of credit availability. The district engineer must review the permit applicant's compensatory mitigation proposal, and notify the applicant of his determination regarding the acceptability of using that mitigation bank or in-lieu fee program.

(s) *IRT concerns with use of credits.* If, in the view of a member of the IRT, an issued permit or series of issued permits raises concerns about how credits from a particular mitigation bank or in-lieu fee program are being used to satisfy compensatory mitigation requirements (including concerns about whether credit use is consistent with the terms of the instrument), the IRT member may notify the district engineer in writing of the concern. The district engineer shall promptly consult with the IRT to address the concern. Resolution of the concern is at the discretion of the district engineer, consistent with applicable statutes, regulations, and policies regarding compensatory mitigation requirements for DA permits. Nothing in this section limits the authorities designated to IRT agencies under existing statutes or regulations.

(t) *Site protection.* (1) For mitigation bank sites, real estate instruments, management plans, or other long-term mechanisms used for site protection must be finalized before any credits can be released.

(2) For in-lieu fee project sites, real estate instruments, management plans, or other long-term protection mechanisms used for site protection

must be finalized before advance credits can become released credits.

(u) *Long-term management.* (1) The legal mechanisms and the party responsible for the long-term management and the protection of the mitigation bank site must be documented in the instrument or, in the case of umbrella mitigation banking instruments and in-lieu fee programs, the approved mitigation plans. The responsible party should make adequate provisions for the operation, maintenance, and long-term management of the compensatory mitigation project site. The long-term management plan should include a description of long-term management needs and identify the funding mechanism that will be used to meet those needs.

(2) The instrument may contain provisions for the sponsor to transfer long-term management responsibilities to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager.

(3) The instrument or approved mitigation plan must address the financial arrangements and timing of any necessary transfer of long-term management funds to the steward.

(4) Where needed, the acquisition and protection of water rights should be secured and documented in the instrument or, in the case of umbrella mitigation banking instruments and in-lieu fee programs, the approved mitigation site plan.

(v) *Grandfathering of existing instruments.* (1) *Mitigation banking instruments.* All mitigation banking instruments approved on or after July 9, 2008 must meet the requirements of this part. Mitigation banks approved prior to July 9, 2008 may continue to operate under the terms of their existing instruments. However, any modification to such a mitigation banking instrument on or after July 9, 2008, including authorization of additional sites under an umbrella mitigation banking instrument, expansion of an existing site, or addition of a different type of resource credits (e.g., stream credits to a wetland bank) must be consistent with the terms of this part.

(2) *In-lieu fee program instruments.* All in-lieu fee program instruments approved on or after July 9, 2008 must meet the requirements of this part. In-lieu fee programs operating under instruments approved prior to July 9, 2008 may continue to operate under those instruments for two years after the effective date of this rule, after which time they must meet the requirements of this part, unless the district engineer determines that circumstances warrant

an extension of up to three additional years. The district engineer must consult with the IRT before approving such extensions. Any revisions made to the in-lieu fee program instrument on or after July 9, 2008 must be consistent with the terms of this part. Any approved project for which construction was completed under the terms of a previously approved instrument may continue to operate indefinitely under those terms if the district engineer determines that the project is providing appropriate mitigation substantially consistent with the terms of this part.

Dated: March 28, 2008.

John Paul Woodley, Jr.,
Assistant Secretary of the Army, (Civil Works),
Department of the Army.

Environmental Protection Agency

40 CFR Chapter I

■ For the reasons stated in the preamble, the Environmental Protection Agency amends 40 CFR part 230 as set forth below:

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

■ 1. The authority citation for part 230 continues to read as follows:

Authority: Secs. 404(b) and 501(a) of the Clean Water Act of 1977 (33 U.S.C. 1344(b) and 1361(a)).

§ 230.12 [Amended]

■ 2. In § 230.12(a)(2) remove the reference “subpart H” and add in its place the reference “subparts H and J”.

Subpart H—[Amended]

■ 3. In subpart H the Note following the subpart heading is amended by adding a sentence to the end to read as follows:

Subpart H—Actions To Minimize Adverse Effects

Note: * * * Additional criteria for compensation measures are provided in subpart J of this part.

■ 4. In § 230.75 add a new sentence after the second sentence in paragraph (d) to read as follows:

§ 230.75 Actions affecting plant and animal populations.

* * * * *

(d) * * * Additional criteria for compensation measures are provided in subpart J of this part. * * *

* * * * *

■ 5. Add Subpart J to part 230 to read as follows:

Subpart J—Compensatory Mitigation for Losses of Aquatic Resources

Sec.

- 230.91 Purpose and general considerations.
- 230.92 Definitions.
- 230.93 General compensatory mitigation requirements.
- 230.94 Planning and documentation.
- 230.95 Ecological performance standards.
- 230.96 Monitoring.
- 230.97 Management.
- 230.98 Mitigation banks and in-lieu fee programs.

Subpart J—Compensatory Mitigation for Losses of Aquatic Resources**§ 230.91 Purpose and general considerations.**

(a) *Purpose.* (1) The purpose of this subpart is to establish standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the United States authorized through the issuance of permits by the U.S. Army Corps of Engineers (Corps) pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344). This subpart implements section 314(b) of the 2004 National Defense Authorization Act (Pub. L. 108–136), which directs that the standards and criteria shall, to the maximum extent practicable, maximize available credits and opportunities for mitigation, provide for regional variations in wetland conditions, functions, and values, and apply equivalent standards and criteria to each type of compensatory mitigation. This subpart is intended to further clarify mitigation requirements established under the Corps and EPA regulations at 33 CFR part 320 and this part, respectively.

(2) This subpart has been jointly developed by the Secretary of the Army, acting through the Chief of Engineers, and the Administrator of the Environmental Protection Agency. From time to time guidance on interpreting and implementing this subpart may be prepared jointly by EPA and the Corps at the national or regional level. No modifications to the basic application, meaning, or intent of this subpart will be made without further joint rulemaking by the Secretary of the Army, acting through the Chief of Engineers and the Administrator of the Environmental Protection Agency, pursuant to the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

(b) *Applicability.* This subpart does not alter the circumstances under which compensatory mitigation is required or the definition of “waters of the United States,” which is provided at § 230.3(s).

Use of resources as compensatory mitigation that are not otherwise subject to regulation under section 404 of the Clean Water Act does not in and of itself make them subject to such regulation.

(c) *Sequencing.* (1) Nothing in this section affects the requirement that all DA permits subject to section 404 of the Clean Water Act comply with applicable provisions of this part.

(2) Pursuant to these requirements, the district engineer will issue an individual section 404 permit only upon a determination that the proposed discharge complies with applicable provisions of 40 CFR part 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States. Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines.

(3) Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines. During the 404(b)(1) Guidelines compliance analysis, the district engineer may determine that a DA permit for the proposed activity cannot be issued because of the lack of appropriate and practicable compensatory mitigation options.

(d) *Accounting for regional variations.* Where appropriate, district engineers shall account for regional characteristics of aquatic resource types, functions and services when determining performance standards and monitoring requirements for compensatory mitigation projects.

(e) *Relationship to other guidance documents.* (1) This subpart applies instead of the “Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks,” which was issued on November 28, 1995, the “Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act,” which was issued on November 7, 2000, and Regulatory Guidance Letter 02–02, “Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899” which was issued on December 24, 2002. These guidance documents are no longer to be

used as compensatory mitigation policy in the Corps Regulatory Program.

(2) In addition, this subpart also applies instead of the provisions relating to the amount, type, and location of compensatory mitigation projects, including the use of preservation, in the February 6, 1990, Memorandum of Agreement (MOA) between the Department of the Army and the Environmental Protection Agency on the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines. All other provisions of this MOA remain in effect.

§ 230.92 Definitions.

For the purposes of this subpart, the following terms are defined:

Adaptive management means the development of a management strategy that anticipates likely challenges associated with compensatory mitigation projects and provides for the implementation of actions to address those challenges, as well as unforeseen changes to those projects. It requires consideration of the risk, uncertainty, and dynamic nature of compensatory mitigation projects and guides modification of those projects to optimize performance. It includes the selection of appropriate measures that will ensure that the aquatic resource functions are provided and involves analysis of monitoring results to identify potential problems of a compensatory mitigation project and the identification and implementation of measures to rectify those problems.

Advance credits means any credits of an approved in-lieu fee program that are available for sale prior to being fulfilled in accordance with an approved mitigation project plan. Advance credit sales require an approved in-lieu fee program instrument that meets all applicable requirements including a specific allocation of advance credits, by service area where applicable. The instrument must also contain a schedule for fulfillment of advance credit sales.

Buffer means an upland, wetland, and/or riparian area that protects and/or enhances aquatic resource functions associated with wetlands, rivers, streams, lakes, marine, and estuarine systems from disturbances associated with adjacent land uses.

Compensatory mitigation means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and

practicable avoidance and minimization has been achieved.

Compensatory mitigation project means compensatory mitigation implemented by the permittee as a requirement of a DA permit (i.e., permittee-responsible mitigation), or by a mitigation bank or an in-lieu fee program.

Condition means the relative ability of an aquatic resource to support and maintain a community of organisms having a species composition, diversity, and functional organization comparable to reference aquatic resources in the region.

Credit means a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the accrual or attainment of aquatic functions at a compensatory mitigation site. The measure of aquatic functions is based on the resources restored, established, enhanced, or preserved.

DA means Department of the Army.

Days means calendar days.

Debit means a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the loss of aquatic functions at an impact or project site. The measure of aquatic functions is based on the resources impacted by the authorized activity.

Enhancement means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Establishment (creation) means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area and functions.

Fulfillment of advance credit sales of an in-lieu fee program means application of credits released in accordance with a credit release schedule in an approved mitigation project plan to satisfy the mitigation requirements represented by the advance credits. Only after any advance credit sales within a service area have been fulfilled through the application of released credits from an in-lieu fee project (in accordance with the credit release schedule for an approved mitigation project plan), may additional released credits from that project be sold or transferred to permittees. When advance credits are fulfilled, an equal number of new advance credits is

restored to the program sponsor for sale or transfer to permit applicants.

Functional capacity means the degree to which an area of aquatic resource performs a specific function.

Functions means the physical, chemical, and biological processes that occur in ecosystems.

Impact means adverse effect.

In-kind means a resource of a similar structural and functional type to the impacted resource.

In-lieu fee program means a program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for DA permits. Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor. However, the rules governing the operation and use of in-lieu fee programs are somewhat different from the rules governing operation and use of mitigation banks. The operation and use of an in-lieu fee program are governed by an in-lieu fee program instrument.

In-lieu fee program instrument means the legal document for the establishment, operation, and use of an in-lieu fee program.

Instrument means mitigation banking instrument or in-lieu fee program instrument.

Interagency Review Team (IRT) means an interagency group of federal, tribal, state, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the district engineer on, the establishment and management of a mitigation bank or an in-lieu fee program.

Mitigation bank means a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by DA permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument.

Mitigation banking instrument means the legal document for the establishment, operation, and use of a mitigation bank.

Off-site means an area that is neither located on the same parcel of land as the

impact site, nor on a parcel of land contiguous to the parcel containing the impact site.

On-site means an area located on the same parcel of land as the impact site, or on a parcel of land contiguous to the impact site.

Out-of-kind means a resource of a different structural and functional type from the impacted resource.

Performance standards are observable or measurable physical (including hydrological), chemical and/or biological attributes that are used to determine if a compensatory mitigation project meets its objectives.

Permittee-responsible mitigation means an aquatic resource restoration, establishment, enhancement, and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to provide compensatory mitigation for which the permittee retains full responsibility.

Preservation means the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Reference aquatic resources are a set of aquatic resources that represent the full range of variability exhibited by a regional class of aquatic resources as a result of natural processes and anthropogenic disturbances.

Rehabilitation means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Release of credits means a determination by the district engineer, in consultation with the IRT, that credits associated with an approved mitigation plan are available for sale or transfer, or in the case of an in-lieu fee program, for fulfillment of advance credit sales. A proportion of projected credits for a specific mitigation bank or in-lieu fee project may be released upon

approval of the mitigation plan, with additional credits released as milestones specified in the credit release schedule are achieved.

Restoration means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Riparian areas are lands adjacent to streams, rivers, lakes, and estuarine-marine shorelines. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality.

Service area means the geographic area within which impacts can be mitigated at a specific mitigation bank or an in-lieu fee program, as designated in its instrument.

Services mean the benefits that human populations receive from functions that occur in ecosystems.

Sponsor means any public or private entity responsible for establishing, and in most circumstances, operating a mitigation bank or in-lieu fee program.

Standard permit means a standard, individual permit issued under the authority of section 404 of the Clean Water Act.

Temporal loss is the time lag between the loss of aquatic resource functions caused by the permitted impacts and the replacement of aquatic resource functions at the compensatory mitigation site. Higher compensation ratios may be required to compensate for temporal loss. When the compensatory mitigation project is initiated prior to, or concurrent with, the permitted impacts, the district engineer may determine that compensation for temporal loss is not necessary, unless the resource has a long development time.

Watershed means a land area that drains to a common waterway, such as a stream, lake, estuary, wetland, or ultimately the ocean.

Watershed approach means an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed. It involves consideration of watershed needs, and how locations and types of compensatory mitigation projects address those needs. A landscape perspective is used to identify the types and locations of compensatory mitigation projects that will benefit the watershed and offset losses of aquatic resource functions and services caused by activities authorized

by DA permits. The watershed approach may involve consideration of landscape scale, historic and potential aquatic resource conditions, past and projected aquatic resource impacts in the watershed, and terrestrial connections between aquatic resources when determining compensatory mitigation requirements for DA permits.

Watershed plan means a plan developed by federal, tribal, state, and/or local government agencies or appropriate non-governmental organizations, in consultation with relevant stakeholders, for the specific goal of aquatic resource restoration, establishment, enhancement, and preservation. A watershed plan addresses aquatic resource conditions in the watershed, multiple stakeholder interests, and land uses. Watershed plans may also identify priority sites for aquatic resource restoration and protection. Examples of watershed plans include special area management plans, advance identification programs, and wetland management plans.

§ 230.93 General compensatory mitigation requirements.

(a) *General considerations.* (1) The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits. The district engineer must determine the compensatory mitigation to be required in a DA permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. When evaluating compensatory mitigation options, the district engineer will consider what would be environmentally preferable. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project. In many cases, the environmentally preferable compensatory mitigation may be provided through mitigation banks or in-lieu fee programs because they usually involve consolidating compensatory mitigation projects where ecologically appropriate, consolidating resources, providing financial planning and scientific expertise (which often is not practical for permittee-responsible compensatory mitigation projects), reducing temporal losses of functions, and reducing uncertainty over project success. Compensatory mitigation requirements must be commensurate with the amount and type of impact that

is associated with a particular DA permit. Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts.

(2) Compensatory mitigation may be performed using the methods of restoration, enhancement, establishment, and in certain circumstances preservation. Restoration should generally be the first option considered because the likelihood of success is greater and the impacts to potentially ecologically important uplands are reduced compared to establishment, and the potential gains in terms of aquatic resource functions are greater, compared to enhancement and preservation.

(3) Compensatory mitigation projects may be sited on public or private lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. All compensatory mitigation projects must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.

(b) *Type and location of compensatory mitigation.* (1) When considering options for successfully providing the required compensatory mitigation, the district engineer shall consider the type and location options in the order presented in paragraphs (b)(2) through (b)(6) of this section. In general, the required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses. When compensating for impacts to marine resources, the location of the compensatory mitigation site should be chosen to replace lost functions and services within the same marine ecological system (e.g., reef complex, littoral drift cell). Compensation for impacts to aquatic resources in coastal watersheds (watersheds that include a tidal water body) should also be located in a coastal watershed where practicable. Compensatory mitigation projects

should not be located where they will increase risks to aviation by attracting wildlife to areas where aircraft-wildlife strikes may occur (e.g., near airports).

(2) *Mitigation bank credits.* When permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Since an approved instrument (including an approved mitigation plan and appropriate real estate and financial assurances) for a mitigation bank is required to be in place before its credits can begin to be used to compensate for authorized impacts, use of a mitigation bank can help reduce risk and uncertainty, as well as temporal loss of resource functions and services. Mitigation bank credits are not released for debiting until specific milestones associated with the mitigation bank site's protection and development are achieved, thus use of mitigation bank credits can also help reduce risk that mitigation will not be fully successful. Mitigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. Also, development of a mitigation bank requires site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu fee programs. For these reasons, the district engineer should give preference to the use of mitigation bank credits when these considerations are applicable. However, these same considerations may also be used to override this preference, where appropriate, as, for example, where an in-lieu fee program has released credits available from a specific approved in-lieu fee project, or a permittee-responsible project will restore an outstanding resource based on rigorous scientific and technical analysis.

(3) *In-lieu fee program credits.* Where permitted impacts are located within the service area of an approved in-lieu fee program, and the sponsor has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Where permitted impacts are not located in the service area of an approved mitigation bank, or the approved mitigation bank does not have the appropriate number and resource type of credits available to offset those impacts, in-lieu fee

mitigation, if available, is generally preferable to permittee-responsible mitigation. In-lieu fee projects typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. They also devote significant resources to identifying and addressing high-priority resource needs on a watershed scale, as reflected in their compensation planning framework. For these reasons, the district engineer should give preference to in-lieu fee program credits over permittee-responsible mitigation, where these considerations are applicable. However, as with the preference for mitigation bank credits, these same considerations may be used to override this preference where appropriate. Additionally, in cases where permittee-responsible mitigation is likely to successfully meet performance standards before advance credits secured from an in-lieu fee program are fulfilled, the district engineer should also give consideration to this factor in deciding between in-lieu fee mitigation and permittee-responsible mitigation.

(4) *Permittee-responsible mitigation under a watershed approach.* Where permitted impacts are not in the service area of an approved mitigation bank or in-lieu fee program that has the appropriate number and resource type of credits available, permittee-responsible mitigation is the only option. Where practicable and likely to be successful and sustainable, the resource type and location for the required permittee-responsible compensatory mitigation should be determined using the principles of a watershed approach as outlined in paragraph (c) of this section.

(5) *Permittee-responsible mitigation through on-site and in-kind mitigation.* In cases where a watershed approach is not practicable, the district engineer should consider opportunities to offset anticipated aquatic resource impacts by requiring on-site and in-kind compensatory mitigation. The district engineer must also consider the practicability of on-site compensatory mitigation and its compatibility with the proposed project.

(6) *Permittee-responsible mitigation through off-site and/or out-of-kind mitigation.* If, after considering opportunities for on-site, in-kind compensatory mitigation as provided in paragraph (b)(5) of this section, the district engineer determines that these compensatory mitigation opportunities are not practicable, are unlikely to compensate for the permitted impacts,

or will be incompatible with the proposed project, and an alternative, practicable off-site and/or out-of-kind mitigation opportunity is identified that has a greater likelihood of offsetting the permitted impacts or is environmentally preferable to on-site or in-kind mitigation, the district engineer should require that this alternative compensatory mitigation be provided.

(c) *Watershed approach to compensatory mitigation.* (1) The district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practicable. Where a watershed plan is available, the district engineer will determine whether the plan is appropriate for use in the watershed approach for compensatory mitigation. In cases where the district engineer determines that an appropriate watershed plan is available, the watershed approach should be based on that plan. Where no such plan is available, the watershed approach should be based on information provided by the project sponsor or available from other sources. The ultimate goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites.

(2) *Considerations.* (i) A watershed approach to compensatory mitigation considers the importance of landscape position and resource type of compensatory mitigation projects for the sustainability of aquatic resource functions within the watershed. Such an approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape. It also considers the habitat requirements of important species, habitat loss or conversion trends, sources of watershed impairment, and current development trends, as well as the requirements of other regulatory and non-regulatory programs that affect the watershed, such as storm water management or habitat conservation programs. It includes the protection and maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, when those resources contribute to or improve the overall ecological functioning of aquatic resources in the watershed. Compensatory mitigation requirements determined through the watershed approach should not focus exclusively on specific functions (e.g., water quality or habitat for certain species), but should provide, where practicable, the

suite of functions typically provided by the affected aquatic resource.

(ii) Locational factors (e.g., hydrology, surrounding land use) are important to the success of compensatory mitigation for impacted habitat functions and may lead to siting of such mitigation away from the project area. However, consideration should also be given to functions and services (e.g., water quality, flood control, shoreline protection) that will likely need to be addressed at or near the areas impacted by the permitted impacts.

(iii) A watershed approach may include on-site compensatory mitigation, off-site compensatory mitigation (including mitigation banks or in-lieu fee programs), or a combination of on-site and off-site compensatory mitigation.

(iv) A watershed approach to compensatory mitigation should include, to the extent practicable, inventories of historic and existing aquatic resources, including identification of degraded aquatic resources, and identification of immediate and long-term aquatic resource needs within watersheds that can be met through permittee-responsible mitigation projects, mitigation banks, or in-lieu fee programs. Planning efforts should identify and prioritize aquatic resource restoration, establishment, and enhancement activities, and preservation of existing aquatic resources that are important for maintaining or improving ecological functions of the watershed. The identification and prioritization of resource needs should be as specific as possible, to enhance the usefulness of the approach in determining compensatory mitigation requirements.

(v) A watershed approach is not appropriate in areas where watershed boundaries do not exist, such as marine areas. In such cases, an appropriate spatial scale should be used to replace lost functions and services within the same ecological system (e.g., reef complex, littoral drift cell).

(3) *Information Needs.* (i) In the absence of a watershed plan determined by the district engineer under paragraph (c)(1) of this section to be appropriate for use in the watershed approach, the district engineer will use a watershed approach based on analysis of information regarding watershed conditions and needs, including potential sites for aquatic resource restoration activities and priorities for aquatic resource restoration and preservation. Such information includes: Current trends in habitat loss or conversion; cumulative impacts of

past development activities, current development trends, the presence and needs of sensitive species; site conditions that favor or hinder the success of compensatory mitigation projects; and chronic environmental problems such as flooding or poor water quality.

(ii) This information may be available from sources such as wetland maps; soil surveys; U.S. Geological Survey topographic and hydrologic maps; aerial photographs; information on rare, endangered and threatened species and critical habitat; local ecological reports or studies; and other information sources that could be used to identify locations for suitable compensatory mitigation projects in the watershed.

(iii) The level of information and analysis needed to support a watershed approach must be commensurate with the scope and scale of the proposed impacts requiring a DA permit, as well as the functions lost as a result of those impacts.

(4) *Watershed Scale.* The size of watershed addressed using a watershed approach should not be larger than is appropriate to ensure that the aquatic resources provided through compensation activities will effectively compensate for adverse environmental impacts resulting from activities authorized by DA permits. The district engineer should consider relevant environmental factors and appropriate locally-developed standards and criteria when determining the appropriate watershed scale in guiding compensation activities.

(d) *Site selection.* (1) The compensatory mitigation project site must be ecologically suitable for providing the desired aquatic resource functions. In determining the ecological suitability of the compensatory mitigation project site, the district engineer must consider, to the extent practicable, the following factors:

(i) Hydrological conditions, soil characteristics, and other physical and chemical characteristics;

(ii) Watershed-scale features, such as aquatic habitat diversity, habitat connectivity, and other landscape scale functions;

(iii) The size and location of the compensatory mitigation site relative to hydrologic sources (including the availability of water rights) and other ecological features;

(iv) Compatibility with adjacent land uses and watershed management plans;

(v) Reasonably foreseeable effects the compensatory mitigation project will have on ecologically important aquatic or terrestrial resources (e.g., shallow sub-tidal habitat, mature forests),

cultural sites, or habitat for federally- or state-listed threatened and endangered species; and

(vi) Other relevant factors including, but not limited to, development trends, anticipated land use changes, habitat status and trends, the relative locations of the impact and mitigation sites in the stream network, local or regional goals for the restoration or protection of particular habitat types or functions (e.g., re-establishment of habitat corridors or habitat for species of concern), water quality goals, floodplain management goals, and the relative potential for chemical contamination of the aquatic resources.

(2) District engineers may require on-site, off-site, or a combination of on-site and off-site compensatory mitigation to replace permitted losses of aquatic resource functions and services.

(3) Applicants should propose compensation sites adjacent to existing aquatic resources or where aquatic resources previously existed.

(e) *Mitigation type.* (1) In general, in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to compensate for the functions and services lost at the impact site. For example, tidal wetland compensatory mitigation projects are most likely to compensate for unavoidable impacts to tidal wetlands, while perennial stream compensatory mitigation projects are most likely to compensate for unavoidable impacts to perennial streams. Thus, except as provided in paragraph (e)(2) of this section, the required compensatory mitigation shall be of a similar type to the affected aquatic resource.

(2) If the district engineer determines, using the watershed approach in accordance with paragraph (c) of this section that out-of-kind compensatory mitigation will serve the aquatic resource needs of the watershed, the district engineer may authorize the use of such out-of-kind compensatory mitigation. The basis for authorization of out-of-kind compensatory mitigation must be documented in the administrative record for the permit action.

(3) For difficult-to-replace resources (e.g., bogs, fens, springs, streams, Atlantic white cedar swamps) if further avoidance and minimization is not practicable, the required compensation should be provided, if practicable, through in-kind rehabilitation, enhancement, or preservation since there is greater certainty that these methods of compensation will successfully offset permitted impacts.

(f) *Amount of compensatory mitigation.* (1) If the district engineer

determines that compensatory mitigation is necessary to offset unavoidable impacts to aquatic resources, the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required. If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used.

(2) The district engineer must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site. The rationale for the required replacement ratio must be documented in the administrative record for the permit action.

(3) If an in-lieu fee program will be used to provide the required compensatory mitigation, and the appropriate number and resource type of released credits are not available, the district engineer must require sufficient compensation to account for the risk and uncertainty associated with in-lieu fee projects that have not been implemented before the permitted impacts have occurred.

(g) *Use of mitigation banks and in-lieu fee programs.* Mitigation banks and in-lieu fee programs may be used to compensate for impacts to aquatic resources authorized by general permits and individual permits, including after-the-fact permits, in accordance with the preference hierarchy in paragraph (b) of this section. Mitigation banks and in-lieu fee programs may also be used to satisfy requirements arising out of an enforcement action, such as supplemental environmental projects.

(h) *Preservation.* (1) Preservation may be used to provide compensatory mitigation for activities authorized by DA permits when all the following criteria are met:

(i) The resources to be preserved provide important physical, chemical, or biological functions for the watershed;

(ii) The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate quantitative assessment tools, where available;

(iii) Preservation is determined by the district engineer to be appropriate and practicable;

(iv) The resources are under threat of destruction or adverse modifications; and

(v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust).

(2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach described in paragraph (c) of this section, but compensation ratios shall be higher.

(i) *Buffers.* District engineers may require the restoration, establishment, enhancement, and preservation, as well as the maintenance, of riparian areas and/or buffers around aquatic resources where necessary to ensure the long-term viability of those resources. Buffers may also provide habitat or corridors necessary for the ecological functioning of aquatic resources. If buffers are required by the district engineer as part of the compensatory mitigation project, compensatory mitigation credit will be provided for those buffers.

(j) *Relationship to other federal, tribal, state, and local programs.* (1)

Compensatory mitigation projects for DA permits may also be used to satisfy the environmental requirements of other programs, such as tribal, state, or local wetlands regulatory programs, other federal programs such as the Surface Mining Control and Reclamation Act, Corps civil works projects, and Department of Defense military construction projects, consistent with the terms and requirements of these programs and subject to the following considerations:

(i) The compensatory mitigation project must include appropriate compensation required by the DA permit for unavoidable impacts to aquatic resources authorized by that permit.

(ii) Under no circumstances may the same credits be used to provide

mitigation for more than one permitted activity. However, where appropriate, compensatory mitigation projects, including mitigation banks and in-lieu fee projects, may be designed to holistically address requirements under multiple programs and authorities for the same activity.

(2) Except for projects undertaken by federal agencies, or where federal funding is specifically authorized to provide compensatory mitigation, federally-funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by DA permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefits of the restoration or conservation project.

(3) Compensatory mitigation projects may also be used to provide compensatory mitigation under the Endangered Species Act or for Habitat Conservation Plans, as long as they comply with the requirements of paragraph (j)(1) of this section.

(k) *Permit conditions.* (1) The compensatory mitigation requirements for a DA permit, including the amount and type of compensatory mitigation, must be clearly stated in the special conditions of the individual permit or general permit verification (see 33 CFR 325.4 and 330.6(a)). The special conditions must be enforceable.

(2) For an individual permit that requires permittee-responsible mitigation, the special conditions must:

(i) Identify the party responsible for providing the compensatory mitigation;

(ii) Incorporate, by reference, the final mitigation plan approved by the district engineer;

(iii) State the objectives, performance standards, and monitoring required for the compensatory mitigation project, unless they are provided in the approved final mitigation plan; and

(iv) Describe any required financial assurances or long-term management provisions for the compensatory mitigation project, unless they are specified in the approved final mitigation plan.

(3) For a general permit activity that requires permittee-responsible compensatory mitigation, the special conditions must describe the compensatory mitigation proposal,

which may be either conceptual or detailed. The general permit verification must also include a special condition that states that the permittee cannot commence work in waters of the United States until the district engineer approves the final mitigation plan, unless the district engineer determines that such a special condition is not practicable and not necessary to ensure timely completion of the required compensatory mitigation. To the extent appropriate and practicable, special conditions of the general permit verification should also address the requirements of paragraph (k)(2) of this section.

(4) If a mitigation bank or in-lieu fee program is used to provide the required compensatory mitigation, the special conditions must indicate whether a mitigation bank or in-lieu fee program will be used, and specify the number and resource type of credits the permittee is required to secure. In the case of an individual permit, the special condition must also identify the specific mitigation bank or in-lieu fee program that will be used. For general permit verifications, the special conditions may either identify the specific mitigation bank or in-lieu fee program, or state that the specific mitigation bank or in-lieu fee program used to provide the required compensatory mitigation must be approved by the district engineer before the credits are secured.

(l) *Party responsible for compensatory mitigation.* (1) For permittee-responsible mitigation, the special conditions of the DA permit must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project.

(2) For mitigation banks and in-lieu fee programs, the instrument must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project(s). The instrument must also contain a provision expressing the sponsor's agreement to assume responsibility for a permittee's compensatory mitigation requirements, once that permittee has secured the appropriate number and resource type of credits from the sponsor and the district engineer has received the documentation described in paragraph (l)(3) of this section.

(3) If use of a mitigation bank or in-lieu fee program is approved by the district engineer to provide part or all of the required compensatory mitigation for a DA permit, the permittee retains responsibility for providing the compensatory mitigation until the

appropriate number and resource type of credits have been secured from a sponsor and the district engineer has received documentation that confirms that the sponsor has accepted the responsibility for providing the required compensatory mitigation. This documentation may consist of a letter or form signed by the sponsor, with the permit number and a statement indicating the number and resource type of credits that have been secured from the sponsor. Copies of this documentation will be retained in the administrative records for both the permit and the instrument. If the sponsor fails to provide the required compensatory mitigation, the district engineer may pursue measures against the sponsor to ensure compliance.

(m) *Timing.* Implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts. The district engineer shall require, to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity.

(n) *Financial assurances.* (1) The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority) the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project.

(2) The amount of the required financial assurances must be determined by the district engineer, in consultation with the project sponsor, and must be based on the size and complexity of the compensatory mitigation project, the degree of completion of the project at the time of project approval, the likelihood of success, the past performance of the project sponsor, and any other factors the district engineer deems appropriate. Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments, subject to the approval of the district engineer. The rationale for determining the amount of the required financial assurances must

be documented in the administrative record for either the DA permit or the instrument. In determining the assurance amount, the district engineer shall consider the cost of providing replacement mitigation, including costs for land acquisition, planning and engineering, legal fees, mobilization, construction, and monitoring.

(3) If financial assurances are required, the DA permit must include a special condition requiring the financial assurances to be in place prior to commencing the permitted activity.

(4) Financial assurances shall be phased out once the compensatory mitigation project has been determined by the district engineer to be successful in accordance with its performance standards. The DA permit or instrument must clearly specify the conditions under which the financial assurances are to be released to the permittee, sponsor, and/or other financial assurance provider, including, as appropriate, linkage to achievement of performance standards, adaptive management, or compliance with special conditions.

(5) A financial assurance must be in a form that ensures that the district engineer will receive notification at least 120 days in advance of any termination or revocation. For third-party assurance providers, this may take the form of a contractual requirement for the assurance provider to notify the district engineer at least 120 days before the assurance is revoked or terminated.

(6) Financial assurances shall be payable at the direction of the district engineer to his designee or to a standby trust agreement. When a standby trust is used (e.g., with performance bonds or letters of credit) all amounts paid by the financial assurance provider shall be deposited directly into the standby trust fund for distribution by the trustee in accordance with the district engineer's instructions.

(o) *Compliance with applicable law.* The compensatory mitigation project must comply with all applicable federal, state, and local laws. The DA permit, mitigation banking instrument, or in-lieu fee program instrument must not require participation by the Corps or any other federal agency in project management, including receipt or management of financial assurances or long-term financing mechanisms, except as determined by the Corps or other agency to be consistent with its statutory authority, mission, and priorities.

§ 230.94 Planning and documentation.

(a) *Pre-application consultations.* Potential applicants for standard

permits are encouraged to participate in pre-application meetings with the Corps and appropriate agencies to discuss potential mitigation requirements and information needs.

(b) *Public review and comment.* (1) For an activity that requires a standard DA permit pursuant to section 404 of the Clean Water Act, the public notice for the proposed activity must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. This explanation shall address, to the extent that such information is provided in the mitigation statement required by 33 CFR 325.1(d)(7), the proposed avoidance and minimization and the amount, type, and location of any proposed compensatory mitigation, including any out-of-kind compensation, or indicate an intention to use an approved mitigation bank or in-lieu fee program. The level of detail provided in the public notice must be commensurate with the scope and scale of the impacts. The notice shall not include information that the district engineer and the permittee believe should be kept confidential for business purposes, such as the exact location of a proposed mitigation site that has not yet been secured. The permittee must clearly identify any information being claimed as confidential in the mitigation statement when submitted. In such cases, the notice must still provide enough information to enable the public to provide meaningful comment on the proposed mitigation.

(2) For individual permits, district engineers must consider any timely comments and recommendations from other federal agencies; tribal, state, or local governments; and the public.

(3) For activities authorized by letters of permission or general permits, the review and approval process for compensatory mitigation proposals and plans must be conducted in accordance with the terms and conditions of those permits and applicable regulations including the applicable provisions of this part.

(c) *Mitigation plan.* (1) *Preparation and Approval.* (i) For individual permits, the permittee must prepare a draft mitigation plan and submit it to the district engineer for review. After addressing any comments provided by the district engineer, the permittee must prepare a final mitigation plan, which must be approved by the district engineer prior to issuing the individual permit. The approved final mitigation plan must be incorporated into the individual permit by reference. The final mitigation plan must include the items described in paragraphs (c)(2)

through (c)(14) of this section, but the level of detail of the mitigation plan should be commensurate with the scale and scope of the impacts. As an alternative, the district engineer may determine that it would be more appropriate to address any of the items described in paragraphs (c)(2) through (c)(14) of this section as permit conditions, instead of components of a compensatory mitigation plan. For permittees who intend to fulfill their compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu fee programs, their mitigation plans need include only the items described in paragraphs (c)(5) and (c)(6) of this section, and the name of the specific mitigation bank or in-lieu fee program to be used.

(ii) For general permits, if compensatory mitigation is required, the district engineer may approve a conceptual or detailed compensatory mitigation plan to meet required time frames for general permit verifications, but a final mitigation plan incorporating the elements in paragraphs (c)(2) through (c)(14) of this section, at a level of detail commensurate with the scale and scope of the impacts, must be approved by the district engineer before the permittee commences work in waters of the United States. As an alternative, the district engineer may determine that it would be more appropriate to address any of the items described in paragraphs (c)(2) through (c)(14) of this section as permit conditions, instead of components of a compensatory mitigation plan. For permittees who intend to fulfill their compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu fee programs, their mitigation plans need include only the items described in paragraphs (c)(5) and (c)(6) of this section, and either the name of the specific mitigation bank or in-lieu fee program to be used or a statement indicating that a mitigation bank or in-lieu fee program will be used (contingent upon approval by the district engineer).

(iii) Mitigation banks and in-lieu fee programs must prepare a mitigation plan including the items in paragraphs (c)(2) through (c)(14) of this section for each separate compensatory mitigation project site. For mitigation banks and in-lieu fee programs, the preparation and approval process for mitigation plans is described in § 230.98.

(2) *Objectives.* A description of the resource type(s) and amount(s) that will be provided, the method of compensation (i.e., restoration, establishment, enhancement, and/or preservation), and the manner in which

the resource functions of the compensatory mitigation project will address the needs of the watershed, ecoregion, physiographic province, or other geographic area of interest.

(3) *Site selection.* A description of the factors considered during the site selection process. This should include consideration of watershed needs, on-site alternatives where applicable, and the practicability of accomplishing ecologically self-sustaining aquatic resource restoration, establishment, enhancement, and/or preservation at the compensatory mitigation project site. (See § 230.93(d).)

(4) *Site protection instrument.* A description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site (see § 230.97(a)).

(5) *Baseline information.* A description of the ecological characteristics of the proposed compensatory mitigation project site and, in the case of an application for a DA permit, the impact site. This may include descriptions of historic and existing plant communities, historic and existing hydrology, soil conditions, a map showing the locations of the impact and mitigation site(s) or the geographic coordinates for those site(s), and other site characteristics appropriate to the type of resource proposed as compensation. The baseline information should also include a delineation of waters of the United States on the proposed compensatory mitigation project site. A prospective permittee planning to secure credits from an approved mitigation bank or in-lieu fee program only needs to provide baseline information about the impact site, not the mitigation bank or in-lieu fee project site.

(6) *Determination of credits.* A description of the number of credits to be provided, including a brief explanation of the rationale for this determination. (See § 230.93(f).)

(i) For permittee-responsible mitigation, this should include an explanation of how the compensatory mitigation project will provide the required compensation for unavoidable impacts to aquatic resources resulting from the permitted activity.

(ii) For permittees intending to secure credits from an approved mitigation bank or in-lieu fee program, it should include the number and resource type of credits to be secured and how these were determined.

(7) *Mitigation work plan.* Detailed written specifications and work descriptions for the compensatory

mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures. For stream compensatory mitigation projects, the mitigation work plan may also include other relevant information, such as planform geometry, channel form (e.g., typical channel cross-sections), watershed size, design discharge, and riparian area plantings.

(8) *Maintenance plan.* A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed.

(9) *Performance standards.* Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives. (See § 230.95.)

(10) *Monitoring requirements.* A description of parameters to be monitored in order to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results to the district engineer must be included. (See § 230.96.)

(11) *Long-term management plan.* A description of how the compensatory mitigation project will be managed after performance standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for long-term management. (See § 230.97(d).)

(12) *Adaptive management plan.* A management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures. The adaptive management plan will guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success. (See § 230.97(c).)

(13) *Financial assurances.* A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully

completed, in accordance with its performance standards (see § 230.93(n)).

(14) *Other information.* The district engineer may require additional information as necessary to determine the appropriateness, feasibility, and practicability of the compensatory mitigation project.

§ 230.95 Ecological performance standards.

(a) The approved mitigation plan must contain performance standards that will be used to assess whether the project is achieving its objectives. Performance standards should relate to the objectives of the compensatory mitigation project, so that the project can be objectively evaluated to determine if it is developing into the desired resource type, providing the expected functions, and attaining any other applicable metrics (e.g., acres).

(b) Performance standards must be based on attributes that are objective and verifiable. Ecological performance standards must be based on the best available science that can be measured or assessed in a practicable manner. Performance standards may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position. The use of reference aquatic resources to establish performance standards will help ensure that those performance standards are reasonably achievable, by reflecting the range of variability exhibited by the regional class of aquatic resources as a result of natural processes and anthropogenic disturbances. Performance standards based on measurements of hydrology should take into consideration the hydrologic variability exhibited by reference aquatic resources, especially wetlands. Where practicable, performance standards should take into account the expected stages of the aquatic resource development process, in order to allow early identification of potential problems and appropriate adaptive management.

§ 230.96 Monitoring.

(a) *General.* (1) Monitoring the compensatory mitigation project site is necessary to determine if the project is meeting its performance standards, and to determine if measures are necessary to ensure that the compensatory mitigation project is accomplishing its objectives. The submission of monitoring reports to assess the development and condition of the

compensatory mitigation project is required, but the content and level of detail for those monitoring reports must be commensurate with the scale and scope of the compensatory mitigation project, as well as the compensatory mitigation project type. The mitigation plan must address the monitoring requirements for the compensatory mitigation project, including the parameters to be monitored, the length of the monitoring period, the party responsible for conducting the monitoring, the frequency for submitting monitoring reports to the district engineer, and the party responsible for submitting those monitoring reports to the district engineer.

(2) The district engineer may conduct site inspections on a regular basis (e.g., annually) during the monitoring period to evaluate mitigation site performance.

(b) *Monitoring period.* The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs). Following project implementation, the district engineer may reduce or waive the remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. Conversely the district engineer may extend the original monitoring period upon a determination that performance standards have not been met or the compensatory mitigation project is not on track to meet them. The district engineer may also revise monitoring requirements when remediation and/or adaptive management is required.

(c) *Monitoring reports.* (1) The district engineer must determine the information to be included in monitoring reports. This information must be sufficient for the district engineer to determine how the compensatory mitigation project is progressing towards meeting its performance standards, and may include plans (such as as-built plans), maps, and photographs to illustrate site conditions. Monitoring reports may also include the results of functional, condition, or other assessments used to provide quantitative or qualitative measures of the functions provided by the compensatory mitigation project site.

(2) The permittee or sponsor is responsible for submitting monitoring reports in accordance with the special conditions of the DA permit or the terms

of the instrument. Failure to submit monitoring reports in a timely manner may result in compliance action by the district engineer.

(3) Monitoring reports must be provided by the district engineer to interested federal, tribal, state, and local resource agencies, and the public, upon request.

§ 230.97 Management.

(a) *Site protection.* (1) The aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project must be provided long-term protection through real estate instruments or other available mechanisms, as appropriate. Long-term protection may be provided through real estate instruments such as conservation easements held by entities such as federal, tribal, state, or local resource agencies, non-profit conservation organizations, or private land managers; the transfer of title to such entities; or by restrictive covenants. For government property, long-term protection may be provided through federal facility management plans or integrated natural resources management plans. When approving a method for long-term protection of non-government property other than transfer of title, the district engineer shall consider relevant legal constraints on the use of conservation easements and/or restrictive covenants in determining whether such mechanisms provide sufficient site protection. To provide sufficient site protection, a conservation easement or restrictive covenant should, where practicable, establish in an appropriate third party (e.g., governmental or non-profit resource management agency) the right to enforce site protections and provide the third party the resources necessary to monitor and enforce these site protections.

(2) The real estate instrument, management plan, or other mechanism providing long-term protection of the compensatory mitigation site must, to the extent appropriate and practicable, prohibit incompatible uses (e.g., clear cutting or mineral extraction) that might otherwise jeopardize the objectives of the compensatory mitigation project. Where appropriate, multiple instruments recognizing compatible uses (e.g., fishing or grazing rights) may be used.

(3) The real estate instrument, management plan, or other long-term protection mechanism must contain a provision requiring 60-day advance notification to the district engineer before any action is taken to void or modify the instrument, management plan, or long-term protection

mechanism, including transfer of title to, or establishment of any other legal claims over, the compensatory mitigation site.

(4) For compensatory mitigation projects on public lands, where Federal facility management plans or integrated natural resources management plans are used to provide long-term protection, and changes in statute, regulation, or agency needs or mission results in an incompatible use on public lands originally set aside for compensatory mitigation, the public agency authorizing the incompatible use is responsible for providing alternative compensatory mitigation that is acceptable to the district engineer for any loss in functions resulting from the incompatible use.

(5) A real estate instrument, management plan, or other long-term protection mechanism used for site protection of permittee-responsible mitigation must be approved by the district engineer in advance of, or concurrent with, the activity causing the authorized impacts.

(b) *Sustainability.* Compensatory mitigation projects shall be designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. This includes minimization of active engineering features (e.g., pumps) and appropriate siting to ensure that natural hydrology and landscape context will support long-term sustainability. Where active long-term management and maintenance are necessary to ensure long-term sustainability (e.g., prescribed burning, invasive species control, maintenance of water control structures, easement enforcement), the responsible party must provide for such management and maintenance. This includes the provision of long-term financing mechanisms where necessary. Where needed, the acquisition and protection of water rights must be secured and documented in the permit conditions or instrument.

(c) *Adaptive management.* (1) If the compensatory mitigation project cannot be constructed in accordance with the approved mitigation plans, the permittee or sponsor must notify the district engineer. A significant modification of the compensatory mitigation project requires approval from the district engineer.

(2) If monitoring or other information indicates that the compensatory mitigation project is not progressing towards meeting its performance standards as anticipated, the responsible party must notify the district engineer as soon as possible. The district engineer will evaluate and pursue measures to

address deficiencies in the compensatory mitigation project. The district engineer will consider whether the compensatory mitigation project is providing ecological benefits comparable to the original objectives of the compensatory mitigation project.

(3) The district engineer, in consultation with the responsible party (and other federal, tribal, state, and local agencies, as appropriate), will determine the appropriate measures. The measures may include site modifications, design changes, revisions to maintenance requirements, and revised monitoring requirements. The measures must be designed to ensure that the modified compensatory mitigation project provides aquatic resource functions comparable to those described in the mitigation plan objectives.

(4) Performance standards may be revised in accordance with adaptive management to account for measures taken to address deficiencies in the compensatory mitigation project. Performance standards may also be revised to reflect changes in management strategies and objectives if the new standards provide for ecological benefits that are comparable or superior to the approved compensatory mitigation project. No other revisions to performance standards will be allowed except in the case of natural disasters.

(d) *Long-term management.* (1) The permit conditions or instrument must identify the party responsible for ownership and all long-term management of the compensatory mitigation project. The permit conditions or instrument may contain provisions allowing the permittee or sponsor to transfer the long-term management responsibilities of the compensatory mitigation project site to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager, after review and approval by the district engineer. The land stewardship entity need not be identified in the original permit or instrument, as long as the future transfer of long-term management responsibility is approved by the district engineer.

(2) A long-term management plan should include a description of long-term management needs, annual cost estimates for these needs, and identify the funding mechanism that will be used to meet those needs.

(3) Any provisions necessary for long-term financing must be addressed in the original permit or instrument. The district engineer may require provisions to address inflationary adjustments and other contingencies, as appropriate. Appropriate long-term financing

mechanisms include non-wasting endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments. In cases where the long-term management entity is a public authority or government agency, that entity must provide a plan for the long-term financing of the site.

(4) For permittee-responsible mitigation, any long-term financing mechanisms must be approved in advance of the activity causing the authorized impacts.

§ 230.98 Mitigation banks and in-lieu fee programs.

(a) *General considerations.* (1) All mitigation banks and in-lieu fee programs must have an approved instrument signed by the sponsor and the district engineer prior to being used to provide compensatory mitigation for DA permits.

(2) To the maximum extent practicable, mitigation banks and in-lieu fee project sites must be planned and designed to be self-sustaining over time, but some active management and maintenance may be required to ensure their long-term viability and sustainability. Examples of acceptable management activities include maintaining fire dependent habitat communities in the absence of natural fire and controlling invasive exotic plant species.

(3) All mitigation banks and in-lieu fee programs must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.

(b) *Interagency Review Team.* (1) The district engineer will establish an Interagency Review Team (IRT) to review documentation for the establishment and management of mitigation banks and in-lieu fee programs. The district engineer or his designated representative serves as Chair of the IRT. In cases where a mitigation bank or in-lieu fee program is proposed to satisfy the requirements of another federal, tribal, state, or local program, in addition to compensatory mitigation requirements of DA permits, it may be appropriate for the administering agency to serve as co-Chair of the IRT.

(2) In addition to the Corps, representatives from the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, NOAA Fisheries, the Natural Resources Conservation Service, and other federal

agencies, as appropriate, may participate in the IRT. The IRT may also include representatives from tribal, state, and local regulatory and resource agencies, where such agencies have authorities and/or mandates directly affecting, or affected by, the establishment, operation, or use of the mitigation bank or in-lieu fee program. The district engineer will seek to include all public agencies with a substantive interest in the establishment of the mitigation bank or in-lieu fee program on the IRT, but retains final authority over its composition.

(3) The primary role of the IRT is to facilitate the establishment of mitigation banks or in-lieu fee programs through the development of mitigation banking or in-lieu fee program instruments. The IRT will review the prospectus, instrument, and other appropriate documents and provide comments to the district engineer. The district engineer and the IRT should use a watershed approach to the extent practicable in reviewing proposed mitigation banks and in-lieu fee programs. Members of the IRT may also sign the instrument, if they so choose. By signing the instrument, the IRT members indicate their agreement with the terms of the instrument. As an alternative, a member of the IRT may submit a letter expressing concurrence with the instrument. The IRT will also advise the district engineer in assessing monitoring reports, recommending remedial or adaptive management measures, approving credit releases, and approving modifications to an instrument. In order to ensure timely processing of instruments and other documentation, comments from IRT members must be received by the district engineer within the time limits specified in this section. Comments received after these deadlines will only be considered at the discretion of the district engineer to the extent that doing so does not jeopardize the deadlines for district engineer action.

(4) The district engineer will give full consideration to any timely comments and advice of the IRT. The district engineer alone retains final authority for approval of the instrument in cases where the mitigation bank or in-lieu fee program is used to satisfy compensatory mitigation requirements of DA permits.

(5) *MOAs with other agencies.* The district engineer and members of the IRT may enter into a memorandum of agreement (MOA) with any other federal, state or local government agency to perform all or some of the IRT review functions described in this section. Such MOAs must include provisions for appropriate federal

oversight of the review process. The district engineer retains sole authority for final approval of instruments and other documentation required under this section.

(c) *Compensation planning framework for in-lieu fee programs.* (1) The approved instrument for an in-lieu fee program must include a compensation planning framework that will be used to select, secure, and implement aquatic resource restoration, establishment, enhancement, and/or preservation activities. The compensation planning framework must support a watershed approach to compensatory mitigation. All specific projects used to provide compensation for DA permits must be consistent with the approved compensation planning framework. Modifications to the framework must be approved as a significant modification to the instrument by the district engineer, after consultation with the IRT.

(2) The compensation planning framework must contain the following elements:

(i) The geographic service area(s), including a watershed-based rationale for the delineation of each service area;

(ii) A description of the threats to aquatic resources in the service area(s), including how the in-lieu fee program will help offset impacts resulting from those threats;

(iii) An analysis of historic aquatic resource loss in the service area(s);

(iv) An analysis of current aquatic resource conditions in the service area(s), supported by an appropriate level of field documentation;

(v) A statement of aquatic resource goals and objectives for each service area, including a description of the general amounts, types and locations of aquatic resources the program will seek to provide;

(vi) A prioritization strategy for selecting and implementing compensatory mitigation activities;

(vii) An explanation of how any preservation objectives identified in paragraph (c)(2)(v) of this section and addressed in the prioritization strategy in paragraph (c)(2)(vi) satisfy the criteria for use of preservation in § 230.93(h);

(viii) A description of any public and private stakeholder involvement in plan development and implementation, including, where appropriate, coordination with federal, state, tribal and local aquatic resource management and regulatory authorities;

(ix) A description of the long-term protection and management strategies for activities conducted by the in-lieu fee program sponsor;

(x) A strategy for periodic evaluation and reporting on the progress of the program in achieving the goals and objectives in paragraph (c)(2)(v) of this section, including a process for revising the planning framework as necessary; and

(xi) Any other information deemed necessary for effective compensation planning by the district engineer.

(3) The level of detail necessary for the compensation planning framework is at the discretion of the district engineer, and will take into account the characteristics of the service area(s) and the scope of the program. As part of the in-lieu fee program instrument, the compensation planning framework will be reviewed by the IRT, and will be a major factor in the district engineer's decision on whether to approve the instrument.

(d) *Review process.* (1) The sponsor is responsible for preparing all documentation associated with establishment of the mitigation bank or in-lieu fee program, including the prospectus, instrument, and other appropriate documents, such as mitigation plans for a mitigation bank. The prospectus provides an overview of the proposed mitigation bank or in-lieu fee program and serves as the basis for public and initial IRT comment. For a mitigation bank, the mitigation plan, as described in § 230.94(c), provides detailed plans and specifications for the mitigation bank site. For in-lieu fee programs, mitigation plans will be prepared as in-lieu fee project sites are identified after the instrument has been approved and the in-lieu fee program becomes operational. The instrument provides the authorization for the mitigation bank or in-lieu fee program to provide credits to be used as compensatory mitigation for DA permits.

(2) *Prospectus.* The prospectus must provide a summary of the information regarding the proposed mitigation bank or in-lieu fee program, at a sufficient level of detail to support informed public and IRT comment. The review process begins when the sponsor submits a complete prospectus to the district engineer. For modifications of approved instruments, submittal of a new prospectus is not required; instead, the sponsor must submit a written request for an instrument modification accompanied by appropriate documentation. The district engineer must notify the sponsor within 30 days whether or not a submitted prospectus is complete. A complete prospectus includes the following information:

(i) The objectives of the proposed mitigation bank or in-lieu fee program.

(ii) How the mitigation bank or in-lieu fee program will be established and operated.

(iii) The proposed service area.

(iv) The general need for and technical feasibility of the proposed mitigation bank or in-lieu fee program.

(v) The proposed ownership arrangements and long-term management strategy for the mitigation bank or in-lieu fee project sites.

(vi) The qualifications of the sponsor to successfully complete the type(s) of mitigation project(s) proposed, including information describing any past such activities by the sponsor.

(vii) For a proposed mitigation bank, the prospectus must also address:

(A) The ecological suitability of the site to achieve the objectives of the proposed mitigation bank, including the physical, chemical, and biological characteristics of the bank site and how that site will support the planned types of aquatic resources and functions; and

(B) Assurance of sufficient water rights to support the long-term sustainability of the mitigation bank.

(viii) For a proposed in-lieu fee program, the prospectus must also include:

(A) The compensation planning framework (see paragraph (c) of this section); and

(B) A description of the in-lieu fee program account required by paragraph (i) of this section.

(3) *Preliminary review of prospectus.* Prior to submitting a prospectus, the sponsor may elect to submit a draft prospectus to the district engineer for comment and consultation. The district engineer will provide copies of the draft prospectus to the IRT and will provide comments back to the sponsor within 30 days. Any comments from IRT members will also be forwarded to the sponsor. This preliminary review is optional but is strongly recommended. It is intended to identify potential issues early so that the sponsor may attempt to address those issues prior to the start of the formal review process.

(4) *Public review and comment.* Within 30 days of receipt of a complete prospectus or an instrument modification request that will be processed in accordance with paragraph (g)(1) of this section, the district engineer will provide public notice of the proposed mitigation bank or in-lieu fee program, in accordance with the public notice procedures at 33 CFR 325.3. The public notice must, at a minimum, include a summary of the prospectus and indicate that the full prospectus is available to the public for review upon request. For modifications of approved instruments, the public

notice must instead summarize, and make available to the public upon request, whatever documentation is appropriate for the modification (e.g., a new or revised mitigation plan). The comment period for public notice will be 30 days, unless the district engineer determines that a longer comment period is appropriate. The district engineer will notify the sponsor if the comment period is extended beyond 30 days, including an explanation of why the longer comment period is necessary. Copies of all comments received in response to the public notice must be distributed to the other IRT members and to the sponsor within 15 days of the close of the public comment period. The district engineer and IRT members may also provide comments to the sponsor at this time, and copies of any such comments will also be distributed to all IRT members. If the construction of a mitigation bank or an in-lieu fee program project requires a DA permit, the public notice requirement may be satisfied through the public notice provisions of the permit processing procedures, provided all of the relevant information is provided.

(5) *Initial evaluation.* (i) After the end of the comment period, the district engineer will review the comments received in response to the public notice, and make a written initial evaluation as to the potential of the proposed mitigation bank or in-lieu fee program to provide compensatory mitigation for activities authorized by DA permits. This initial evaluation letter must be provided to the sponsor within 30 days of the end of the public notice comment period.

(ii) If the district engineer determines that the proposed mitigation bank or in-lieu fee program has potential for providing appropriate compensatory mitigation for activities authorized by DA permits, the initial evaluation letter will inform the sponsor that he/she may proceed with preparation of the draft instrument (see paragraph (d)(6) of this section).

(iii) If the district engineer determines that the proposed mitigation bank or in-lieu fee program does not have potential for providing appropriate compensatory mitigation for DA permits, the initial evaluation letter must discuss the reasons for that determination. The sponsor may revise the prospectus to address the district engineer's concerns, and submit the revised prospectus to the district engineer. If the sponsor submits a revised prospectus, a revised public notice will be issued in accordance with paragraph (d)(4) of this section.

(iv) This initial evaluation procedure does not apply to proposed modifications of approved instruments.

(6) *Draft instrument.* (i) After considering comments from the district engineer, the IRT, and the public, if the sponsor chooses to proceed with establishment of the mitigation bank or in-lieu fee program, he must prepare a draft instrument and submit it to the district engineer. In the case of an instrument modification, the sponsor must prepare a draft amendment (e.g., a specific instrument provision, a new or modified mitigation plan), and submit it to the district engineer. The district engineer must notify the sponsor within 30 days of receipt, whether the draft instrument or amendment is complete. If the draft instrument or amendment is incomplete, the district engineer will request from the sponsor the information necessary to make the draft instrument or amendment complete. Once any additional information is submitted, the district engineer must notify the sponsor as soon as he determines that the draft instrument or amendment is complete. The draft instrument must be based on the prospectus and must describe in detail the physical and legal characteristics of the mitigation bank or in-lieu fee program and how it will be established and operated.

(ii) For mitigation banks and in-lieu fee programs, the draft instrument must include the following information:

(A) A description of the proposed geographic service area of the mitigation bank or in-lieu fee program. The service area is the watershed, ecoregion, physiographic province, and/or other geographic area within which the mitigation bank or in-lieu fee program is authorized to provide compensatory mitigation required by DA permits. The service area must be appropriately sized to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area. For example, in urban areas, a U.S. Geological Survey 8-digit hydrologic unit code (HUC) watershed or a smaller watershed may be an appropriate service area. In rural areas, several contiguous 8-digit HUCs or a 6-digit HUC watershed may be an appropriate service area. Delineation of the service area must also consider any locally-developed standards and criteria that may be applicable. The economic viability of the mitigation bank or in-lieu fee program may also be considered in determining the size of the service area. The basis for the proposed service area must be documented in the instrument. An in-lieu fee program or umbrella mitigation banking instrument

may have multiple service areas governed by its instrument (e.g., each watershed within a State or Corps district may be a separate service area under the instrument); however, all impacts and compensatory mitigation must be accounted for by service area;

(B) Accounting procedures;

(C) A provision stating that legal responsibility for providing the compensatory mitigation lies with the sponsor once a permittee secures credits from the sponsor;

(D) Default and closure provisions;

(E) Reporting protocols; and

(F) Any other information deemed necessary by the district engineer.

(iii) For a mitigation bank, a complete draft instrument must include the following additional information:

(A) Mitigation plans that include all applicable items listed in § 230.94(c)(2) through (14); and

(B) A credit release schedule, which is tied to achievement of specific milestones. All credit releases must be approved by the district engineer, in consultation with the IRT, based on a determination that required milestones have been achieved. The district engineer, in consultation with the IRT, may modify the credit release schedule, including reducing the number of available credits or suspending credit sales or transfers altogether, where necessary to ensure that all credits sales or transfers remain tied to compensatory mitigation projects with a high likelihood of meeting performance standards;

(iv) For an in-lieu fee program, a complete draft instrument must include the following additional information:

(A) The compensation planning framework (see paragraph (c) of this section);

(B) Specification of the initial allocation of advance credits (see paragraph (n) of this section) and a draft fee schedule for these credits, by service area, including an explanation of the basis for the allocation and draft fee schedule;

(C) A methodology for determining future project-specific credits and fees; and

(D) A description of the in-lieu fee program account required by paragraph (i) of this section.

(7) *IRT review.* Upon receipt of notification by the district engineer that the draft instrument or amendment is complete, the sponsor must provide the district engineer with a sufficient number of copies of the draft instrument or amendment to distribute to the IRT members. The district engineer will promptly distribute copies of the draft instrument or amendment to the IRT

members for a 30 day comment period. The 30-day comment period begins 5 days after the district engineer distributes the copies of the draft instrument or amendment to the IRT. Following the comment period, the district engineer will discuss any comments with the appropriate agencies and with the sponsor. The district engineer will seek to resolve issues using a consensus based approach, to the extent practicable, while still meeting the decision-making time frames specified in this section. Within 90 days of receipt of the complete draft instrument or amendment by the IRT members, the district engineer must notify the sponsor of the status of the IRT review. Specifically, the district engineer must indicate to the sponsor if the draft instrument or amendment is generally acceptable and what changes, if any, are needed. If there are significant unresolved concerns that may lead to a formal objection from one or more IRT members to the final instrument or amendment, the district engineer will indicate the nature of those concerns.

(8) *Final instrument.* The sponsor must submit a final instrument to the district engineer for approval, with supporting documentation that explains how the final instrument addresses the comments provided by the IRT. For modifications of approved instruments, the sponsor must submit a final amendment to the district engineer for approval, with supporting documentation that explains how the final amendment addresses the comments provided by the IRT. The final instrument or amendment must be provided directly by the sponsor to all members of the IRT. Within 30 days of receipt of the final instrument or amendment, the district engineer will notify the IRT members whether or not he intends to approve the instrument or amendment. If no IRT member objects, by initiating the dispute resolution process in paragraph (e) of this section within 45 days of receipt of the final instrument or amendment, the district engineer will notify the sponsor of his final decision and, if the instrument or amendment is approved, arrange for it to be signed by the appropriate parties. If any IRT member initiates the dispute resolution process, the district engineer will notify the sponsor. Following conclusion of the dispute resolution process, the district engineer will notify the sponsor of his final decision, and if the instrument or amendment is approved, arrange for it to be signed by the appropriate parties. For mitigation banks, the final instrument must contain

the information items listed in paragraphs (d)(6)(ii), and (iii) of this section. For in-lieu fee programs, the final instrument must contain the information items listed in paragraphs (d)(6)(ii) and (iv) of this section. For the modification of an approved instrument, the amendment must contain appropriate information, as determined by the district engineer. The final instrument or amendment must be made available to the public upon request.

(e) *Dispute resolution process.* (1) Within 15 days of receipt of the district engineer's notification of intent to approve an instrument or amendment, the Regional Administrator of the U.S. EPA, the Regional Director of the U.S. Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service, and/or other senior officials of agencies represented on the IRT may notify the district engineer and other IRT members by letter if they object to the approval of the proposed final instrument or amendment. This letter must include an explanation of the basis for the objection and, where feasible, offer recommendations for resolving the objections. If the district engineer does not receive any objections within this time period, he may proceed to final action on the instrument or amendment.

(2) The district engineer must respond to the objection within 30 days of receipt of the letter. The district engineer's response may indicate an intent to disapprove the instrument or amendment as a result of the objection, an intent to approve the instrument or amendment despite the objection, or may provide a modified instrument or amendment that attempts to address the objection. The district engineer's response must be provided to all IRT members.

(3) Within 15 days of receipt of the district engineer's response, if the Regional Administrator or Regional Director is not satisfied with the response he may forward the issue to the Assistant Administrator for Water of the U.S. EPA, the Assistant Secretary for Fish and Wildlife and Parks of the U.S. FWS, or the Undersecretary for Oceans and Atmosphere of NOAA, as appropriate, for review and must notify the district engineer by letter via electronic mail or facsimile machine (with copies to all IRT members) that the issue has been forwarded for Headquarters review. This step is available only to the IRT members representing these three federal agencies, however, other IRT members who do not agree with the district engineer's final decision do not have to sign the instrument or amendment or

recognize the mitigation bank or in-lieu fee program for purposes of their own programs and authorities. If an IRT member other than the one filing the original objection has a new objection based on the district engineer's response, he may use the first step in this procedure (paragraph (e)(1) of this section) to provide that objection to the district engineer.

(4) If the issue has not been forwarded to the objecting agency's Headquarters, then the district engineer may proceed with final action on the instrument or amendment. If the issue has been forwarded to the objecting agency's Headquarters, the district engineer must hold in abeyance the final action on the instrument or amendment, pending Headquarters level review described below.

(5) Within 20 days from the date of the letter requesting Headquarters level review, the Assistant Administrator for Water, the Assistant Secretary for Fish and Wildlife and Parks, or the Undersecretary for Oceans and Atmosphere must either notify the Assistant Secretary of the Army (Civil Works) (ASA(CW)) that further review will not be requested, or request that the ASA(CW) review the final instrument or amendment.

(6) Within 30 days of receipt of the letter from the objecting agency's Headquarters request for ASA(CW)'s review of the final instrument, the ASA(CW), through the Director of Civil Works, must review the draft instrument or amendment and advise the district engineer on how to proceed with final action on that instrument or amendment. The ASA(CW) must immediately notify the Assistant Administrator for Water, the Assistant Secretary for Fish and Wildlife and Parks, and/or the Undersecretary for Oceans and Atmosphere of the final decision.

(7) In cases where the dispute resolution procedure is used, the district engineer must notify the sponsor of his final decision within 150 days of receipt of the final instrument or amendment.

(f) *Extension of deadlines.* (1) The deadlines in paragraphs (d) and (e) of this section may be extended by the district engineer at his sole discretion in cases where:

(i) Compliance with other applicable laws, such as consultation under section 7 of the Endangered Species Act or section 106 of the National Historic Preservation Act, is required;

(ii) It is necessary to conduct government-to-government consultation with Indian tribes;

(iii) Timely submittal of information necessary for the review of the proposed

mitigation bank or in-lieu fee program or the proposed modification of an approved instrument is not accomplished by the sponsor; or

(iv) Information that is essential to the district engineer's decision cannot be reasonably obtained within the specified time frame.

(2) In such cases, the district engineer must promptly notify the sponsor in writing of the extension and the reason for it. Such extensions shall be for the minimum time necessary to resolve the issue necessitating the extension.

(g) *Modification of instruments.* (1) *Approval of an amendment to an approved instrument.* Modification of an approved instrument, including the addition and approval of umbrella mitigation bank sites or in-lieu fee project sites or expansions of previously approved mitigation bank or in-lieu fee project sites, must follow the appropriate procedures in paragraph (d) of this section, unless the district engineer determines that the streamlined review process described in paragraph (g)(2) of this section is warranted.

(2) *Streamlined review process.* The streamlined modification review process may be used for the following modifications of instruments: changes reflecting adaptive management of the mitigation bank or in-lieu fee program, credit releases, changes in credit releases and credit release schedules, and changes that the district engineer determines are not significant. If the district engineer determines that the streamlined review process is warranted, he must notify the IRT members and the sponsor of this determination and provide them with copies of the proposed modification. IRT members and the sponsor have 30 days to notify the district engineer if they have concerns with the proposed modification. If IRT members or the sponsor notify the district engineer of such concerns, the district engineer shall attempt to resolve those concerns. Within 60 days of providing the proposed modification to the IRT, the district engineer must notify the IRT members of his intent to approve or disapprove the proposed modification. If no IRT member objects, by initiating the dispute resolution process in paragraph (e) of this section, within 15 days of receipt of this notification, the district engineer will notify the sponsor of his final decision and, if the modification is approved, arrange for it to be signed by the appropriate parties. If any IRT member initiates the dispute resolution process, the district engineer will so notify the sponsor. Following conclusion of the dispute resolution

process, the district engineer will notify the sponsor of his final decision, and if the modification is approved, arrange for it to be signed by the appropriate parties.

(h) *Umbrella mitigation banking instruments.* A single mitigation banking instrument may provide for future authorization of additional mitigation bank sites. As additional sites are selected, they must be included in the mitigation banking instrument as modifications, using the procedures in paragraph (g)(1) of this section. Credit withdrawal from the additional bank sites shall be consistent with paragraph (m) of this section.

(i) *In-lieu fee program account.* (1) The in-lieu fee program sponsor must establish a program account after the instrument is approved by the district engineer, prior to accepting any fees from permittees. If the sponsor accepts funds from entities other than permittees, those funds must be kept in separate accounts. The program account must be established at a financial institution that is a member of the Federal Deposit Insurance Corporation. All interests and earnings accruing to the program account must remain in that account for use by the in-lieu fee program for the purposes of providing compensatory mitigation for DA permits. The program account may only be used for the selection, design, acquisition, implementation, and management of in-lieu fee compensatory mitigation projects, except for a small percentage (as determined by the district engineer in consultation with the IRT and specified in the instrument) that can be used for administrative costs.

(2) The sponsor must submit proposed in-lieu fee projects to the district engineer for funding approval. Disbursements from the program account may only be made upon receipt of written authorization from the district engineer, after the district engineer has consulted with the IRT. The terms of the program account must specify that the district engineer has the authority to direct those funds to alternative compensatory mitigation projects in cases where the sponsor does not provide compensatory mitigation in accordance with the time frame specified in paragraph (n)(4) of this section.

(3) The sponsor must provide annual reports to the district engineer and the IRT. The annual reports must include the following information:

(i) All income received, disbursements, and interest earned by the program account;

(ii) A list of all permits for which in-lieu fee program funds were accepted. This list shall include: the Corps permit number (or the state permit number if there is no corresponding Corps permit number, in cases of state programmatic general permits or other regional general permits), the service area in which the authorized impacts are located, the amount of authorized impacts, the amount of required compensatory mitigation, the amount paid to the in-lieu fee program, and the date the funds were received from the permittee;

(iii) A description of in-lieu fee program expenditures from the account, such as the costs of land acquisition, planning, construction, monitoring, maintenance, contingencies, adaptive management, and administration;

(iv) The balance of advance credits and released credits at the end of the report period for each service area; and

(v) Any other information required by the district engineer.

(4) The district engineer may audit the records pertaining to the program account. All books, accounts, reports, files, and other records relating to the in-lieu fee program account shall be available at reasonable times for inspection and audit by the district engineer.

(j) *In-lieu fee project approval.* (1) As in-lieu fee project sites are identified and secured, the sponsor must submit mitigation plans to the district engineer that include all applicable items listed in § 230.94(c)(2) through (14). The mitigation plan must also include a credit release schedule consistent with paragraph (o)(8) of this section that is tied to achievement of specific performance standards. The review and approval of in-lieu fee projects will be conducted in accordance with the procedures in paragraph (g)(1) of this section, as modifications of the in-lieu fee program instrument. This includes compensatory mitigation projects conducted by another party on behalf of the sponsor through requests for proposals and awarding of contracts.

(2) If a DA permit is required for an in-lieu fee project, the permit should not be issued until all relevant provisions of the mitigation plan have been substantively determined, to ensure that the DA permit accurately reflects all relevant provisions of the approved mitigation plan, such as performance standards.

(k) *Coordination of mitigation banking instruments and DA permit issuance.* In cases where initial establishment of the mitigation bank, or the development of a new project site under an umbrella banking instrument, involves activities requiring DA

authorization, the permit should not be issued until all relevant provisions of the mitigation plan have been substantively determined. This is to ensure that the DA permit accurately reflects all relevant provisions of the final instrument, such as performance standards.

(l) *Project implementation.* (1) The sponsor must have an approved instrument prior to collecting funds from permittees to satisfy compensatory mitigation requirements for DA permits.

(2) Authorization to sell credits to satisfy compensatory mitigation requirements in DA permits is contingent on compliance with all of the terms of the instrument. This includes constructing a mitigation bank or in-lieu fee project in accordance with the mitigation plan approved by the district engineer and incorporated by reference in the instrument. If the aquatic resource restoration, establishment, enhancement, and/or preservation activities cannot be implemented in accordance with the approved mitigation plan, the district engineer must consult with the sponsor and the IRT to consider modifications to the instrument, including adaptive management, revisions to the credit release schedule, and alternatives for providing compensatory mitigation to satisfy any credits that have already been sold.

(3) An in-lieu fee program sponsor is responsible for the implementation, long-term management, and any required remediation of the restoration, establishment, enhancement, and/or preservation activities, even though those activities may be conducted by other parties through requests for proposals or other contracting mechanisms.

(m) *Credit withdrawal from mitigation banks.* The mitigation banking instrument may allow for an initial debiting of a percentage of the total credits projected at mitigation bank maturity, provided the following conditions are satisfied: the mitigation banking instrument and mitigation plan have been approved, the mitigation bank site has been secured, appropriate financial assurances have been established, and any other requirements determined to be necessary by the district engineer have been fulfilled. The mitigation banking instrument must provide a schedule for additional credit releases as appropriate milestones are achieved (see paragraph (o)(8) of this section). Implementation of the approved mitigation plan shall be initiated no later than the first full growing season after the date of the first credit transaction.

(n) *Advance credits for in-lieu fee programs.* (1) The in-lieu fee program instrument may make a limited number of advance credits available to permittees when the instrument is approved. The number of advance credits will be determined by the district engineer, in consultation with the IRT, and will be specified for each service area in the instrument. The number of advance credits will be based on the following considerations:

- (i) The compensation planning framework;
- (ii) The sponsor's past performance for implementing aquatic resource restoration, establishment, enhancement, and/or preservation activities in the proposed service area or other areas; and
- (iii) The projected financing necessary to begin planning and implementation of in-lieu fee projects.

(2) To determine the appropriate number of advance credits for a particular service area, the district engineer may require the sponsor to provide confidential supporting information that will not be made available to the general public. Examples of confidential supporting information may include prospective in-lieu fee project sites.

(3) As released credits are produced by in-lieu fee projects, they must be used to fulfill any advance credits that have already been provided within the project service area before any remaining released credits can be sold or transferred to permittees. Once previously provided advance credits have been fulfilled, an equal number of advance credits is re-allocated to the sponsor for sale or transfer to fulfill new mitigation requirements, consistent with the terms of the instrument. The number of advance credits available to the sponsor at any given time to sell or transfer to permittees in a given service area is equal to the number of advance credits specified in the instrument, minus any that have already been provided but not yet fulfilled.

(4) Land acquisition and initial physical and biological improvements must be completed by the third full growing season after the first advance credit in that service area is secured by a permittee, unless the district engineer determines that more or less time is needed to plan and implement an in-lieu fee project. If the district engineer determines that there is a compensatory mitigation deficit in a specific service area by the third growing season after the first advance credit in that service area is sold, and determines that it would not be in the public interest to allow the sponsor additional time to

plan and implement an in-lieu fee project, the district engineer must direct the sponsor to disburse funds from the in-lieu fee program account to provide alternative compensatory mitigation to fulfill those compensation obligations.

(5) The sponsor is responsible for complying with the terms of the in-lieu fee program instrument. If the district engineer determines, as a result of review of annual reports on the operation of the in-lieu fee program (see paragraphs (p)(2) and (q)(1) of this section), that it is not performing in compliance with its instrument, the district engineer will take appropriate action, which may include suspension of credit sales, to ensure compliance with the in-lieu fee program instrument (see paragraph (o)(10) of this section). Permittees that secured credits from the in-lieu fee program are not responsible for in-lieu fee program compliance.

(o) *Determining credits.* (1) *Units of measure.* The principal units for credits and debits are acres, linear feet, functional assessment units, or other suitable metrics of particular resource types. Functional assessment units or other suitable metrics may be linked to acres or linear feet.

(2) *Assessment.* Where practicable, an appropriate assessment method (e.g., hydrogeomorphic approach to wetlands functional assessment, index of biological integrity) or other suitable metric must be used to assess and describe the aquatic resource types that will be restored, established, enhanced and/or preserved by the mitigation bank or in-lieu fee project.

(3) *Credit production.* The number of credits must reflect the difference between pre- and post-compensatory mitigation project site conditions, as determined by a functional or condition assessment or other suitable metric.

(4) *Credit value.* Once a credit is debited (sold or transferred to a permittee), its value cannot change.

(5) *Credit costs.* (i) The cost of compensatory mitigation credits provided by a mitigation bank or in-lieu fee program is determined by the sponsor.

(ii) For in-lieu fee programs, the cost per unit of credit must include the expected costs associated with the restoration, establishment, enhancement, and/or preservation of aquatic resources in that service area. These costs must be based on full cost accounting, and include, as appropriate, expenses such as land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, and remediation or adaptive management activities, as well as administration of the in-lieu fee

program. The cost per unit credit must also take into account contingency costs appropriate to the stage of project planning, including uncertainties in construction and real estate expenses. The cost per unit of credit must also take into account the resources necessary for the long-term management and protection of the in-lieu fee project. In addition, the cost per unit credit must include financial assurances that are necessary to ensure successful completion of in-lieu fee projects.

(6) *Credits provided by preservation.* These credits should be specified as acres, linear feet, or other suitable metrics of preservation of a particular resource type. In determining the compensatory mitigation requirements for DA permits using mitigation banks or in-lieu fee programs, the district engineer should apply a higher mitigation ratio if the requirements are to be met through the use of preservation credits. In determining this higher ratio, the district engineer must consider the relative importance of both the impacted and the preserved aquatic resources in sustaining watershed functions.

(7) *Credits provided by riparian areas, buffers, and uplands.* These credits should be specified as acres, linear feet, or other suitable metrics of riparian area, buffer, and uplands respectively. Non-aquatic resources can only be used as compensatory mitigation for impacts to aquatic resources authorized by DA permits when those resources are essential to maintaining the ecological viability of adjoining aquatic resources. In determining the compensatory mitigation requirements for DA permits using mitigation banks and in-lieu fee programs, the district engineer may authorize the use of riparian area, buffer, and/or upland credits if he determines that these areas are essential to sustaining aquatic resource functions in the watershed and are the most appropriate compensation for the authorized impacts.

(8) *Credit release schedule.* (i) *General considerations.* Release of credits must be tied to performance based milestones (e.g., construction, planting, establishment of specified plant and animal communities). The credit release schedule should reserve a significant share of the total credits for release only after full achievement of ecological performance standards. When determining the credit release schedule, factors to be considered may include, but are not limited to: The method of providing compensatory mitigation credits (e.g., restoration), the likelihood of success, the nature and amount of work needed to generate the credits, and

the aquatic resource type(s) and function(s) to be provided by the mitigation bank or in-lieu fee project. The district engineer will determine the credit release schedule, including the share to be released only after full achievement of performance standards, after consulting with the IRT. Once released, credits may only be used to satisfy compensatory mitigation requirements of a DA permit if the use of credits for a specific permit has been approved by the district engineer.

(ii) For single-site mitigation banks, the terms of the credit release schedule must be specified in the mitigation banking instrument. The credit release schedule may provide for an initial debiting of a limited number of credits once the instrument is approved and other appropriate milestones are achieved (see paragraph (m) of this section).

(iii) For in-lieu fee projects and umbrella mitigation bank sites, the terms of the credit release schedule must be specified in the approved mitigation plan. When an in-lieu fee project or umbrella mitigation bank site is implemented and is achieving the performance-based milestones specified in the credit release schedule, credits are generated in accordance with the credit release schedule for the approved mitigation plan. If the in-lieu fee project or umbrella mitigation bank site does not achieve those performance-based milestones, the district engineer may modify the credit release schedule, including reducing the number of credits.

(9) *Credit release approval.* Credit releases for mitigation banks and in-lieu fee projects must be approved by the district engineer. In order for credits to be released, the sponsor must submit documentation to the district engineer demonstrating that the appropriate milestones for credit release have been achieved and requesting the release. The district engineer will provide copies of this documentation to the IRT members for review. IRT members must provide any comments to the district engineer within 15 days of receiving this documentation. However, if the district engineer determines that a site visit is necessary, IRT members must provide any comments to the district engineer within 15 days of the site visit. The district engineer must schedule the site visit so that it occurs as soon as it is practicable, but the site visit may be delayed by seasonal considerations that affect the ability of the district engineer and the IRT to assess whether the applicable credit release milestones have been achieved. After full consideration of any comments

received, the district engineer will determine whether the milestones have been achieved and the credits can be released. The district engineer shall make a decision within 30 days of the end of that comment period, and notify the sponsor and the IRT.

(10) *Suspension and termination.* If the district engineer determines that the mitigation bank or in-lieu fee program is not meeting performance standards or complying with the terms of the instrument, appropriate action will be taken. Such actions may include, but are not limited to, suspending credit sales, adaptive management, decreasing available credits, utilizing financial assurances, and terminating the instrument.

(p) *Accounting procedures.* (1) For mitigation banks, the instrument must contain a provision requiring the sponsor to establish and maintain a ledger to account for all credit transactions. Each time an approved credit transaction occurs, the sponsor must notify the district engineer.

(2) For in-lieu fee programs, the instrument must contain a provision requiring the sponsor to establish and maintain an annual report ledger in accordance with paragraph (i)(3) of this section, as well as individual ledgers that track the production of released credits for each in-lieu fee project.

(q) *Reporting.* (1) *Ledger account.* The sponsor must compile an annual ledger report showing the beginning and ending balance of available credits and permitted impacts for each resource type, all additions and subtractions of credits, and any other changes in credit availability (e.g., additional credits released, credit sales suspended). The ledger report must be submitted to the district engineer, who will distribute copies to the IRT members. The ledger report is part of the administrative record for the mitigation bank or in-lieu fee program. The district engineer will make the ledger report available to the public upon request.

(2) *Monitoring reports.* The sponsor is responsible for monitoring the mitigation bank site or the in-lieu fee project site in accordance with the approved monitoring requirements to determine the level of success and identify problems requiring remedial action or adaptive management measures. Monitoring must be conducted in accordance with the requirements in § 230.96, and at time intervals appropriate for the particular project type and until such time that the district engineer, in consultation with the IRT, has determined that the performance standards have been attained. The instrument must include

requirements for periodic monitoring reports to be submitted to the district engineer, who will provide copies to other IRT members.

(3) *Financial assurance and long-term management funding report.* The district engineer may require the sponsor to provide an annual report showing beginning and ending balances, including deposits into and any withdrawals from, the accounts providing funds for financial assurances and long-term management activities. The report should also include information on the amount of required financial assurances and the status of those assurances, including their potential expiration.

(r) *Use of credits.* Except as provided below, all activities authorized by DA permits are eligible, at the discretion of the district engineer, to use mitigation banks or in-lieu fee programs to fulfill compensatory mitigation requirements for DA permits. The district engineer will determine the number and type(s) of credits required to compensate for the authorized impacts. Permit applicants may propose to use a particular mitigation bank or in-lieu fee program to provide the required compensatory mitigation. In such cases, the sponsor must provide the permit applicant with a statement of credit availability. The district engineer must review the permit applicant's compensatory mitigation proposal, and notify the applicant of his determination regarding the acceptability of using that mitigation bank or in-lieu fee program.

(s) *IRT concerns with use of credits.* If, in the view of a member of the IRT, an issued permit or series of issued permits raises concerns about how credits from a particular mitigation bank or in-lieu fee program are being used to satisfy compensatory mitigation requirements (including concerns about whether credit use is consistent with the terms of the instrument), the IRT member may notify the district engineer in writing of the concern. The district engineer shall promptly consult with the IRT to address the concern. Resolution of the concern is at the discretion of the district engineer, consistent with applicable statutes, regulations, and policies regarding compensatory mitigation requirements for DA permits. Nothing in this section limits the authorities designated to IRT agencies under existing statutes or regulations.

(t) *Site protection.* (1) For mitigation bank sites, real estate instruments, management plans, or other long-term mechanisms used for site protection must be finalized before any credits can be released.

(2) For in-lieu fee project sites, real estate instruments, management plans, or other long-term protection mechanisms used for site protection must be finalized before advance credits can become released credits.

(u) *Long-term management.* (1) The legal mechanisms and the party responsible for the long-term management and the protection of the mitigation bank site must be documented in the instrument or, in the case of umbrella mitigation banking instruments and in-lieu fee programs, the approved mitigation plans. The responsible party should make adequate provisions for the operation, maintenance, and long-term management of the compensatory mitigation project site. The long-term management plan should include a description of long-term management needs and identify the funding mechanism that will be used to meet those needs.

(2) The instrument may contain provisions for the sponsor to transfer long-term management responsibilities to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager.

(3) The instrument or approved mitigation plan must address the financial arrangements and timing of any necessary transfer of long-term management funds to the steward.

(4) Where needed, the acquisition and protection of water rights should be secured and documented in the instrument or, in the case of umbrella mitigation banking instruments and in-lieu fee programs, the approved mitigation site plan.

(v) *Grandfathering of existing instruments.* (1) *Mitigation banking instruments.* All mitigation banking instruments approved on or after July 9, 2008 must meet the requirements of this part. Mitigation banks approved prior to July 9, 2008 may continue to operate under the terms of their existing instruments. However, any modification to such a mitigation banking instrument on or after July 9, 2008, including authorization of additional sites under an umbrella mitigation banking instrument, expansion of an existing site, or addition of a different type of resource credits (e.g., stream credits to a wetland bank) must be consistent with the terms of this part.

(2) *In-lieu fee program instruments.* All in-lieu fee program instruments

approved on or after July 9, 2008 must meet the requirements of this part. In-lieu fee programs operating under instruments approved prior to July 9, 2008 may continue to operate under those instruments for two years after the effective date of this rule, after which time they must meet the requirements of this part, unless the district engineer determines that circumstances warrant an extension of up to three additional years. The district engineer must consult with the IRT before approving such extensions. Any revisions made to the in-lieu-fee program instrument on or after July 9, 2008 must be consistent with the terms of this part. Any approved project for which construction was completed under the terms of a previously approved instrument may continue to operate indefinitely under those terms if the district engineer determines that the project is providing appropriate mitigation substantially consistent with the terms of this part.

Dated: March 28, 2008.

Stephen L. Johnson,
Administrator, U.S. Environmental Protection Agency.

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**Thursday,
April 10, 2008**

Part III

Department of Health and Human Services

**45 CFR Parts 1385, 1386, 1387, and 1388
Developmental Disabilities Program;
Proposed Rule**

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 1385, 1386, 1387, and 1388

RIN 0970-AB11

Developmental Disabilities Program

AGENCY: Administration on Developmental Disabilities, Administration for Children and Families, HHS.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This rule proposes clarifications and new requirements to implement the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act of 2000). Of particular note, the proposed rule covers responsibilities of the Secretary in the area of program accountability and the indicators of progress. Under the proposal, one or more measures of progress must be used to measure the goal(s) developed for each area of emphasis. The areas of emphasis include: (1) Quality assurance activities; (2) education activities and early intervention activities; (3) child care-related activities; (4) health-related activities; (5) employment-related activities; (6) housing-related activities; (7) transportation-related activities; (8) recreation-related activities; and (9) other services available or offered to individuals in a community, including formal and informal community supports that affect their quality of life.

DATES: Comments will be accepted through June 9, 2008.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to: Commissioner, Administration on Developmental Disabilities, Administration for Children and Families, 370 L'Enfant Promenade SW., Mail Stop: HHH 405D, Washington, DC 20447. Persons may also transmit comments electronically via the Internet at: <http://www.regulations.acf.hhs.gov>. Electronic comments must include the full name, address, and organizational affiliation (if any) of the commenter. All comments and letters will be available for public inspection, Monday through Friday 7 a.m. to 4 p.m., at the address above, by calling (202) 690-5841 to set up an appointment and gain entry to the building. Electronically-submitted comments will be available for viewing immediately. To download an electronic version of the rule, you should access ACF's regulation page at: <http://www.regulations.acf.hhs.gov> or www.regulations.gov.

FOR FURTHER INFORMATION CONTACT:

Elsbeth Porter Wyatt, Administration on Developmental Disabilities, telephone (202) 690-5841 (Voice). The TDD telephone number for the Administration on Developmental Disabilities is (202) 690-6415. These are not toll-free numbers. This document will be made available in alternative formats upon request.

SUPPLEMENTARY INFORMATION:

I. Developmental Disabilities Assistance and Bill of Rights Act of 2000

In 1963 the President signed into law the Mental Retardation Facilities and Construction Act (Pub. L. 88-164). It gave the authority to plan activities and construct facilities to provide services to persons with mental retardation. This legislation was significantly amended a number of times since 1963 and most recently by the Developmental Disabilities Assistance and Bill of Rights Act of 2000, Public Law 106-402 (the DD Act of 2000). The DD Act of 2000 directs the Secretary of Health and Human Services to implement an accountability process to monitor the grantees that receive funds under the Act (Section 104(a)(3), 42 U.S.C. 15004(a)(3)). The process is to identify and report on progress achieved through advocacy, capacity building, and systemic change activities. Indicators of progress are to be developed for each area of emphasis and each entity receiving funds is required to meet these indicators of progress. A report to the President, Congress, and the National Council on Disability must be prepared using information on grantee progress with regard to these indicators every two years. Activities that focus on coordination and collaboration within and across the programs must be included in the report.

The accountability system and the new reporting requirements form the substantive basis of this proposed rule. In addition, the proposed rule addresses the following changes made by the DD Act:

- The DD Act of 2000 also requires State Councils to set-aside 70 percent of the Federal funds for activities tied to Council goals (Section 124(c)(5)(B)(i)). The previous amount was 65 percent. Also, the DD Act of 2000 increases the percentage from 50 percent to 60 percent of representation by individuals with developmental disabilities on Councils (Section 125(b)(1)(C)(3)).

- The DD Act of 2000 also requires that a Protection and Advocacy (P&A) governing board be selected by the P&A and be subject to the policies and procedures the P&A chooses to establish. The membership of the board

is now subject to term limits set by the P&A to ensure rotating membership. The DD Act of 2000 strengthens provisions regarding access to service providers and records of individuals with developmental disabilities in order to investigate potential abuse and neglect. Also, the State must now provide information to a P&A about the adequacy of health care and other services, supports, and other assistance that individuals with developmental disabilities receive through home and community-based waivers.

- Additionally, under the Act, the University Affiliated Programs are renamed University Centers for Excellence in Developmental Disabilities Education, Research, and Service (referred to as UCEDDs). Each UCEDD receives a core award. When appropriations are sufficient to provide at least \$500,000, as adjusted for inflation, in funding to each existing UCEDD, ADD is required to award grants for national training initiatives and is authorized to create additional UCEDDs or to make additional grants to existing UCEDDs. New UCEDDs created under this authority or additional grants to existing UCEDDs would be in States or for populations that are unserved or underserved due to such factors as population, a high concentration of rural or urban areas or a high concentration of unserved or underserved populations (Section 152(d)).

- Finally, the DD Act of 2000 authorizes Federal interagency initiatives to carry out projects relating to the development of policies that reinforce and promote the self-determination, independence, productivity, and inclusion in community life of individuals with developmental disabilities through the Projects of National Significance program.

While not the subject of this proposed rule, the DD Act of 2000 also established two additional program authorities, title II—Families of Children with Disabilities Support Act of 2000, and title III—Program for Direct Support Workers Who Assist Individuals with Developmental Disabilities.

II. Grantees of the Administration on Developmental Disabilities (ADD) Network Under the Act

A. Protection and Advocacy of Individual Rights

Formula grants are made to each State and other eligible jurisdictions for the establishment of a system to protect and advocate for the rights of individuals with developmental disabilities (P&As).

The system must have the authority to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection, advocacy and rights of individuals with developmental disabilities who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangement, with particular attention to members of ethnic and racial minority groups. The system must provide information and referral for programs and services addressing the needs of individuals with developmental disabilities, and have the authority to investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the system, or if there is probable cause to believe that the incidents occurred.

B. Federal Assistance to State Councils on Developmental Disabilities

Formula grants are made to each State and other eligible jurisdictions to support a State Council on Developmental Disabilities to engage in advocacy, capacity building, and systemic change activities that assure that individuals with developmental disabilities and their families participate in service and program design, and have access to needed community services. Formula grants provide individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life through culturally competent programs. Activities contribute to a coordinated, consumer and family-centered, consumer and family-directed, comprehensive system that includes needed community services, individualized supports, and other forms of assistance that promote self-determination for individuals with developmental disabilities and their families.

C. Projects of National Significance

Under subtitle E of title I of the Act, ADD may award grants, contracts or cooperative agreements for Projects of National Significance (PNS) to enhance the independence, productivity, and inclusion of individuals with developmental disabilities. Generally, projects are to promote promising practices, demonstrate innovative approaches, provide technical assistance, collect data, educate policymakers, disseminate information, and expand opportunities for individuals with disabilities to participate in decision making and community life.

D. National Network of University Centers for Excellence in Developmental Disabilities Education, Research, and Service (UCEDDs). [Formerly University Affiliated Programs/UAP]

In order to provide leadership, advise Federal, State, and community policymakers, and promote self-determination, independence, productivity, and full integration of individuals with developmental disabilities, grants are awarded to entities designated as Centers in the States and other eligible jurisdictions. The Centers are interdisciplinary education, research, and public service units of universities or public or not-for-profit entities associated with the universities that engage in the core functions of interdisciplinary pre-service preparation and continuing education of students and fellows, provision of community services, conduct of research, and dissemination of information related to activities undertaken to address the purpose of title I of the Act.

III. Discussion of NPRM

This proposed regulation addresses the requirements of the DD Act of 2000 and reflects input from the grantees of the ADD network (State Councils on Developmental Disabilities, P&As, UCEDDs, and the national organizations that represent them: The National Association of Developmental Disability Councils (NADDC), the National Association of Protection and Advocacy Systems (NAPAS), and the Association of University Centers on Disabilities (AUCD)).

Key proposed provisions are as follows:

(a) The Definitions section (§ 1385.3) of the regulations has been updated to reflect terms defined in the statute that apply to all of the programs authorized by the DD Act of 2000;

(b) Section 1385.5 of the regulations has been added to address program accountability and indicators of progress requirements for the State Councils on Developmental Disabilities, P&As and UCEDDs as added by Section 104(a) of the DD Act of 2000;

(c) Current section 1386.22 of the regulations addresses access to records, facilities and individuals with developmental disabilities. We propose to move and revise this section to establish these regulations as a separate subpart C for the Protection and Advocacy Program;

(d) Section 1388.5 of the regulations addresses the five-year plan and reporting requirements for UCEDDs. This section proposes a new Annual

Report for UCEDDs to meet the requirements of the Act (42 U.S.C. 15064).

Technical and conforming changes to other sections of the rules for the DD Act programs have been made to address new terminology and revised statutory cites and to provide clarity. For ease of public understanding and comment, we have republished the regulatory text of all provisions of 45 CFR Chapter XIII, Subchapter I, The Administration on Developmental Disabilities, Developmental Disabilities Program in full.

In developing this proposed regulation ADD examined many issues tied to the legislation and the administration of the programs funded under the DD Act.

One issue for which we specifically seek public comment is whether the current process involving class action lawsuits provides adequate protection for individuals with developmental disabilities. For example, in order to include an individual as a member of a class what criteria should be applied or clearance process should be followed? Informed consent is a cornerstone of class action lawsuits to protect the rights of individuals who may choose to be or not to be members of a potential class. When an individual has a developmental disability a guardian may have a role in that decision. State laws vary greatly with regard to the roles and authority of guardians. What happens when there is a difference of opinion between the individual and guardian on whether to be a member of a class action lawsuit? It would be very helpful to receive comments on the procedures used to reach decisions on whether to pursue class action lawsuits and the method of informing/obtaining consent. We will carefully consider all comments provided to determine whether any changes are warranted in the final regulations to ensure adequate protection of individual choice.

Another issue is the question of which activities grantees may engage in to influence legislation and still be in compliance with statutes, regulations and OMB Circulars which generally restrict such activities and other activities ordinarily referred to as "lobbying." The questions arise because State Councils, Protection and Advocacy agencies (P&As), University Centers for Excellence and Projects of National Significance are authorized under the provisions of the DD Act, to "educate," "advise" or "inform" Federal, State and local policymakers. Sections 125(a)(5)(J), 143(a)(2)(L), 153(a)(1), and 161(2)(D)(iii). The "policymakers" referred to in the statute

include members of Congress, officials of the Federal executive branch, Governors, members of State legislatures and staff of State agencies.

Congress customarily has included in the annual appropriations acts for HHS language restricting the use of appropriated funds to influence legislation. *See, e.g.,* Section 503 of Public Law 209–149. Additionally, all projects funded by ADD, including those projects funded for the purpose of informing, educating or advising policymakers, are subject to restrictions on the use of Federal funds for lobbying purposes. Non-profit organizations receiving ADD awards are subject to the requirements of OMB Circular A–122, Attachment B, Paragraph 25, pertaining to lobbying.

A section-by-section discussion of the significant changes made by this proposed regulation follows:

PART 1385—REQUIREMENTS APPLICABLE TO THE DEVELOPMENTAL DISABILITIES PROGRAMS

Section 1385.1 General

Section 1385.1 General, covers administrative requirements for the ADD Network grantees. We are proposing to amend § 1385.1 of this part by revising the introductory text to include a reference to section 1385.5 Program Accountability and Indicators of Progress. Paragraph (a) is proposed to be amended to update the name of the State Developmental Disabilities Councils to State Councils on Developmental Disabilities. Similarly, paragraph (b) is proposed to be amended to update the reference from Protection and Advocacy of the Rights of Individuals with Developmental Disabilities to Protection and Advocacy of Individual Rights. Paragraph (d) is proposed to be amended to update the reference from University Affiliated Programs to National Network of University Centers for Excellence in Developmental Disabilities Education, Research, and Service. These changes are proposed to conform the regulations with the language of the DD Act of 2000.

Section 1385.2 Purpose of the Regulation

This section of the NPRM proposes to update the statutory reference to reflect enactment of the Developmental Disabilities Assistance and Bill of Rights Act of 2000.

Section 1385.3 Definitions

This section of the NPRM updates terminology and definitions resulting from enactment of the Developmental

Disabilities Assistance and Bill of Rights Act of 2000 and other necessary updates.

Section 1385.4 Rights of Individuals With Developmental Disabilities

We are proposing to amend paragraph (a) to update the statutory citations. Section 109 of the Act is only applicable to State Councils on Developmental Disabilities. Additionally, the DD Act of 2000 repealed the requirement that Councils, UAPs and Projects of National Significance provide assurances of compliance with Section 110 of the Act.

Similarly, we are proposing to amend paragraph (b) to update statutory and U.S. Code citations for this requirement of the Councils and the submission of the State plan.

We are proposing to amend paragraph (c). The PNS reference is being deleted as the Act no longer contains this provision or a comparable requirement. The UAP reference is proposed to be updated to refer to UCEDD and the application's assurance of compliance cite is being changed to Section 101(c) of the Act as provided in Section 154(a)(3)(D) of the Act of 2000.

Section 1385.5 Program Accountability and Indicators of Progress

We propose to add under section 1385.5, previously reserved, the Program Accountability and Indicators of Progress requirements for ADD grantees.

The DD Act of 2000 requires that: (1) There be indicators of progress for each area of emphasis; (2) the indicators of progress be used by the Secretary and grantees to describe and measure at a minimum progress in advocacy, capacity building, and systemic change activities by satisfaction, collaboration, and improvement; (3) the indicators of progress be complied by grantees; (4) the indicators of progress result in information which can be included in the Secretary's report to Congress; and (5) the Secretary have a monitoring process for establishing program accountability that incorporates the indicators of progress.

As proposed in section 1385.3, the areas of emphasis under the DD Act include: quality assurance activities; education activities and early intervention activities; child care-related activities; health-related activities; employment-related activities; housing-related activities; transportation-related activities; recreation-related activities; and other services available or offered to individuals in a community, including

formal and informal community support that affect their quality of life.

The NPRM establishes the requirements for State Councils, P&As, and UCEDDs to identify, characterize, and track progress on grant goals. Each goal must be related to an area of emphasis. First, a grantee must select a goal or goals for the year in question. Second, a grantee must select a type of activity—advocacy, capacity building, or systemic change—through which each goal shall be undertaken. Third, a grantee must track progress on each goal by establishing measures of progress.

The measures of progress must describe and measure: (1) Consumer satisfaction with the services provided through the activities of the grantee under its ADD funded program; (2) collaboration with other ADD grantees subject to the regulation; and (3) improvements in the ability of individuals with developmental disabilities to make choices about and exert control over the services which they receive, to participate in the full range of community life with persons of the individual's choice, and to access services, supports, and assistance to ensure the individual is free from exploitation, violations of legal and human rights, and inappropriate restraint or seclusion.

The approach taken by the Administration on Developmental Disabilities in developing the proposed regulations was to comply with the requirements of the Act while preserving the capacity of grantees to design their programs to meet the needs of their individual communities as provided under the Federal Assistance to State Councils on Developmental Disabilities, the system of Protection and Advocacy of Individual Rights, and the national network of University Centers for Excellence in Developmental Disabilities Education, Research, and Service.

The proposed regulations were developed in response to these requirements as follows: paragraph (a) Program Accountability Process; paragraph (b) Measures of Progress; paragraph (c) Indicators of Progress; paragraph (d) Measures of Consumer Satisfaction; paragraph (e) Measures of Collaboration; and paragraph (f) Measures of Improvement.

For each area of emphasis under which a goal has been identified, each State Council on Developmental Disabilities, P&A, and UCEDD must state in its required planning document (State plan for Councils, Statement of Goals and Priorities for P&As, and the Five-Year plan for UCEDDs) the measures of progress (measures of

consumer satisfaction, improvement, and collaboration) to be applied to its goals in the areas of emphasis selected for each year covered by the planning document. Each UCEDD plan also must categorize its goals under both an area of emphasis and one of its four core functions. *Those functions are:* (1) Interdisciplinary pre-service preparation and continuing education of students and fellows; (2) community services that

provide training or technical assistance; (3) conduct of research; and (4) dissemination of information.

Accordingly, under paragraph (a)(1) as proposed, the required planning document must classify under one or more areas of emphasis each of the goals related to advocacy, capacity building, and systemic change activities to be pursued during the year. The areas of emphasis selected may vary from

grantee to grantee. UCEDDS also must classify any goal activity in terms of mandated core functions. Following is an example of the Education and Early Intervention area of emphasis using the goal of children with developmental disabilities being included in preschool programs:

Example: Area of Emphasis: Education and Early Intervention.

Long-term goal	Short-term objective	Role of State Council	Role of P&A	Role of UCEDD
Children with developmental disabilities are included in preschool programs.	Number of children with developmental disabilities in Head Start programs will increase by 10%.	Present information to Head Start directors on number of children with developmental disabilities waiting for inclusive preschool programs. Attend meetings of Head Start directors to outline issues and barriers. Convene meeting of Head Start directors and DD Act network to develop plan of action.	Train parents on legal rights of children with developmental disabilities to participate in preschool programs. Include information on accessibility, ADA, assistive technology, etc.	Train Head Start providers on inclusion of children with developmental disabilities in the classroom. Follow up to determine actual increase in number of children included.

Paragraph (a)(2) requires that for each area of emphasis the required planning document must include measures of progress for goals identified measuring: Consumer satisfaction; collaboration; and improvements in outcomes for persons with developmental disabilities. Measures of progress developed must be able to, over time, demonstrate whether the grantee has achieved progress in meeting the goals of the Act through its advocacy, capacity building, and systemic change activities.

Paragraph (a)(3) provides that the measures of progress must meet all applicable program regulations. In the event the planning document fails to meet these regulatory requirements, the Commissioner shall decline to accept the planning document.

Paragraph (a)(4) requires that the results of the application of the measures of progress for each area of emphasis under which a goal has been established be reported.

Paragraph (c) of the proposed rule requires that for each of the areas of emphasis under which the State Councils on Developmental Disabilities, the P&A, or UCEDD has classified activities, the indicators of progress shall be the grantee's achievement of the measures of progress it has established pursuant to this section for the years on which the grantee is reporting. Each State Council on Developmental Disabilities, the P&A, and UCEDD is required to meet the indicators of

progress for each of the areas of emphasis in which it has classified activities for the year on which it is reporting.

Measures of consumer satisfaction are addressed under proposed paragraph (d). Under this paragraph, each State Council on DD, P&A, and UCEDD must establish criteria on the level of consumer satisfaction to be attained for each area of emphasis for each goal identified and track its progress.

Any grantee that is a member of the ADD Network must establish a goal or goals in one or more areas of emphasis. For each area of emphasis selected, a grantee must measure progress related to its goal(s) through activity(ies) in terms of consumer satisfaction in each of its selected area(s) of emphasis. Consumer satisfaction may be measured by the results of surveys of individuals with developmental disabilities affected by its activities, surveys of stakeholders, focus groups, and phone interviews. A grantee may include reports on whether the planned activity associated with a goal resulted in improved access to services for individuals with developmental disabilities.

The following is an example of consumer satisfaction measures with respect to a Council. A State does not currently have a program to financially assist families who care for their children with developmental disabilities who live at home. A Council plans to fund a voucher program to

support these families and children. Using examples from other States, several different approaches will be used with vouchers going toward different services including housing and child care. The Council plans to locate families and provide vouchers. Consumer satisfaction is measured through a post-activity questionnaire. A consumer survey of the program is planned to provide this information. The survey will address how the activity: (1) Improved the ability of individuals with developmental disabilities to exert choice and control over the services, support, and assistance; (2) Improved the ability to participate in community life; (3) Improved the ability to access services in a way that the individual is free from abuse, neglect, exploitation, and harmful treatment; and (4) Improved the individual's situation and circumstances. A final evaluation will lead to the development of a legislative proposal to introduce a permanent program for the State. This would be a Council systemic change, capacity building activity. The results of these measures must be reported in the annual Program Performance Report.

The following is an example for P&As. A P&A plans to represent children who are not being allowed into an inclusive program at schools within the State. Looking at enrollment data the P&A targets three counties. The P&A identifies the cases of greatest need. The

P&A then works with the school districts on Individualized Education Programs, facilitating the placement of children with developmental disabilities into regular classrooms. The P&A documents the numbers of children placed in inclusive programs as a result of the intervention, surveys those involved with this initiative and obtains their input to assist the P&A with future advocacy activities. This is a P&A advocacy activity. The goals in this example focus on: Identifying clients to be served; targeted education and early intervention as the area of emphasis; tracking progress through improvement measures; and, surveys that measure client satisfaction.

The following is a UCEDD example. A UCEDD wants to train a group of pediatricians to serve individuals with developmental disabilities. The UCEDD identifies the group and provides the training. It checks back with the pediatricians to see if the training helped them. Consumer satisfaction is measured through a survey of a sample of patients or family members/advocates to assess the level of their satisfaction with their pediatricians trained by the UCEDD and to receive recommendations on expansion or changes in the training activities. This is a UCEDD capacity building activity. The goals in this example focus on the health area of emphasis. The type of activity includes training via curricula, role playing, case example, and/or consumer or family member/advocate interview or presentation. The UCEDD measure of progress would be an increase in pediatricians' caseloads of clients with developmental disabilities and patients being satisfied with the care they received from trained pediatricians.

Proposed paragraph (e) specifies the requirement related to measures of collaboration. Under this paragraph, we propose to require each Council, P&A, and UCEDD to identify collaborative activities it will implement for each area of emphasis related to a goal. Under the proposal, UCEDDs also must identify interstate collaborative activities. In-state collaborations must include a meeting or Memorandum of Understanding on the proposed collaborative activities.

Collaboration among a State's ADD grantees is very important. By collaboration ADD means efforts in which all three categories of a State's grantees work together (State Council, P&A, and UCEDD). In some States there are multiple UCEDDs. In these States the multiple UCEDDs would be expected to collaborate with each other and the State's Council and P&A.

Proposed paragraph (f) specifies requirements related to measures of improvement. Under this proposed paragraph, State DD Councils, P&As, and UCEDDs must establish measures of improvement they will attain for each area of emphasis where a goal has been established by assessing the extent to which grantee activities have improved outcomes for individuals with developmental disabilities.

Specifically, under the proposed rule, improvement measures assess the contribution of a grantee's activity to the ability of individuals with developmental disabilities to: (1) Make choices and exert control over the type, intensity, and timing of services, supports, and assistance that the individuals have used; (2) participate in the full range of community life with persons of the individual's choice; and (3) access services, supports and assistance in a manner that ensures that such an individual is free from abuse, neglect, sexual and financial exploitation, violation of legal and human rights, and the inappropriate use of restraints and seclusion.

Improvement measures a grantee selects will be influenced by the nature of the goal(s) set by a grantee for its selected area(s) of emphasis. Describing and measuring improvements requires collection of baseline data and then tracking change. It would be appropriate to use either qualitative or quantitative measures, or both. ADD recognizes that a goal, rather than an area of emphasis, may be a determinant factor when a grantee decides on which improvement measures to use.

The following is an example of improvement measures with respect to a Council. A Council selects the area of emphasis on employment. A goal is established that individuals with developmental disabilities will be employed through a variety of flexible employment options, including self-employment and working for temporary service agencies. The activities are to foster collaboration, provide technical assistance and training. The Council will work with the Division of Vocational Services (DVS) who will then contact interested individuals to develop work plans. Such plans will include marketing strategies and budgeting for fiscal responsibility. The Council will coordinate small, low-interest loans through the local Business Leadership network and the Chamber of Commerce. Measures of progress will include: Adults have jobs of their choice through Council efforts; increased dollars leveraged for employment programs; employment programs or policies are created/improved; and

individuals with developmental disabilities have additional employment opportunities.

An example of an improvement measure with respect to an agency designated to administer the State P&A system follows. A P&A agency selects the area of emphasis on employment. A goal is established to reduce discrimination in the hiring, promotion, termination and failure to provide reasonable accommodations for people with developmental disabilities. The activities will be tied to requests for assistance. A case comes up involving a thirty year old person with mental retardation who lives in the community and has worked in the mailroom of a local bank for seven years. Following a change in management, the individual has a new supervisor. This supervisor has been increasingly hostile to the individual, including making it difficult for the individual's job coach to provide on-site assistance. In this case, the P&A will document that they provided training to management of the bank on the Americans with Disabilities Act, information on what constitutes a reasonable accommodation and information on the importance of natural supports to assist individuals with developmental disabilities to live and succeed in the community. This information included literature and contact information. The measure of progress will include increased consumer satisfaction with changes in workplace conditions after P&A intervention, and individuals with developmental disabilities will retain jobs in competitive workplace environments. The P&A would use this measure as baseline and work towards increasing the number of individuals being served.

An example of improvement measures with respect to a University Center follows. A UCEDD wants to develop, implement, and evaluate a comprehensive statewide training program for direct support professionals (e.g., personal care assistants, occupational and physical therapy aides, home health aides, medical assistants, and human services case managers). The UCEDD establishes a timeframe of five years. The UCEDD develops a curriculum, obtaining input from other UCEDDs and other network partners and from individuals with developmental disabilities or family members/advocates. The UCEDD trains direct support professionals with the curriculum. The UCEDD evaluates its program annually and at the end of the five-year period, using input from all parties involved with respect to their satisfaction and recommendations for

future activities and revision of materials. The goals of this example focus on the health area of emphasis. The type of activity includes training via modules, role-playing, case examples, and/or consumer or family member/advocate interview or presentation. The proposed UCEDD measure of progress would be an increase in the number of direct support personnel successfully trained.

As indicated above, under this proposed rule the areas of emphasis may vary from grantee to grantee. Examples that highlight the flexibility grantees have in selecting areas of emphasis include: (1) State Councils—One Council may focus on activities that support individuals with developmental disabilities in obtaining employment, while another Council may award funding to a model demonstration project to provide vouchers for respite care to families of persons who have developmental disabilities; (2) Protection and Advocacy System (P&A)—One P&A may spend time assisting children with developmental disabilities to secure an education in their neighborhood schools, while another P&A may focus on abuse and neglect within a large State-run residential facility; (3) University Centers for Excellence in Developmental Disabilities Education, Research, and Service (UCEDDs)—One UCEDD may provide direct clinical services by performing diagnostic evaluations on children with developmental disabilities, while another UCEDD may be involved with aging issues and people with developmental disabilities. This NPRM maximizes flexibility and fosters collaboration among grantees of the ADD Network.

These proposed provisions are based in part on input from the field. The requirements also represent an evolution of a product called the ADD Roadmap to the Future, written prior to the DD Act of 2000. The Roadmap was developed to establish performance measures. Reporting mechanisms were developed in response to the requirements of the Government Performance and Results Act (GPRA) in 1993.

GPRA was passed in response to ongoing concerns that policy making, spending decisions, and program oversight were being hindered by insufficient information about program performance and results. GPRA holds agencies accountable for program performance by requiring the development of a five-year strategic plan, an annual performance plan, and an annual performance report. The strategic plan must include a

comprehensive mission statement and general goals and objectives covering the major functions and operations of the agency. The annual performance plan must: (1) Be consistent with the agency's strategic plan; (2) establish measurable performance goals; and (3) describe the operational processes, resources and technology required to meet the performance goals. The agency must submit an annual performance report to the President and the Congress on the results for the previous fiscal year. The performance report compares the annual performance goals established for the fiscal year with the actual performance achieved in that year. The report assesses the progress made in achieving the goals and explains factors causing deviations from the original goal targets.

It is important that the ADD programs continue to focus on the GPRA measures, where applicable, as well as the goals and activities tied to the measures of progress.

Prior to 2002, ADD's GPRA measures focused on consumer impact, systemic change, and the establishment of baseline data in the areas of employment, housing, education, health, self-determination, and community inclusion. Although grantees may focus on any area(s) of emphasis through their goals, we encourage that goals be tied to ADD's GPRA measures.

Section 1385.6 Employment of Individuals With Disabilities

This section of the regulation addresses grantee responsibilities regarding affirmative action and employment tied to disability without discrimination and is proposed to be published unchanged except to update statutory and U.S. Code citations.

Section 1385.7 Reports of the Secretary

We are proposing to add a new section covering Reports of the Secretary as required by Section 105 of the DD Act of 2000 (42 U.S.C. 15005) at § 1385.7 which is currently reserved. Under the proposed language, in order for ADD to have the required information to prepare the Report to Congress all grantees would be required to submit plans, applications and reports that label goals, activities and results clearly in terms of the following: Area of emphasis, type of activity, and categories of measures of progress.

Section 1385.8 Formula for Determining Allotments

This section addresses how the Commissioner will allocate funds

appropriated under the Act for the Councils and the P&As. This section of the regulation is proposed to be published unchanged except to update the reference from State Developmental Disabilities Councils to State Councils on Developmental Disabilities.

Section 1385.9 Grants Administration

The NPRM proposes technical changes to § 1385.9 to include reference to two additional parts of title 45 CFR that apply to grants under this section, 45 CFR part 76—Government-Wide Debarment and Suspension (Non-Procurement) and Government-Wide Requirements for Drug-Free Workplace and 45 CFR part 93—New Restrictions on Lobbying, and to delete reference to Part 75—Informal Appeal Procedures, as these requirements have been withdrawn by the Department of Health and Human Services. Other changes are proposed to address terminology changes made by the DD Act of 2000.

PART 1386—FORMULA GRANT PROGRAMS

Subpart A—Basic Requirements

Section 1386.1 General

The NPRM proposes technical changes to § 1386.1 to update the terminology.

Section 1386.2 Obligation of Funds

Similarly, the NPRM revises § 1386.2 to update terminology.

We propose to revise the title of subpart B to read: Subpart B—Protection and Advocacy of Individual Rights.

Section 1386.19 Definitions

This section of the NPRM revises the terms and definitions that apply in §§ 1386.20, 1386.21, 1386.24 and 1386.25 of this subpart and to subpart C. Specifically:

- The definition of "abuse" has been revised to be consistent with the interpretation contained in the preamble accompanying the Protection and Advocacy for Individual with Mental Illness (PAIMI) regulation, at 62 FR 53551 (Oct. 15, 1997). The current regulation includes a list of acts that constitute abuse. The new language indicates that what constitutes abuse is not limited to these acts. The regulation does not define specifically the threshold at which a violation of an individual's rights constitutes abuse. Such a decision would be up to the P&A system to determine based on their intimate knowledge of the situation on behalf of an individual with developmental disabilities. The definition is not intended to limit the authority of the courts to review the

determinations of P&As of whether individuals with developmental disabilities have been subject to abuse.

- The definition of “American Indian Consortium” was added to clarify the eligibility requirements for the award of an American Indian Consortium under the P&A program. The American Indian Consortium is unique to the P&A program and carries out the responsibilities and exercises the authorities specified for a state.

- The definition of “complaint” has been revised from language indicating that the complaint be tied to alleged abuse or neglect of an individual with a developmental disability to broader language indicating that the complaint relates to the status or treatment of an individual with a developmental disability.

- The definition of the term “facility” was deleted. The Act no longer refers to “facilities,” but instead refers to “a location in which services, supports, or other assistance are provided to an individual with a developmental disability.” See 42 U.S.C. 15043(a)(2)(H) (access authority) and 42 U.S.C. 15043(c) (definition of “records”). The Act’s use of this phrase confirms that P&As may serve persons residing in community settings so we also are deleting the definition of “Community living arrangements.”

- The term “full investigation” has been revised to delete reference to “facilities” and “clients” to be replaced with the phrase “individuals with developmental disabilities” as all eligible persons are to have access to P&A services, not just those where a client relationship has been established.

- The definition of “neglect” has been revised to indicate that an individual perpetrating the act of neglect now must be responsible for providing “services, supports or other assistance” rather than an individual providing “treatment or habilitation services.”

- The definition of “probable cause” has been revised. The proposed regulation indicates that the P&A system is the final arbiter of probable cause between itself and the organization or individuals from whom it is seeking records. The definition is not intended to affect the authority of the courts to review the determinations of P&As of whether probable cause exists.

- Additionally, a new definition of “Service Provider” has been proposed. The definition states, the term “service provider” refers to any individual (including a family member of an individual with a developmental disability), or a public or private organization or agency that provides,

directly or through contract, brief or long-term services, supports or other assistance to one or more individuals with developmental disabilities. Service providers include, but are not limited to, locations such as group homes, board and care homes, individual residence and apartments, day programs, public and private residential and non-residential schools (including charter schools), juvenile detention centers, hospitals, nursing homes, homeless shelters, and jails and prisons.

- A definition of “State Protection and Advocacy system” has been added to clarify that the term “State Protection and Advocacy System” is synonymous with the term “P&A” used elsewhere in this regulation, and the terms “system” and Protection and Advocacy system used in this part and in Part C.

Section 1386.20 Agency Designated To Administer the State Protection and Advocacy System

ADD is proposing to revise the title of section 1386.20 to Agency Designated To Administer the State Protection and Advocacy System from Designated State Protection and Advocacy Agency. The statute makes a distinction between the “system” which must be in existence and the agency implementing the system. See 42 U.S.C. 15043(a)(4). This phrase has been substituted throughout this section of the proposed rule as appropriate.

ADD also is proposing to revise paragraph (e)(6) regarding redesignation to clarify that the P&A and the designating official will have an opportunity to respond to comments from agencies administering the Federal protection and advocacy program. Additionally, statutory citations have been updated for paragraphs (d)(2)(i) and (f)(2), and paragraph (d)(4) has been slightly edited.

Section 1386.21 Requirements and Authority of the State Protection and Advocacy System

ADD is proposing to revise the title to include a reference to “State” in relation to the Protection and Advocacy System for clarity. In paragraphs (a) and (f) we are proposing to update terminology and statutory cites. We are proposing two substantive changes. First, we propose to revise paragraph (c) to include additional language regarding prohibited State actions which would diminish or interfere with the exercise of the P&As required authority. Second, in order to ensure that the notice and the opportunity for comment is given to all individuals who might potentially be interested in commenting, ADD is proposing to revise paragraph (h) to

indicate that prior to any Federal review of the State program, a 30-day notice and opportunity for public comment must be provided in the **Federal Register**.

To improve organization of the regulation, ADD is proposing to redesignate current § 1386.22 as section 1386.25 that would be included under a new subpart C. This section is discussed in more detail later in the preamble.

Current section 1386.23 is proposed to be revised and redesignated as § 1386.22, Periodic Reports: State Protection and Advocacy System.

Under proposed section 1386.22 ADD is proposing to revise the title to include a reference to “State” in relation to the Protection and Advocacy System for clarity. ADD is proposing to revise paragraph (a) to address the requirements of Section 144(e) of the Act (42 U.S.C. 15044), the applicable regulations and include information on the system’s program necessary for the Secretary to comply with Section 105(1), (2), and (3) of the Act (42 U.S.C. 15005). Each system must report on its achievement of the measures of progress for the proceeding year pursuant to section 1385.5.

ADD is proposing to revise paragraph (b) to clarify what financial report is required and that the report shall be submitted semiannually.

ADD also is proposing to revise paragraphs (c) and (d) to update terminology, including converting references to “Statement of Objectives and Priorities (SOP)” to Annual Statement of Goals and Priorities (SGP). Under paragraph (c), we also are proposing to include language regarding each area of emphasis and the measure of progress (measures of consumer satisfaction, improvement, and collaboration) as provided under section 1385.5 of this part to measures goals. If changes are made to the goals or the measures of progress established for a year, the SGP must be amended to reflect those changes. The SGP must include a description of how the Protection and Advocacy system operates, and where applicable, how it coordinates the State Protection and Advocacy program for individuals with developmental disabilities with other Protection and Advocacy programs administered by the State Protection and Advocacy system. This description must include the System’s processes for intake, internal and external referrals, and streamlining of advocacy services. The description also must address collaboration, the reduction of duplication and overlap of services, the sharing of information on service needs,

and the development of statements of goals and priorities for the various advocacy programs. In addition, we are proposing that each Protection and Advocacy system be required to disclose in its SGP whether it will be requesting or requiring fees or donations from clients as part of the intake process. This new requirement is being proposed in order that the public will have notice of such a policy and an opportunity to comment on it as part of the process required under paragraph (d).

Section 1386.24 Non-allowable costs for the State Protection and Advocacy System of the current regulations is proposed to be redesignated as section 1386.23. ADD is proposing to revise the title to include a reference to "State" in relation to the Protection and Advocacy System for clarity. We are republishing the full text of newly designated § 1386.23, Non-allowable costs for the State Protection and Advocacy System for the ease of public comment. No changes are proposed to be made in this section.

Finally, section 1386.25 Allowable litigation costs for the State Protection and Advocacy System, is proposed to be redesignated as section 1386.24. ADD is proposing to revise the title to include a reference to the "State Protection and Advocacy System" for clarity. We are republishing the remaining text for the ease of public comment.

Subpart C—Access To Records, Service Providers and Service Recipients

ADD is proposing to create a new subpart C. This change is being proposed because of the increased level of importance and detail that accessing records of individuals with developmental disabilities plays in supporting the P&A system in investigating suspected cases of abuse and neglect. ADD also is proposing to make the regulation on access to records consistent, where applicable, with the PAIMI regulation referenced earlier (42 CFR part 51.41). The goal is to ensure that all facets of the P&A system administered by the Department are subject to the same legally supportable requirements. ADD is the lead agency that administers the P&A system and the DD Act establishes those requirements. Many of the changes reflect the new access authority language contained in 42 U.S.C. 15043(a)(2)(I) and (J). Where we exercise discretion, we do so in the belief that the proposed provisions are necessary to meet Congress' underlying intent to ensure necessary access to records to promote the System's authority to investigate abuse and neglect and ensure the protection of rights. This broad interpretation of

available records and reports also is consistent with the requirements of the PAIMI regulations.

This NPRM addresses key provisions in subtitle C (42 U.S.C. 15043)(a)(1); (2)(A), (H), (I), (J); and (c) Protection and Advocacy of Individual Rights, in the DD Act that pertain to P&As access to service providers, access to recipients of services (i.e., individuals with developmental disabilities) and access to records when incidents of abuse or neglect are suspected or reported, the health and safety of individuals with developmental disabilities are in jeopardy or are suspected of being in jeopardy, or in the case of a death of an individual with a developmental disability. In addition, the NPRM addresses provisions in Subtitle C concerning when consent for access to records from an individual with a developmental disability or the individual's guardian, conservator or legal representative is required and when it is not required. Moreover, the NPRM addresses provisions in Subtitle C that describe examples of the types of records to which a P&A shall have access. Given the obligation of P&As to conduct investigations of the incidences described here and in certain circumstances to contact an individual's guardian, conservator or legal representative, the Administration on Developmental Disabilities takes the position in this NPRM that a P&A shall have prompt access to contact information of such individuals. The law and this NPRM make distinctions about when a P&A will have access to records between "routine incidents" and other incidents involving abuse, neglect, health, safety, or a death.

The NPRM approach to addressing these key provisions are not only consistent with the DD Act but also consistent with the 2nd Circuit decision in "State of Connecticut Office of Protection and Advocacy for Persons with Disabilities and James McGaughey, Executive Director, State of Connecticut, Office of Protection & Advocacy for Persons with Disabilities v. Hartford Board of Education, Hartford Public Schools and Robert Henry, Supt. Of School."

Consistent with the DD Act, the 2nd Circuit's decision, and the proposed definition of "service provider" elsewhere in this NPRM, when schools provide services to individuals with developmental disabilities, they must provide P&As with access to locations, individuals, and records under the conditions spelled out in the DD Act (42 U.S.C. 15043)(a)(1); (2)(A), (H), (I), (J); and (c)).

Second, the 2nd Circuit decision and this NPRM track the DD Act, requiring that a P&A have access at reasonable times to any individual with a developmental disability in a location in which services, supports, and other assistance are provided to such an individual, in order to carry out the purpose of Subtitle C ((42 U.S.C. 15043)(a)(2)(H)). It is important to note that the DD Act, and therefore this NPRM makes no distinctions on the basis of age with regard to access an individual by the P&A.

Third, the 2nd Circuit in its decision and this NPRM recognize that the charge to P&As is to engage in a *range* of activities—protect the legal and human rights of individuals with developmental disabilities and monitoring for incidents of abuse or neglect and the health and safety of individuals with developmental disabilities. Thus, a P&As work does not end when it investigates and brings to closure a specific incident of abuse or neglect or risk to health and safety. We interpret the DD Act as providing P&As with the authority to pro-actively monitor situations where abuse and neglect or risks to health and safety may occur. We believe this NPRM outlines reasonable parameters for which P&As may have access to individuals with developmental disabilities, their records, their service providers, and the locations where services are provided to them, even under non-emergency situations (i.e., those not involving allegations of abuse or neglect, probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy, or in the case of a death).

Fourth, this NPRM and the DD Act are very specific in terms of when consent for records is required. In situations in which an individual's health and safety are in immediate jeopardy or a death has occurred, no consent is required and access to records should be provided no later than within 24 hours (42 U.S.C. 15043(a)(2)(J)(ii)). The 2nd Circuit in its decision recognizes and cites the DD Act as having special conditions (noted here) when an emergency situation is the issue (i.e., those involving allegations of abuse or neglect, probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy, or in the case of a death).

Fifth, the 2nd Circuit, the DD Act (at 42 U.S.C. 15043(a)(2)(I)(iii)(III)–(V)), and this NPRM recognize the importance of having contact information when P&As are conducting investigations. As such, and consistent with the 2nd Circuit, this NPRM proposes to require that P&As

have access to contact information when conducting an investigation. In incidences of suspected or reported abuse or neglect (when such incidents have been reported or good cause has been shown), risks to health and safety, or in the case of a death of an individual with a developmental disability, timing is a vital factor. Service providers should maintain up-to-date contact information for individuals with developmental disabilities, and parents, guardians, legal representatives, or conservators for individuals with developmental disabilities. In the situations noted here, when asked by a P&A for this contact information, a service provider should provide the information immediately.

As indicated previously, section 1386.22 is proposed to be redesignated and renamed section 1386.25 Access to Records. We are proposing to revise section 1386.25(a)(3), as redesignated, to incorporate monitoring activities and changing reference to "health and safety" to "abuse or neglect." In paragraph (3)(i), we propose to add a requirement for disclosure of the name and address of a representative be given to the P&A promptly. ADD believes that it is critical to the investigative function that P&As be given access to the names of representatives promptly. This requirement prevents undue delay in the P&As' intervention in the prevention of further abuse and neglect. Paragraphs (a)(2)(iii) and (3)(ii), as redesignated, are republished with slight edits. Paragraph (3)(iii) has been changed to read, "the representative has failed or refused to act on behalf of the individual."

We also are proposing to make changes to section 1386.25(b) as redesignated. In paragraph (b)(1) we propose to delete reference to "supportive" and refer instead to "supports or assistance" and "service provider" to be consistent with the Act. The language regarding reports available to the P&A is based on Congress' intent to ensure access to records to promote the System's authority to investigate abuse or neglect and ensure the protection of rights. The remainder of paragraph (b) has been revised to reflect editorial changes.

ADD also is proposing to revise paragraph (c) of this section to reflect new authority contained in the DD Act of 2000. Specifically, the second sentence of (c)(1) proposes language related to access to the records of a deceased person without any showing of probable cause, and is based on our interpretation of 42 U.S.C. 15043 (a)(2)(j)(ii)(II). The provision also requires that a P&A have access to records of an individual with a

developmental disability within 24 hours of the P&A's written request when the P&A has probable cause to believe that the individual is in serious and immediate jeopardy. In the case of a deceased individual or where the P&A has probable cause to believe the individual is in serious and immediate jeopardy, the consent of another party is not necessary for access to the records. ADD is also proposing to set a standard in the regulation for determining whether a decedent had a developmental disability. The proposed regulation provides: "Any individual who dies in a situation in which services, supports, or other assistance are, have been, or may customarily be provided to individuals with developmental disabilities shall, for purposes of the P&A's obtaining access to the individual's records, be deemed an individual with a developmental disability." The purpose of this proposal is to simplify the task of P&As in establishing that the decedent was an individual with a developmental disability. Proving that the functional definition of the developmental disability which appears in Section 102(8) of the Act applies to a living person can be difficult; it will be all the more difficult to prove its application to an individual who is no longer living. In making this proposal ADD is seeking to avoid making access to the records of a deceased individual so difficult that the intent of Congress in enacting Section 143(a)(2)(j)(ii)(II) of the Act would be frustrated.

ADD is proposing to remove all of section 1386.25(e) as redesignated and consolidate the provisions into section 1386.28(e), discussed later in this preamble.

Proposed section 1386.25(d) addresses the remaining provisions regarding sharing and copying of records. This paragraph proposes, "If the organization or agency having possession of the records copies them for the P&A system, it may not charge the P&A system an amount that would exceed the amount it customarily charged other non-profit or State government agencies for reproducing documents." These revisions also will make this new section consistent with the PAIMI regulation. The PAIMI regulation states (42 CFR 51.41) that the P&A system may not be charged for copies more than is "reasonable" according to prevailing local rates, and certainly not a rate higher than that charged by any other service provider, and that nothing shall prevent a system from negotiating a lower fee or no fee. Many service providers have tried to impose excessive costs on P&As for

copies as a means of obstructing access. The above clarifications are necessary to prevent this from occurring. Also the clarification on the time frame during which copies of records must be provided to P&As is necessary to avoid the frequently long delays in this regard. Often it is the service provider and not the P&A which makes the copies of the requested records. Prompt access for the P&A to inspect records is of little assistance in its investigation if copies of the records themselves are not provided quickly.

In § 1386.25(d) it is not the intent of ADD that the requirement for P&As to have a right to use their own equipment for copying be used to require that organizations being investigated allow P&As to remove records from the organization's premises to make the copies. The remaining provisions of 1386.25 as redesignated, ((current regulations section 1386.22 (f), (g), (h) and (i))), are proposed to be incorporated into new §§ 1386.26 and 1386.27 as discussed below.

ADD is proposing a new section 1386.26 named "Denial or Delay of Access." This section parallels the PAIMI regulation at 42 CFR 51.43. Under this paragraph, P&As must be able to obtain the identities of service recipients from service providers (who have control of this information). The confidentiality of such P&A records as proposed are protected under other provisions of this regulation. In emergency situations or in the case of a service recipient's death, section 143(a)(2)(j)(ii) of the DD Act provides P&As with access to records of service recipients within 24 hours after written request is made and without consent. In that vein, we propose a one-business day deadline for providing the written justification denying access. ADD believes that such standards are necessary in recognition of the consequences of not accessing individuals quickly when there are allegations of abuse or neglect, probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy, or in the case of a death.

Section 1386.26 concludes with a description of the information that should be included in the justification denying access. This provision is contained in current regulations at 1386.22(i).

ADD is proposing a new section 1386.27 Access to Service Providers and Service Recipients to replace section 1386.22(f) of the current regulations. Under this section, the term "service provider" is substituted throughout for the term "facility." The language

otherwise remains the same except for editorial changes. We are proposing changes under (b)(1) through (3) to address the times and circumstances under which access shall be afforded. This language is consistent with the PAIMI regulation (62 FR 53561–62).

In this NPRM, we propose that P&A systems should not be required to provide notice to a service provider when they are coming to investigate an allegation of abuse or neglect, when they have probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy, or in the case of a death. However, P&As should give notice when it will be visiting a service provider as part of an investigation in non-emergency situations (those not involving allegations of abuse or neglect, probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy, or in the case of a death).

ADD is proposing that P&A systems should have the right to access service providers “all times necessary * * *” to conduct a full investigation, and particularly when the system has determined “probable cause” that there is or may be imminent danger of serious abuse or neglect of an individual. ADD believes that immediate access is necessary with respect to service providers to permit P&As to uncover situations that may involve immediate threats to health or safety. It also is necessary to prevent interested parties from concealing situations involving abuse or neglect or taking actions which may compromise evidence related to such incidents (such as intimidating staff or service recipients).

To address this, ADD is proposing a new subsection 1386.27(c) which replaces section 1386.22(g) of the current regulation. We are proposing to add new language in paragraph (c) to read, “A P&A also shall be permitted to attend treatment planning meetings concerning individual service recipients with the consent of the individual or his or her guardian, conservator or other legal representative. Access to facilities shall be afforded immediately upon an oral or written request by the P&A system. Except where complying with the P&A’s request would interfere with treatment or therapy to be provided, service providers shall provide access to individuals for the purpose covered by this paragraph within 24 hours of the system’s making a request. If the P&A’s access to an individual must be delayed beyond 24 hours to allow for the provision of treatment or therapy, the P&A shall receive access as soon as possible thereafter. Service recipients

subject to the requirements in this paragraph include adults or minors who have legal guardians or conservators. P&A activities shall be conducted so as to minimize interference with service provider programs, respect service recipients’ privacy interests, and honor a recipient’s request to terminate an interview.” Under the proposed rule, such access is for the purpose of:

(1) Providing information, training, and referral for programs addressing the needs of individuals with developmental disabilities, and information and training about individual rights, and the protection and advocacy services available from the P&A system, including the name, address, and telephone number of the P&A;

(2) Monitoring compliance with respect to the rights and safety of service recipients; and

(3) Inspecting, viewing and photographing all areas of a service provider’s premises which are used by service recipients or are accessible to them.

ADD is proposing these changes to clarify that access be permitted to treatment planning meetings (with the consent of the individual or his or her guardian), as such access is needed to assure that service providers are protecting the health and safety of service recipients. The limitation related to individual/guardian consent would provide an appropriate safeguard concerning privacy. Consent of other individuals who may be receiving treatment or services at the same location (for example, group therapy situations) will be tied to the policies of the premises where the care is being provided.

The ADD proposed regulations support the PAIMI Act regulation. For example, such access is supported by the legislative history of the PAIMI Act, which provides that P&As must be afforded “access to meetings within the facility regarding investigations of abuse and neglect and to discharge planning sessions.” S. Rep. 454, 100th Cong., 2d Sess. (1988). Based on this statement (and in the interest of assuring consistency with the PAIMI Program), the P&A also should be authorized to attend treatment team meetings, which serve some of the same purposes as discharge planning sessions. The DD Act and its case law generally support extremely broad access to individuals to monitor conditions relating to safety and health. We interpret these authorities, then, to generally support treatment team access; as such access is an important strategy in monitoring the adequacy of health care.

We are further proposing to move section 1386.22(h) in the current regulation to section 1386.27(d) in the proposed regulation. Changes proposed are only editorial.

Similar to the approach used in the PAIMI regulation at section 42 CFR 51.45, ADD is proposing to incorporate in a new section 1386.28, Confidentiality of Protection and Advocacy Systems Records. This section will replace the current ADD regulation in 45 CFR 1386.22(e), Access to Records, Facilities and Individuals that deals with P&A access authority. Because the confidentiality provisions relate to a broad range of client information, and not only materials obtained through the P&A’s access authority, it is more appropriate to address the issues in a separate, dedicated section of the regulation. ADD also proposes that the new provision on confidentiality be modeled after the existing provision on this subject in the PAIMI regulation at 42 CFR 51.45, with certain alterations. Paragraph (a) and (a)(1) of section 1386.28 as proposed mirror the existing provisions (1386.22(e) and (e)(3)) with editorial changes. Paragraphs (a)(1)(i), (ii), (iii) and (iv) contain new language to clarify that the P&A must keep confidential—records and information, in any automated electronic database pertaining to clients; individuals who have been provided general information or technical assistance on a particular matter; the identity of individuals who report incidents of abuse or neglect, or who furnish information that forms the basis for a determination that probable cause exists and names of individuals who have received services; and names of individuals who have received services, supports or other assistance, and who provided information to the P&A for the record. Paragraph (a)(2) remains the same as current regulations (1386.22(e)(2)). Paragraph (a)(2) requires the P&A systems to have written policies governing the access, storage, duplication and release of information from client records. Paragraph (a)(3) as proposed requires the P&A system to obtain written consent from the client and/or various other individuals, before releasing information on such individuals to individuals not authorized to receive such information.

Proposed paragraphs (b) and (c) reflect the critical need for P&As to disclose to other investigative and enforcement agencies information about ongoing or potential abuse and neglect and specific individuals affected. Frequently, a P&A will uncover, as part of its own investigation or monitoring efforts, information about abuse and

neglect which must be addressed promptly by other agencies with specialized State or Federal authority and/or greater resources, such as State licensing and certification agencies, the Department of Justice, and the police. In order for these agencies to act promptly and effectively, they must be provided specific information about individuals subject to abuse or neglect and the relevant circumstances. We recommend that such information be disclosed where possible with significant restrictions on redisclosure and only under those circumstances in which the P&As have obtained the information pursuant to the authority under the DD Act.

The NPRM redesignates subpart C as subpart D and revises the material to update statutory and U.S. Code citations to conform to the Developmental Disabilities Act of 2000 and update the wording of the State Councils on Developmental Disabilities.

In § 1386.30, State plan requirements, we are proposing in paragraph (c) that the State plan must be submitted through the Electronic Data Submission system rather than any other format. In paragraph (c)(2) new language on the plan goals is being proposed. The goals must be clearly expressed in terms of the area(s) of emphasis to be covered, the types of activity to be undertaken (i.e., advocacy, capacity building, systems change), the specific measures of progress to be used (consumer, collaboration, improvement), and if applicable, and not reflected otherwise, the extent to which unserved or underserved individuals or groups, particularly from ethnic or racial groups or geographic regions (e.g., rural) were the target of assistance or services (see Section 125(c)(7) and Section 105(1)(C) of the Act).

Paragraph (c)(3) proposes that the plan provide for the establishment and maintenance of a Council and describe the membership of the Council. This includes the requirement that the non-State agency members of the Council shall be subject to term limits to ensure rotating membership. Paragraph (d) proposes to require that the State plan be updated as appropriate during the five-year plan period and specifies that amendments to plans are required when substantive changes are made, including changes under proposed paragraph (c)(2) related to performance activities. In paragraph (e) we are proposing time limits (no longer than five years) for demonstration projects and activities performed by the Councils. A five-year time limit has been established to coincide with the duration of the State plan. Paragraph (a) is republished with

updated statutory citations, and paragraphs (b) and (f) are republished with updated statutory citations and editorial changes.

In § 1386.31 State plan submittal and approval, we are proposing to revise paragraph (b) to require that the plan be submitted to ADD rather than the appropriate regional office. Also, we are proposing to revise the provision which requires the Governor or the Governor's designee approval of the State plan or amendment. The regulation proposes that the State plan or amendment must be approved by the entity or individual authorized to do so under State law. This requires States to determine who would approve the State plan or amendment, which could be the Council, the Governor or the Governor's designee. This authorization could be based on such actions as: executive orders, proclamations, State statute, common law, or the State constitution. In paragraph (c) we are proposing to indicate that plans received during a quarter of the Federal fiscal year are approved back to the first day of the quarter so costs incurred from that point forward are approvable. Paragraphs (a) and (d) are proposed to be republished without change.

In § 1386.32, *Periodic reports*: Federal assistance to State Developmental Disabilities Councils, we are proposing to revise the title to read § 1386.32 Periodic reports: Federal assistance to State Councils on Developmental Disabilities. ADD is proposing to revise paragraph (a) to clarify what financial report is required and that the report shall be submitted semiannually. In § 1386.32(b) the reference to a statutory cite is proposed to be updated and language is revised to clarify that State Council's Program Performance Report (PPR) must be clearly expressed in terms of area(s) of emphasis to be covered, the types of activity to be undertaken (i.e., advocacy, capacity building, systems change), the measures of progress to be used, and if applicable, and not stated elsewhere in the document, the extent to which unserved or underserved individuals or groups, particularly from ethnic or racial groups or geographic regions (e.g., rural), were the target of assistance or services (see Section 125(c)(7) and Section 105(1)(C)). Under paragraphs (b)(1)–(12), each report must contain information about the progress made by the Council in achieving its goals. In new section 1386.32(c) each State Council on Developmental Disabilities must include in its Annual Program Performance Report information on its achievement of the measures of progress established pursuant to section 1385.5.

Section 1386.33, Protection of employee's interests, is revised to update statutory cites and to provide clarity.

Section 1386.34, Designated State Agency, is revised to update statutory cites and technical changes are made to provide clarity.

Section 1386.35, Allowable and non-allowable costs for Federal Assistance to State Councils on Developmental Disabilities, is proposed to be revised to update statutory cites with technical changes to provide clarity.

Section 1386.36, Final disapproval of the State plan or plan amendments, is revised to update statutory cites, remove references to the HHS Regional Offices, and contains slight editorial changes.

Subpart E—Practice and Procedure for Hearings Pertaining to State's Conformity and Compliance with Developmental Disabilities State Plans, Reports and Federal Requirements, formerly subpart D, is being revised to make technical changes and is republished in full.

Specifically under the General section, in section 1386.80 Definitions, we are proposing to add the terms Act and Department. In section 1386.81, Scope of rules, we have updated the legal cites. No changes are proposed to section 1386.82–1386.85 but these sections are republished for the ease of public comment. Under the section on Preliminary Matters—Notice and Parties, section 1386.90 is proposed to be revised to update references to the State Councils on Developmental Disabilities. Section 1386.91–1386.94 are proposed to be republished unchanged. Under Hearing Procedures, sections 1386.100–1386.109 are republished with technical edits made to sections 101 and 106. Finally under the section on Post-hearing Procedures and Decisions, no change is proposed to section 1386.110 but it is being republished for the ease of public comments and sections 1386.111–1386.112 have been revised to update legal cites.

PART 1387—PROJECTS OF NATIONAL SIGNIFICANCE

In § 1387.1 General Requirements ADD is proposing to revise paragraph (a) to indicate that all projects funded under this part must be of national significance and serve or relate to individuals with developmental disabilities to comply with section 161 of the Act as well as section 162 of the Act. We are proposing to remove the current regulatory language of paragraph (b) as the requirement for the Secretary to publish the proposed priorities for PNS funding in the **Federal Register** for

public comments is no longer required under the Act. Current regulatory language of paragraph (c) will now become paragraph (b), indicating that the requirements concerning format and content of the application, submittal procedures, eligible applicants, and final priority areas will be published in program announcements in the **Federal Register**. Current regulatory language of paragraph (d), with minor edits, will now become paragraph (c), indicating that in general, Projects of National Significance provide technical assistance, collect data, demonstrate exemplary and innovative models, disseminate knowledge at the local and national levels, and otherwise meet the goals of Part E of the Act, 42 U.S.C. 15081.

As the DD Act provided several new types of activities allowable under Projects of National Significance we are proposing in paragraph (d) to indicate that Projects of National Significance may engage in one or more of the types of activities provided in Section 161(2) of the statute.

As provided under new paragraph (e), funding for projects are to be awarded to public and private non-profit entities for wide applicability and impact. A request for proposal process shall solicit applications from non-profits, institutions of higher learning, State and local governments, and Tribal governments for PNS funding.

As provided under new paragraph (f), faith-based organizations are eligible to apply for PNS funding, providing that the faith-based organization meets the specific eligibility criteria contained in the Program Announcement for a given Fiscal Year.

Program Announcements, requesting proposals, are published in the **Federal Register** and posted on ADD's Web site at <http://www.acf.dhhs.gov/programs/add>. A panel of experts shall review and score each eligible application, received by the submission deadline, based on the evaluation criteria in the Program Announcement. Final funding decisions are made by the ADD Commissioner.

PART 1388—NATIONAL NETWORK OF UNIVERSITY CENTERS FOR EXCELLENCE IN DEVELOPMENTAL DISABILITIES EDUCATION, RESEARCH, AND SERVICE (UCEDDS)

The Notice of Proposed Rulemaking for the UCEDDs includes a number of changes to part 1388. The DD Act of 2000 included a significant restructuring of subtitle D—National Network of University Centers for Excellence in Developmental Disabilities Education, Research, and Service. These changes have led to a

proposed reorganization of the regulation.

First, section 1388.1, Definitions, has been changed to Purpose. Several of the terms under the proposed rule appear in proposed § 1385.3 of the regulation and other terms were removed from the DD Act of 2000 and therefore are no longer needed in the regulation. In the case of the term “Mandated Core Functions”, these are now more clearly defined under section 1388.2. In addition, “Research and Evaluation” is included as a Core Function separate from dissemination of information. Both are included and described in § 1388.2 of the proposed regulation. Section 1388.1 Purpose, as proposed provides information about the Centers, including their intended functions.

Sections 1388.2–1388.7 of the current regulation provides information about ‘Program Criteria’ for the UCEDDs in the following areas: Purpose, Mission, Governance and Administration, Preparation of Personnel, Services and Supports, Dissemination, and Peer Review. The DD Act of 2000 deleted the provisions specifically associated with the ‘Program Criteria’ and the proposed changes to the regulation are necessary to make it consistent with the DD Act of 2000.

The title of section 1388.2 has been changed to Core Functions. The DD Act of 2000 now refers to Core Functions of Centers. This section proposes to provide information about Core Functions, including the provision of interdisciplinary pre-service preparation and continuing education of students and fellows, provision of community services, the carrying out of research, and dissemination of information.

The title of section 1388.3 has been changed to National Training Initiatives on Critical and Emerging Needs. Centers have discretion in selecting the activities they will pursue within the broad definition of their purpose in the statute and therefore the current regulation which defines the mission of the Centers as a group is not needed. ADD proposes that revised section 1388.3 contain information about the National Training Initiatives on Critical and Emerging Needs, which replaces the Training Initiative Projects (TIPs) that appear in the current regulation. Under this section, supplemental grant funds for National Training Initiatives on Critical and Emerging Needs will be reserved when each Center funded has received a grant award of at least \$500,000, adjusted for inflation. The critical and emerging needs grants are to pay the Federal share of the cost of training initiatives and will be awarded

on a competitive basis for periods of not longer than 5 years.

The title of section 1388.4 Program Criteria—Governance and Administration, has been changed to Applications and provides information about a Center's eligibility for grant awards through applications as well as required application contents such as the five-year plan describing the projected goal(s) related to one or more areas of emphasis for each of the core functions; a number of assurances, including how the Center will address the projected goals, carry out goal-related activities, collaborate with the consumer advisory committee comprised of a cross-section of stakeholders (e.g., individuals with developmental disabilities and related disabilities, family members of individuals with developmental disabilities, a representative of the State Protection and Advocacy System, a representative of a self-advocacy organization, and representatives of other relevant organizations), strategies for leveraging additional public and private funds, director qualifications, and plans for information dissemination. The applications section also includes reference to the measures of progress, which now represent the regulatory standards for the Centers. The program criteria of the current regulation had been the basis for such standards. In addition, the Applications section proposes to include information about the peer review process, including the composition of the peer review groups. Finally, information about the Federal Share under the proposed rule is provided in the Applications section of the regulation. For the purpose of determining the Federal share with respect to the project, expenditures on that project by a political subdivision of a State or by a public or private entity shall be subject to the provisions of 45 CFR part 93—New Restrictions on Lobbying (see section 1385.9 Grants administration) and must be considered as an expenditure of the Center under subtitle D.

Section 1388.5 of the proposed rule has been revised to address the five-year plan and annual report. Provisions on ‘Program Criteria—Preparation of Personnel’ are no longer needed in this section because of changes in the DD Act of 2000 and changes made in other sections of this proposed rule. Under the proposal, section 1388.5 addresses the five-year plan and annual report and includes requirements for Centers to report on their progress. The Annual Report must be submitted by July 31st of each year and include information on the progress made in achieving the

projected goals, proposed revisions to the goals, and a description of successful efforts to leverage funds. The timeframe for the Annual Report is tied to the UCEDDs fiscal and reporting cycle. The five-year plan must be amended to reflect changes made to the measures of progress established for any year.

We propose to delete the remaining paragraphs in section 1388 to reflect the DD Act of 2000 and changes made elsewhere in the proposed rule.

Amended Proposed Regulations, 45 CFR Parts 1385, 1386, 1387, and 1388

The Administration on Developmental Disabilities presents 45 CFR parts 1385, 1386, 1387, and 1388 as an amended whole in response to numerous requests by direct consumers, family members of individuals with developmental disabilities, members of advocacy organizations, and the Developmental Disabilities Network. Reprinting the regulation in its entirety to include the proposed new regulations and the current regulation will assist these individuals in responding to the proposed rule, especially the proposed measures of progress.

Impact Analysis

Executive Order 12866

Executive Order 12866 requires that regulations be drafted to ensure that they are consistent with the priorities and principles set forth in Executive Order 12866. The Department has determined that this proposed rule is consistent with these priorities and principles.

Executive Order 12866 encourages agencies, as appropriate, to provide the public with meaningful participation in the regulatory process. The proposed rule seeks to implement the Developmental Disabilities Act of 2000 and especially provisions of the Act addressing program accountability and indicators of progress. In developing

this regulation, we considered input we received from the developmental disabilities community, especially in relation to our extensive discussion on the issue of performance outcomes with the grantees of the ADD network (State Councils on Developmental Disabilities, P&As, UCEDDs, and the national organizations that represent them: The National Association of Developmental Disability Councils (NADDC), the National Association of Protection and Advocacy Systems (NAPAS), and the Association of University Centers on Disabilities (AUCD). In addition, we are providing a 60 day public comment period.

Regulatory Flexibility Analysis

The Secretary certifies under 5 U.S.C. 605(b), the Regulatory Flexibility Act (Pub. L. 96-354), that this regulation will not have a significant economic impact on a substantial number of small entities. The primary impact of this regulation is on State Councils on Developmental Disabilities, State Protection and Advocacy Systems, and UCEDDs. P&As are administered by small nonprofits. This regulation will support the work of the P&As by providing guidance regarding access to service providers and records of individuals in order to investigate potential abuse and neglect. Service providers will be impacted if a complaint is made against them. Similarly, this regulation will support the work of UCEDDs by providing guidance on the administration of the program, especially the measures of progress, which now represent the regulatory standards for the UCEDDs. The regulation does not have a significant economic impact on these entities. We estimate an average impact of \$300 per grantee, resulting in a total cost across the DD network of less than \$100,000.

This rule is considered a "significant regulatory action" as it relates to service

providers and the P&As. If a complaint is made against a service provider and the P&A investigates potential abuse and neglect, it may result in adversely affecting those service providers in a material way, (section 3(f)(1) of Executive Order 12866). Therefore, this proposed regulation has been reviewed by the Office of Management and Budget.

Paperwork Reduction Act of 1995

Sections 1386.22, 1386.32, and 1388.5 contain information collection requirements. In Section 1386 of the NPRM, the State Council on Developmental Disabilities Program Performance Report and the Protection and Advocacy Statement of Goals and Priorities required reinstatement from OMB. Further changes to these reports will be required once the indicators of progress are established through final regulations. For the Protection and Advocacy Program Performance Report in Section 1386 of the NPRM, the OMB Standard Form—PPR will be used.

Recordkeeping and reporting requirements for the UCEDDs (Part 1388) include the submission of an approved grant application (section 154(a)(2) of the Act (42 U.S.C. 15064)) and a new annual report (section 154(e)). The application for core funding uses OMB Standard Form 424—Application for Federal Assistance and Budget Information. The annual report will require a new reporting format that will address the satisfaction of individuals with developmental disabilities with advocacy, capacity building, and systemic change activities; the extent to which the advocacy, capacity building, and systemic change activities provided results through improvements; and the extent to which collaboration was achieved in the areas of advocacy, capacity building and systemic change activities.

REPORTING AND RECORDKEEPING REQUIREMENTS IN PART 1386 AND 1388 OF THE NPRM

		Expires	Annual number of respondents	Average burden response (hours)	Annual burden hours
1386.22(a) SF-PPR	0970-0334	06/30/2009	57	44	2,508
1386.22(c) P&A SGP Reinstatement	0980-0270	11/30/2009	57	44	2,508
1386.30(c) Council State Plan	0980-0162	05/31/2009	55	80	4,400
1386.32(b) Council PPR Reinstatement	0980-0172	02/28/2009	55	44	2,420
1386.32(a) Council Financial Status Report (ADD-02B):					
ADD-02 Council	0980-0212	05/31/2009	55	8	440
1388.5(b) UCEDD Annual Report	0970-0289	08/31/2008	67	200	13,400

The Administration for Developmental Disabilities will

consider comments by the public on

these collections of information in the following areas:

(a) Evaluating whether the proposed collection(s) is (are) necessary for the proper performance of the functions of ADD, including whether the information will have practical utility;

(b) Evaluating the accuracy of the ADD's estimate of the burden of the proposed collection(s) of information, including the validity of the methodology and assumptions used;

(c) Enhancing the quality, usefulness and clarity of the information to be collected; and

(d) Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technology, e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collection(s) of information contained in these proposed regulations 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. This does not affect the deadline for the public to comment to the Department on the NPRM. Written comments to OMB for the proposed information collection should be sent directly to OMB either by FAX to 202-395-6974 or by e-mail to OIRA_submission@omb.eop.gov, attn: desk officer for the Administration for Children and Families.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act) requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in expenditures by State, local and Tribal governments, in the aggregate, or by the private sector, of \$100 million, adjusted for inflation, or more in any one year.

If a covered agency must prepare a budgetary impact statement, section 205 further requires that it select the most cost-effective and least burdensome alternatives that achieves the objectives of the rule and consistent with the statutory requirements. In addition, section 203 requires a plan for informing and advising any small government that may be significantly or uniquely impacted by a proposed rule.

We have determined that this rule does not result in the expenditure by State, local, and Tribal government in the aggregate, or by the private sector of more than \$100 million in any one year.

Congressional Review

This rule is not a major rule as defined in 5 U.S.C. § 804(2).

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a policy or regulation may affect family well being. If the agency's conclusion is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. These regulations do not have an impact on family well being as defined in the legislation.

Executive Order 13132

Executive Order 13132 on "federalism" was signed August 4, 1999. The purposes of the Order are: ". . . to guarantee the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution, to ensure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies, and to further the policies of the Unfunded Mandates Reform Act. . . ."

The Department certifies that this rule does not have a substantial direct effect on States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government.

ADD is not aware of any specific State laws that would be preempted by the adoption of the regulation in subpart C of 45 CFR part 1386. ADD would welcome comments from any State whose laws would be in conflict with the requirements of the proposed regulation or whose laws require modification to establish compliance with requirements of the proposed regulation. States should alert ADD in their comments of the specific provisions of the NPRM that would require delay in the effective dates in order to bring State laws into conformance. ADD will consider delaying the effective date of some provisions in the final regulation if States must modify legislation or enact new legislation to bring their laws into conformance with the new regulation. The rule does not impose unfunded mandates.

This proposed rule does contain regulatory policies with federalism implications that require specific consultation with State or local elected

officials. For example, compliance with the indicators of progress is mandatory for State programs. However, prior to the development of the rule, the Administration on Developmental Disabilities consulted with State Developmental Disabilities Councils, P&As, and UCEDDs to minimize any substantial direct effect on them and indirectly on States.

List of Subjects

45 CFR Part 1385

Disabled, Grant programs/education, Grant programs/social programs, Reporting and recordkeeping requirements.

45 CFR Part 1386

Disabled, Administrative practice and procedures, Grant programs—education, Grant programs—social programs, Reporting and recordkeeping requirements.

45 CFR Part 1387

Administrative practice and procedure, Grant programs—education, Grant programs—social programs, Individuals with disabilities.

45 CFR Part 1388

Colleges and Universities, Grant programs/education, Grant programs/social programs/University Centers for Excellence in Developmental Disabilities Education, Research and Services.

(Catalog of Federal Domestic Assistance Program, Nos. 93.630 Developmental Disabilities Basic Support and 93.632 Developmental Disabilities—University Centers for Excellence)

Dated: November 20, 2007.

Daniel C. Schneider,

Acting Assistant Secretary for Children and Families.

Approved: November 26, 2007.

Michael O. Leavitt,

Secretary, Department of Health and Human Services.

Editorial Note: This document was received at the Office of the Federal Register on April 3, 2008.

For reasons set forth in the preamble, The Department of Health and Human Services proposes to amend subchapter I, chapter XIII, of title 45 of the Code of Federal Regulations as set forth below.

1. Revise part 1385 to read as follows:

PART 1385—REQUIREMENTS APPLICABLE TO THE DEVELOPMENTAL DISABILITIES PROGRAM

Section Contents
Sec.

- 1385.1 General.
- 1385.2 Purpose of the regulations.
- 1385.3 Definitions.
- 1385.4 Rights of individuals with developmental disabilities.
- 1385.5 Program accountability and indicators of progress.
- 1385.6 Employment of individuals with disabilities.
- 1385.7 Reports to the Secretary.
- 1385.8 Formula for determining allotments.
- 1385.9 Grants administration requirements.

Authority: 42 U.S.C. 15001 *et seq.*

§ 1385.1 General.

Except as specified in §§ 1385.4 and 1385.5, the requirements in this part are applicable to the following programs and projects:

- (a) Federal Assistance to State Councils on Developmental Disabilities;
- (b) Protection and Advocacy of Individual Rights;
- (c) Projects of National Significance; and
- (d) National Network of University Centers for Excellence in Developmental Disabilities Education, Research, and Service.

§ 1385.2 Purpose of the regulations.

These regulations implement the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 *et seq.*).

§ 1385.3 Definitions.

The following definitions apply:

ACF. The term “ACF” means the Administration for Children and Families within the Department of Health and Human Services.

Act. The term “Act” means the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 *et seq.*).

Accessibility. The term “Accessibility” means that programs funded under the DD Act of 2000 and facilities which are used in those programs meet applicable requirements of 45 CFR part 84 and the Americans with Disabilities Act of 1990.

ADD. “ADD” means the Administration on Developmental Disabilities, within the Administration for Children and Families.

ADD Network. “ADD Network” means the State Councils on Developmental Disabilities, the Protection and Advocacy System, and the University Centers for Excellence in Developmental Disabilities Education, Research, and Service.

Advocacy activities. The term “Advocacy activities” means active support of policies and practices that promote self-determination and inclusion in the community and workforce for individuals with

developmental disabilities and their families.

Areas of emphasis. The term “areas of emphasis” means the areas related to quality assurance activities, education activities and early intervention activities, child care-related activities, health-related activities, employment-related activities, housing-related activities, transportation-related activities, recreation-related activities, and other services available or offered to individuals in a community, including formal and informal community supports that affect their quality of life.

Assistive technology device. The term “assistive technology device” means any item, piece of equipment, or product system, whether acquired commercially, modified or customized, that is used to maintain, increase amount of or improve quality of the functional capabilities of individuals with developmental disabilities.

Assistive technology service. The term “assistive technology service” means any service that directly assists an individual with a developmental disability in the selection, acquisition, or use of an assistive technology device. Such term includes: conducting an evaluation of the needs of an individual with a developmental disability, including a functional evaluation of the individual in the individual’s environment; purchasing, leasing, or otherwise providing for the acquisition of an assistive technology device by an individual with a developmental disability; selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing or replacing an assistive technology device; coordinating and using another therapy, intervention, or service with an assistive technology device, such as a therapy, intervention, or service associated with an education or rehabilitation plan or program; providing training or technical assistance for an individual with a developmental disability, or, where appropriate, a family member, guardian, advocate, or authorized representative of an individual with a developmental disability; and providing training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, serve, employ, or are otherwise substantially involved in the major life functions of an individual with developmental disabilities.

Capacity building activities. The term “capacity building activities” means a system for sustaining and expanding the successful delivery of services, support and other assistance to individuals with

developmental disabilities and their families.

Center. The term “Center” means a University Center for Excellence in Developmental Disabilities Education, Research, and Service (UCEDD) established under subtitle D of the DD Act of 2000.

Child care-related activities. The term “child care-related activities” means advocacy, capacity building, and systemic change activities that result in families of children with developmental disabilities having access to and use of child care services, including before-school, after-school, and out-of-school services, in their communities.

Collaboration. The term “collaboration” means the use of interagency agreements and similar mechanisms by agencies under the Act (State Developmental Disabilities Councils, the Protection and Advocacy agencies and the University Centers for Excellence in Developmental Disabilities Education Research, and Service). These agencies may work among themselves and with private individuals, groups, and organizations and State and local government agencies to foster cooperation in achieving the purposes of the Act.

Commissioner. The term “Commissioner” means the Commissioner of the Administration on Developmental Disabilities, Administration for Children and Families, Department of Health and Human Services, or his or her designee.

Culturally competent. The term “culturally competent,” means that services, supports, or other assistance that are conducted or provided in a manner that is responsive to the beliefs, interpersonal styles, attitudes, language, and behaviors of individuals who are receiving the services, supports or other assistance, and in a manner that has the greatest likelihood of ensuring their maximum participation in the program involved.

Department. The term “Department” means the U.S. Department of Health and Human Services.

Developmental disability. The term “developmental disability,” as determined on a case by case basis, means a severe, chronic disability of an individual that—

- (1) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
- (2) Is manifested before the individual attains age 22;
- (3) Is likely to continue indefinitely;
- (4) Results in substantial functional limitations in three or more of the following areas of major life activity—
 - (i) Self-care;

(ii) Receptive and expressive language;
(iii) Learning;
(iv) Mobility;
(v) Self-direction;
(vi) Capacity for independent living;
and

(vii) Economic self-sufficiency.

(5) Reflects the individual's need for a combination and sequence of special, interdisciplinary or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated.

(6) An individual from birth to age nine, inclusive, who has a substantial developmental delay or specific congenital or acquired condition, may be considered to have a developmental disability without meeting three or more of the criteria described in (A)(1) through (5), if the individual, without services and supports, has a high probability of meeting those criteria later in life.

Early intervention activities. The term "early intervention activities" means advocacy, capacity building, and systemic change activities provided to infants and young children described in the definition of "developmental disability" and their families to enhance the development of the individuals to maximize their potential, and the capacity of families to meet the special needs of the individuals.

Education activities. The term "education activities" means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities being able to access appropriate supports and modifications when necessary, to maximize their educational potential, to benefit from lifelong educational activities, and to be integrated and included in all facets of student life.

Employment-related activities. The term "employment-related activities" means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities acquiring, retaining, or advancing in paid employment, including supported employment or self-employment, in integrated settings in a community.

Family support services. The term "family support services" means services, supports, and other assistance, provided to families with a member or members who have developmental disabilities, that are designed to: strengthen the family's role as primary caregiver; prevent inappropriate out-of-the-home placement of the members and maintain family unity; and reunite, whenever possible, families with

members who have been placed out of the home. This term includes respite care, provision of rehabilitation technology and assistive technology, personal assistance services, parent training and counseling, support for families headed by aging caregivers, vehicular and home modifications, and assistance with extraordinary expenses associated with the needs of individuals with developmental disabilities.

Fiscal year. The term "fiscal year" means the Federal fiscal year unless otherwise specified.

Governor. The term "Governor" means the chief executive officer of a State, as that term is defined in the Act, or his or her designee who has been formally designated to act for the Governor in carrying out the requirements of the Act and the regulations.

Health-related activities. The term "health-related activities" means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities having access to and use of coordinated health, dental, mental health, and other human and social services, including prevention activities, in their communities.

Housing-related activities. The term "housing-related activities" means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities having access to and use of housing and housing supports and services in their communities, including assistance related to renting, owning, or modifying an apartment or home.

Inclusion. The term "inclusion," means the acceptance and encouragement of the presence and participation of individuals with developmental disabilities by individuals without disabilities in social, educational, work, and community activities that enable individuals with developmental disabilities to have friendships and relationships with individuals of their own choice; live in homes close to community resources with regular contact with individuals without disabilities in their communities; enjoy full access and active participation in the same community activities and types of employment as individuals without disabilities; and take full advantage of their integration into the same community as individuals without disabilities, living, learning, working, and enjoying life in regular contact with individuals without disabilities.

Indicators of progress. The term "indicators of progress" means the grantee's compliance with its own self-

selected, ADD approved, measures of progress.

Individualized supports. The term "individualized supports" means supports that: Enable an individual with a developmental disability to exercise self-determination, be independent, be productive, and be integrated and included in all facets of community life; designed to enable such individual to control such individual's environment, permitting the most independent life possible; and prevent placement into a more restrictive living arrangement than is necessary and enable such individual to live, learn, work, and enjoy life in the community; and include early intervention services, respite care, personal assistance services, family support services, supported employment services support services for families headed by aging caregivers of individuals with developmental disabilities, and provision of rehabilitation technology and assistive technology, and assistive technology services.

Integration. The term "integration," means exercising the equal rights of individuals with developmental disabilities to access and use the same community resources as are used by and available to other individuals.

Measures of progress. The term "measures of progress" means the grantee's standards of performance that they have developed pursuant to section 1385.5.

Not-for-profit. The term "not-for-profit," used with respect to an agency, institution or organization, means an agency, institution, or organization that is owned or operated by one or more corporations or associations, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

Personal assistance services. The term "personal assistance services" means a range of services provided by one or more individuals designed to assist an individual with a disability to perform daily activities, including activities on or off a job that such individual would typically perform if such individual did not have a disability. Such services shall be designed to increase such individual's control in life and ability to perform everyday activities, including activities on or off a job.

Prevention activities. The term "prevention activities" means activities that address the causes of developmental disabilities and the exacerbation of functional limitation, such as activities that: Eliminate or reduce the factors that cause or predispose individuals to developmental disabilities or that

increase the prevalence of developmental disabilities; increase the early identification of problems to eliminate circumstances that create or increase functional limitations; and mitigate against the effects of developmental disabilities throughout the lifespan of an individual.

Productivity. The term “productivity” means engagement in income-producing work that is measured by increased income, improved employment status, or job advancement, or engagement in work that contributes to a household or community.

Protection and Advocacy Agency. The term “Protection and Advocacy Agency” means the organization or agency designated in a State to administer and operate a protection and advocacy (P&A) system for individuals with developmental disabilities. A P&A system is authorized to investigate incidents of abuse and neglect regarding persons with developmental disabilities and the rights of such individuals. The P&A may provide information and referral to programs and services addressing the needs of such individuals. The Protection and Advocacy agency also shall provide advocacy services under other Federal programs and undertake the other activities authorized therein, except when participation in such program is inconsistent with its duties under the Act.

Quality assurance activities. The term “quality assurance activities” means advocacy, capacity building, and systemic change activities that result in improved consumer and family-centered quality assurance and that result in systems of quality assurance and consumer protection that include monitoring of services, supports, and assistance provided to an individual with developmental disabilities that ensures that the individual will not experience abuse, neglect, sexual or financial exploitation, or violation of legal or human rights; and will not be subject to the inappropriate use of restraints or seclusion; include training in leadership, self-advocacy, and self-determination for individuals with developmental disabilities, their families, and their guardians to ensure that those individuals will not experience abuse, neglect, sexual or financial exploitation, or violation of legal or human rights; and will not be subject to the inappropriate use of restraints or seclusion; or include activities related to interagency coordination and systems integration that result in improved and enhanced services, supports, and other assistance that contribute to and protect the self-

determination, independence, productivity, and integration and inclusion in all facets of community life of individuals with developmental disabilities.

Recreation-related activities. The term “recreation-related activities” means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities having access to and use of recreational, leisure, and social activities, in their communities.

Rehabilitation technology. The term “rehabilitation technology” means the systematic application of technologies, engineering methodologies, or scientific principles to meet the needs of, and address the barriers confronted by individuals with developmental disabilities in areas that include education, rehabilitation, employment, transportation, independent living, and recreation. Such terms include rehabilitation engineering, and the provision of assistive technology devices and assistive technology services.

Required planning documents. The term “required planning documents” means the State plans required by § 1386.30 of this part for the State Council on Developmental Disabilities; the Annual Statement of Goals and Priorities required by § 1386.22(c) for P&As; and the Five-Year plan required by § 1388.5(a)(4) for UCEDDs.

Secretary. The term “Secretary” means the Secretary of Health and Human Services.

Self-determination activities. The term “self-determination activities” means activities that result in individuals with developmental disabilities, with appropriate assistance, having the ability and opportunity to communicate and make personal decisions; the ability and opportunity to communicate choices and exercise control over the type and intensity of services, supports, and other assistance the individuals receive; the authority to control resources to obtain needed services, supports, and other assistance; opportunities to participate in, and contribute to, their communities; and support, including financial support, to advocate for themselves and others to develop leadership skills through training in self-advocacy to participate in coalitions, to educate policymakers, and to play a role in the development of public policies that affect individuals with developmental disabilities.

State. The term “State”, includes, in addition to each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands,

Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

State Council on Developmental Disabilities. The term “State Council on Developmental Disabilities” means a Council established under Section 125 of the DD Act.

Supported employment services. The term “supported employment services” means services that enable individuals with developmental disabilities to perform competitive work in integrated work settings or work for individuals for whom competitive employment has been interrupted or intermittent as a result of significant disabilities, and who, because of the nature and severity of their disabilities, need intensive supported employment services or extended services in order to perform such work.

Systemic change activities. The term “systemic change activities” means a sustainable, transferable and replicable change in some aspect of service or support availability, design or delivery that promotes positive or meaningful outcomes for individuals with developmental disabilities and their families.

Transportation-related activities. The term “transportation-related activities” means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities having access to and use of transportation.

UCEDDs. The term “UCEDD” means University Centers for Excellence in Developmental Disabilities Education, Research, and Service, also known by the term “Center” under Section 102(5) of the Act.

Unserved and underserved. The term “unserved and underserved” includes populations such as individuals from racial and ethnic minority backgrounds, disadvantaged individuals, individuals with limited English proficiency, individuals from underserved geographic areas (rural or urban) and specific groups of individuals within the population of individuals with developmental disabilities, including individuals who require assistive technology in order to participate in community life.

§ 1385.4 Rights of individuals with developmental disabilities.

(a) Section 109 of the Act, Rights of Individuals with Developmental Disabilities (42 U.S.C. 15009), is applicable to the State Councils on Developmental Disabilities.

(b) In order to comply with Section 124(c)(5)(H) of the Act (42 U.S.C. 15024(c)(5)(H)), regarding the rights of

individuals with developmental disabilities, the State participating in the Developmental Disabilities Council program must meet the requirements of 45 CFR 1386.30(f)(2).

(c) Applications from UCEDDs also must contain an assurance that the human rights of individuals assisted by this program will be protected consistent with Section 101(c) (see Section 154(a)(3)(D) of the Act).

§ 1385.5 Program accountability and indicators of progress.

(a) Program Accountability Process.

(1) The required planning document and updates must classify under one or more areas of emphasis (as defined in section 1385.3 of this part) each of the goals related to advocacy, capacity building, and systemic change activities the State Council on Developmental Disabilities, P&A, or UCEDD will be pursuing during each of the years covered by the document. For UCEDDs, goal activities also must be classified in terms of mandated core functions.

(2) State Councils on Developmental Disabilities, P&As and UCEDDs must state in the required planning document the measures of progress to measure consumer satisfaction, collaboration, or improvement for each established goal under each selected area of emphasis during any year covered by the planning document. The measures of progress developed by State Councils, P&As, and UCEDDs must be able to, over time, demonstrate whether the grantee has achieved progress in meeting the goals of the Act through its advocacy, capacity building, and systemic change activities.

(3) Measures of progress included in the required planning document, or in revisions to such document, shall meet the requirements under this part. In the event that one or more of the measures of progress included in the required planning document, or an amendment to the document, do not meet the requirements under this part, the Commissioner shall decline to accept the planning document, or the revision to such document, submitted by the grantee.

(4) Each State Council on Developmental Disabilities pursuant to section 1386.32(b), P&A pursuant to § 1386.22(a), and UCEDD pursuant to § 1388.5(a)(4) must report the results of the measures of progress measuring consumer satisfaction, collaboration, or improvement for each area of emphasis under which a goal has been established for the year on which it is reporting. The report must include information necessary for the Secretary to comply

with the Act and other information required by the applicable regulation.

(b) *Measures of Progress.* For each of the areas of emphasis under which a grantee has established a goal(s), it shall meet approved annual measures for successful achievement of progress.

(c) *Indicators of Progress.* For each of the areas of emphasis under which a State Council on Developmental Disabilities, a P&A, or a UCEDD has classified activities, the indicators of progress shall be the achievement of the measures of progress they have established pursuant to this section for the year on which it is reporting. Each State Council on Developmental Disabilities, P&A, and UCEDD is required to meet the indicators of progress for each of the areas of emphasis in which it has classified activities for the year on which it is reporting.

(d) *Measures of Consumer Satisfaction.* Each State Council on Developmental Disabilities, P&A, and UCEDD must:

(1) establish criteria in its planning document, or any revision, on the level of consumer satisfaction to be attained for each area of emphasis for which goals are identified, and

(2) track consumer satisfaction for each area of emphasis for which goals are identified through the end of each year. If, for any reason, a State Council on Developmental Disabilities, P&A, or UCEDD does not fully perform a planned activity related to a goal under an area of emphasis, as appropriate, the consumer satisfaction with the activity shall be measured by the grantee on the basis of the portion of the activity performed.

(e) *Measures of Collaboration.* (1) Each State Council on Developmental Disabilities, P&A, and UCEDD must identify in its planning document, and any revision, the collaborative activities that it will implement for each area of emphasis under which it has identified one or more goals. Each UCEDD also must identify the collaborative activities it will implement with UCEDDs in other States which are pursuing similar activities under the same areas of emphasis.

(2) Collaboration by each State Council on Developmental Disabilities, P&A, and UCEDD with other grantees within the State must include the following:

(i) A meeting with the other grantees in the State on the proposed collaboration and on the implementation of the agreed upon collaborative activities;

(ii) A Memorandum of Understanding on the collaboration initiative agreed

upon by each of the other grantees in the State, signed by the administering officials of the State Council, P&A, and UCEDD.

(f) *Measures of Improvement.* (1) Each State Council on Developmental Disabilities, P&A, and UCEDD must establish for each year covered by the planning document the measures of improvement it will attain in each area of emphasis for which goals have been identified by assessing the extent to which grantee activities have enabled individuals with developmental disabilities to:

(i) Make choices and exert control over the type, intensity, and timing of services, supports and assistance in the area of emphasis;

(ii) Participate in the full range of community life associated with the area of emphasis with persons of the individual's choice; and

(iii) Access services, supports and assistance in the area of emphasis in a manner that ensures that such individuals are free from abuse, neglect, sexual and financial exploitation, violation of legal and human rights, and the inappropriate use of restriction and seclusion.

(2) State Councils on Developmental Disabilities, P&As, and UCEDDs may adopt additional measures of progress to assess their performance during a year.

§ 1385.6 Employment of individuals with disabilities.

Each grantee which receives Federal funding under the Act must meet the requirements of Section 107 of the Act (42 U.S.C. 15007) regarding affirmative action. The grantee must take affirmative action to employ and advance in employment and otherwise treat qualified individuals with disabilities without discrimination based upon their physical or mental disability in all employment practices such as the following: advertising, recruitment, employment, rates of pay or other forms of compensation, selection for training, including apprenticeship, upgrading, demotion or transfer, and layoff or termination. This obligation is in addition to the requirements of 45 CFR part 84, subpart B, prohibiting discrimination in employment practices on the basis of disability in programs receiving assistance from the Department. Recipients of funds under the Act also may be bound by the provisions of the Americans with Disabilities Act of 1990 (Pub. L. 101-336, 42 U.S.C. 12101 *et seq.*) with respect to employment of individuals with disabilities. Failure to comply with Section 107 of the Act may result in loss of Federal funds under the

Act. If a compliance action is taken, the State will be given reasonable notice and an opportunity for a hearing as provided in subpart E of 45 CFR part 1386.

§ 1385.7 Reports of the Secretary.

All grantee submission of plans, applications and reports must label goals, activities and results clearly in terms of the following: area of emphasis, type of activity (advocacy, capacity building, systemic change), and categories of measures of progress.

§ 1385.8 Formula for determining allotments.

The Commissioner will allocate funds appropriated under the Act for the State Councils on Developmental Disabilities and the P&As on the following basis:

(a) Two-thirds of the amount appropriated will be allotted to each State according to the ratio the population of each State bears to the population of the United States. This ratio is weighted by the relative per capita income for each State. The data used to compute allotments are supplied by the U.S. Department of Commerce for the three most recent consecutive years for which satisfactory data are available.

(b) One-third of the amount appropriated will be allotted to each State on the basis of the relative need for services of persons with developmental disabilities. The relative need is determined by the number of persons receiving benefits under the Childhood Disabilities Beneficiary Program [(Section 202(d)(1)(B)(ii) of the Social Security Act), (42 U.S.C. 402(d)(1)(B)(ii)].

§ 1385.9 Grants administration requirements.

(a) The following parts of title 45 CFR apply to grants funded under parts 1386 and 1388 of this chapter, and to grants for Projects of National Significance under Section 162 of the Act (42 U.S.C. 15082).

45 CFR Part 16—Procedures of the Departmental Grant Appeals Board.

45 CFR Part 46—Protection of Human Subjects.

45 CFR Part 74—Administration of Grants.

45 CFR Part 76—Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace.

45 CFR Part 80—Nondiscrimination under Programs Receiving Federal Assistance through the Department of Health and Human Services—Effectuation of title VI of the Civil Rights Act of 1964.

45 CFR Part 81—Practice and Procedures—Practice and Procedure for Hearings Act under Part 80 of this title.

45 CFR Part 84—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance.

45 CFR Part 86—Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance.

45 CFR Part 91—Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from HHS.

45 CFR Part 92—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

45 CFR Part 93—New restrictions on Lobbying.

(b) The Departmental Appeals Board also has jurisdiction over appeals by any grantee that has received grants under the UCEDD programs or for Projects of National Significance. The scope of the Board's jurisdiction concerning these appeals is described in 45 CFR part 16.

(c) The Departmental Appeals Board also has jurisdiction to decide appeals brought by the States concerning any disallowances taken by the Commissioner with respect to specific expenditures incurred by the States or by contractors or subgrantees of States. This jurisdiction relates to funds provided under the two formula programs—subtitle B of the Act—Federal Assistance to State Councils on Developmental Disabilities, and subtitle C of the Act—Protection and Advocacy of Individual Rights. Appeals filed by States shall be decided in accordance with 45 CFR part 16.

(d) In making audits and examination to any books, documents, papers, and transcripts of records of State Councils on Developmental Disabilities, the UCEDDs and the Projects of National Significance grantees and subgrantees, as provided for in 45 CFR part 74 and part 92, the Department will keep information about individual clients confidential to the maximum extent permitted by law and regulations.

(e)(1) The Department or other authorized Federal officials may access client and case eligibility records or other records of a P&A system for audit purposes, and for purposes of monitoring system compliance pursuant to Section 103(b) of the Act. However, such information will be limited pursuant to Section 144(c) of the Act. No personal identifying information such as name, address, and social security number will be obtained. Only eligibility information will be obtained

regarding the type and level of disability of individuals being served by the P&A and the nature of the issue concerning which the system represented an individual.

(2) Notwithstanding paragraph (e)(1) of this section, if an audit, monitoring review, evaluation, or other investigation by the Department produces evidence that the system has violated the Act or the regulations, the system will bear the burden of proving its compliance. The system's inability to establish compliance because of the confidentiality of records will not relieve it of this responsibility. The P&A may elect to obtain a release regarding personal information and privacy from all individuals requesting or receiving services at the time of intake or application. The release shall state that only information directly related to client and case eligibility will be subject to disclosure to officials of the Department.

2. Revise part 1386 to read as follows.

PART 1386—FORMULA GRANT PROGRAMS

Section Contents

Subpart A—Basic Requirements

Sec.

1386.1 General.

1386.2 Obligation of funds.

1386.3 Liquidation of obligations.

1386.4 [Reserved]

Subpart B—Protection and Advocacy of Individual Rights

1386.19 Definitions.

1386.20 Agency Designated to Administer the State Protection and Advocacy System.

1386.21 Requirements and authority of the State Protection and Advocacy System.

1386.22 Periodic reports: State Protection and Advocacy System.

1386.23 Non-allowable costs for the State Protection and Advocacy System.

1386.24 Allowable litigation costs for the State Protection and Advocacy System.

Subpart C—Access to Records, Service Providers, and Service Recipients

1386.25 Access to records.

1386.26 Denial or delay of access.

1386.27 Access to Service Providers and Service Recipients.

1386.28 Confidentiality of protection and advocacy systems records.

Subpart D—Federal Assistance to State Councils on Developmental Disabilities

1386.30 State plan requirements.

1386.31 State plan submittal and approval.

1386.32 Periodic reports: Federal assistance to State Councils on Developmental Disabilities.

1386.33 Protection of employee's interests.

1386.34 Designated State Agency.

- 1386.35 Allowable and non-allowable costs for Federal Assistance to State Councils on Developmental Disabilities.
- 1386.36 Final disapproval of the State plan or plan amendments.

Subpart E—Practice and Procedure for Hearings Pertaining to State's Conformity and Compliance With Developmental Disabilities State Plans, Reports and Federal Requirements

General

- 1386.80 Definitions.
- 1386.81 Scope of rules.
- 1386.82 Records to the public.
- 1386.83 Use of gender and number.
- 1386.84 Suspension of rules.
- 1386.85 Filing and service of papers.

Preliminary Matters—Notice and Parties

- 1386.90 Notice of hearing opportunity for hearing.
- 1386.91 Time of hearing.
- 1386.92 Place.
- 1386.93 Issues at hearing.
- 1386.94 Request to participate in hearing.

Hearing Procedures

- 1386.100 Who presides.
- 1386.101 Authority of presiding officer.
- 1386.102 Rights of parties.
- 1386.103 Discovery.
- 1386.104 Evidentiary purpose.
- 1386.105 Evidence.
- 1386.106 Exclusion from hearing for misconduct.
- 1386.107 Unsponsored written material.
- 1386.108 Official transcript.
- 1386.109 Record for decision.

Posthearing Procedures, Decisions

- 1386.110 Posthearing briefs.
- 1386.111 Decisions following hearing.
- 1386.112 Effective date of decision by the Assistant Secretary.

Authority: 42 U.S.C. 15001 *et seq.*

Subpart A—Basic Requirements

§ 1386.1 General.

All rules under this subpart are applicable to both the State Councils on Developmental Disabilities and the agency designated to administer the State Protection and Advocacy System (P&As).

§ 1386.2 Obligation of funds.

(a) Funds which the Federal Government allots under this part during a Federal fiscal year are available for obligation by States for a two-year period beginning with the first day of the Federal fiscal year in which the grant is awarded.

(b)(1) A State incurs an obligation for acquisition of personal property or for the performance of work on the date it makes a binding, legally enforceable, written commitment, or when the State Council on Developmental Disabilities enters into an Interagency Agreement with an agency of State government for

acquisition of personal property or for the performance of work.

(2) A State incurs an obligation for personal services, for services performed by public utilities, for travel or for rental of real or personal property on the date it receives the services, its personnel takes the travel, or it uses the rented property.

(c)(1) A Protection & Advocacy System may elect to treat entry of an appearance in judicial and administrative proceedings on behalf of an individual with a developmental disability as a basis for obligating funds for the litigation costs. The amount of the funds obligated must not exceed a reasonable estimate of the costs, and the way the estimate was calculated must be documented.

(2) For the purpose of this paragraph, *litigation costs* mean expenses for court costs, depositions, expert witness fees, travel in connection with a case and similar costs, and costs resulting from litigation in which the agency has represented an individual with developmental disabilities (e.g., monitoring court orders, consent decrees), but not for salaries of employees of the P&A. All funds made available for Federal assistance to State Councils on Developmental Disabilities and to the P&As obligated under this paragraph are subject to the requirement of paragraph (a) of this section. These funds, if reobligated, may be reobligated only within a two-year period beginning with the first day of the Federal fiscal year in which the funds were originally awarded.

§ 1386.3 Liquidation of obligations.

(a) All obligations incurred pursuant to a grant made under the Act for a specific Federal fiscal year, must be liquidated within two years of the close of the Federal fiscal year in which the grant was awarded.

(b) The Commissioner may waive the requirements of paragraph (a) of this section when State law impedes implementation or the amount of obligated funds to be liquidated is in dispute.

(c) Funds attributable to obligations which are not liquidated in accordance with the provisions of this section revert to the Federal Government.

§ 1386.4 [Reserved]

Subpart B—Protection and Advocacy of Individual Rights

§ 1386.19 Definitions.

As used in §§ 1386.20, 1386.21, 1386.24, and 1386.25 of this part and subpart C the following definitions apply:

Abuse. The term “abuse” means any act or failure to act which was performed, or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused, or may have caused, injury or death to an individual with developmental disabilities, and includes but is not limited to such acts as: verbal, nonverbal, mental and emotional harassment; rape or sexual assault; striking; the use of excessive force when placing such an individual in bodily restraints; the use of bodily or chemical restraints which is not in compliance with Federal and State laws and regulations; or, any other practice which is likely to cause immediate physical or psychological harm or result in long term harm if such practices continue. In addition, the P&A may determine, in its discretion, that repeated and/or egregious violations of an individual's statutory or constitutional rights amounts to abuse, such as in a case where an individual is subject to significant financial exploitation which may prevent the individual from providing for his or her basic needs such as food and shelter.

American Indian Consortium. The term “American Indian Consortium” means any confederation of 2 or more recognized American Indian tribes, created through the official action of each participating tribe, that has a combined total resident population of 150,000 enrolled tribal members and a contiguous territory of Indian lands in two or more States.

Complaint. The term “complaint” includes, but is not limited to, any report or communication, whether formal or informal, written or oral, received by the system, including media accounts, newspaper articles, telephone calls (including anonymous calls) from any source relating to the status or treatment of an individual with a developmental disability.

Designating Official. The term “designating official” means the Governor or other State official, who is empowered by the State legislature or Governor to designate the State official or public or private agency to be accountable for the proper use of funds by and conduct of the agency designated to administer the State Protection and Advocacy System.

Full Investigation. The term “full investigation” means access to service providers, individuals with developmental disabilities and records authorized under these regulations, that are necessary for a P&A system to make a determination about whether alleged or suspected instances of abuse and neglect are taking place or have taken

place. Full investigations may be conducted independently or in cooperation with other agencies authorized to conduct similar investigations.

Legal Guardian, conservator and legal representative. The terms “legal guardian,” “conservator,” and “legal representative” all mean an individual appointed and regularly reviewed by a State court or agency empowered under State law to appoint and review such officers, and having authority to make all decisions on behalf of individuals with developmental disabilities. It does not include persons acting only as a representative payee, persons acting only to handle financial payments, attorneys or other persons acting on behalf of an individual with developmental disabilities only in individual legal matters, or officials or their designees responsible for the provision of treatment or habilitation services to an individual with developmental disabilities.

Neglect. The term “neglect” means a negligent act or omission by an individual responsible for providing services, supports or other assistance which caused or may have caused injury or death to an individual with developmental disabilities, or which placed an individual with developmental disabilities at risk of injury or death, and includes acts or omissions such as failure to: establish or carry out an appropriate individual program plan or treatment plan (including a discharge plan); provide adequate nutrition, clothing, or health care to an individual with developmental disabilities; or provide a safe environment which also includes failure to maintain adequate numbers of trained staff.

Probable cause. The term “probable cause” means, depending on the context, a reasonable ground for belief that an individual with developmental disabilities has been, or may be, subject to abuse or neglect, or that the health or safety of the individual is in serious and immediate jeopardy. The individual making such determination may base the decision on reasonable inferences drawn from his or her experience or training regarding similar incidents, conditions or problems that are usually associated with abuse or neglect. The P&A system is the final arbiter of probable cause between itself and the organization or individual from whom it is seeking records.

Service provider. The term “service provider” refers to any individual (including a family member of an individual with a developmental disability), or a public or private

organization or agency that provides, directly or through contract, brief or long-term services, supports or other assistance to one or more individuals with developmental disabilities. Service providers include, entities that provide either specialized assistance addressing the needs of persons with developmental disabilities or more general assistance such as the provision of vocational training, transportation, education or shelter, food or clothing. Service providers may include, but are not limited to, organizations such as group homes, board and care homes, individual residences and apartments, day programs, public and private residential and non-residential schools (including charter schools), juvenile detention centers, hospitals, nursing homes, homeless shelters, and jails and prisons.

State Protection and Advocacy System. The term “State Protection and Advocacy System” is synonymous with the term “P&A” used elsewhere in this regulation, and the terms “system” and “Protection and Advocacy System” used in this part and in part C.

§ 1386.20 Agency Designated to Administer the State Protection and Advocacy System.

(a) The designating official must designate the State official or public or private agency to be accountable for proper use of funds and conduct of the Protection and Advocacy System.

(b) An agency of the State or private agency providing direct services, including guardianship services, may not be designated as the agency to administer the Protection and Advocacy System.

(c) In the event that an entity outside of the State government is designated to carry out the program, the designating official or entity must assign a responsible State official to receive, on behalf of the State, notices of disallowances and compliance actions as the State is accountable for the proper and appropriate expenditure of Federal funds.

(d)(1) Prior to any redesignation of the agency which administers and operates the State Protection and Advocacy System, the designating official must give written notice of the intention to make the redesignation to the agency currently administering and operating the State Protection and Advocacy System by registered or certified mail. The notice must indicate that the proposed redesignation is being made for good cause. The designating official also must publish a public notice of the proposed action. The agency and the public shall have a reasonable period of

time, but not less than 45 days, to respond to the notice.

(2) The public notice must include:

(i) The Federal requirements for the State Protection and Advocacy System for individuals with developmental disabilities (Section 143 of the Act); and where applicable, the requirements of other Federal advocacy programs administered by the State Protection and Advocacy System;

(ii) The goals and function of the State’s Protection and Advocacy System including the current Statement of Goals and Priorities;

(iii) The name and address of the agency currently designated to administer and operate the State Protection and Advocacy System, and an indication of whether the agency also operates other Federal advocacy programs;

(iv) A description of the current agency operating and administering the Protection and Advocacy System including, as applicable, descriptions of other Federal advocacy programs it operates;

(v) A clear and detailed explanation of the good cause for the proposed redesignation;

(vi) A statement suggesting that interested persons may wish to write the current agency operating and administering the State Protection and Advocacy System at the address provided in paragraph (d)(2)(iii) of this section to obtain a copy of its response to the notice required by paragraph (d)(1) of this section. Copies shall be provided in accessible formats to individuals with disabilities upon request;

(vii) The name of the new agency proposed to administer and operate the State Protection and Advocacy System under the Developmental Disabilities program. This agency will be eligible to administer other Federal advocacy programs;

(viii) A description of the system which the new agency would administer and operate, including a description of all other Federal advocacy programs the agency would operate;

(ix) The timetable for assumption of operations by the new agency and the estimated costs of any transfer and start-up operations; and

(x) A statement of assurance that the proposed new designated State Protection and Advocacy System will continue to serve existing clients and cases of the current P&A System or refer them to other sources of legal advocacy as appropriate, without disruption.

(3) The public notice as required by paragraph (d)(1) of this section, must be

in a format accessible to individuals with developmental disabilities or their representatives, e.g., tape, diskette. The designating official must provide for publication of the notice of the proposed redesignation using the State register, statewide newspapers, public service announcements on radio and television, or any other legally equivalent process. Copies of the notice must be made generally available to individuals with developmental disabilities and mental illness who live in residential facilities through posting or some other means.

(4) After the expiration of the public comment period required in paragraph (d)(1) of this section, the designating official must conduct a public hearing on the redesignation proposal. After consideration of all public and agency comments, the designating official must give notice of the final decision to the currently designated agency and the public through the same means used under paragraph (d)(3) of this section. This notice must include a clear and detailed explanation of the good cause finding. If the notice to the currently designated agency states that the redesignation will take place, it also must inform the agency of its right to appeal this decision to the Assistant Secretary for Children and Families, who has been delegated the authority to hear appeals by the Secretary, and provide a summary of the public comments received in regard to the notice of intent to redesignate and the results of the public hearing and its responses to those comments. The redesignation shall not be effective until 10 working days after notifying the current agency that administers and operates the State Protection and Advocacy System or, if the agency appeals, until the Assistant Secretary has considered the appeal.

(e)(1) Following notification as indicated in paragraph (d)(4) of this section, the agency that administers and operates the State Protection and Advocacy System which is the subject of such action, may appeal the redesignation to the Assistant Secretary. To do so, the agency that administers and operates the State Protection and Advocacy System must submit an appeal in writing to the Assistant Secretary within 20 days of receiving official notification under paragraph (d)(4) of this section, with a separate copy sent by registered or certified mail to the designating official who made the decision concerning redesignation.

(2) In the event that the agency subject to redesignation does exercise its right to appeal under paragraph (e)(1) of this section, the designating official must

give public notice of the Assistant Secretary's final decision regarding the appeal through the same means utilized under paragraph (d)(3) of this section within 10 working days of receipt of the Assistant Secretary's final decision under paragraph (e)(6) of this section.

(3) The designating official within 10 working days from the receipt of a copy of the appeal must provide written comments to the Assistant Secretary (with a copy sent by registered or certified mail to the Protection and Advocacy agency appealing under paragraph (e)(1) of this section), or withdraw the redesignation. The comments must include a summary of the public comments received in regard to the notice of intent to redesignate and the results of the public hearing and its responses to those comments.

(4) In the event that the designating official withdraws the redesignation while under appeal pursuant to paragraph (e)(1) of this section, the designating official must notify the Assistant Secretary, and the current agency, and must give public notice of his or her decision through the same means utilized under paragraph (d)(3) of this section.

(5) As part of their submission under paragraph (e)(1) or (e)(3) of this section, either party may request, and the Assistant Secretary may grant, an opportunity for an informal meeting with the Assistant Secretary at which representatives of both parties will present their views on the issues in the appeal. The meeting will be held within 20 working days of the submission of written comments by the designating official under paragraph (e)(2) of this section. The Assistant Secretary will promptly notify the parties of the date and place of the meeting.

(6) Within 30 days of the informal meeting under paragraph (e)(5) of this section, or, if there is no informal meeting under paragraph (e)(5) of this section, within 30 days of the submission under paragraph (e)(3) of this section, the Assistant Secretary will issue to the parties a final written decision on whether the redesignation was for good cause as defined in paragraph (d)(1) of this section. The Assistant Secretary will receive comments on the record from agencies administering the Federal advocacy programs that will be directly affected by the proposed redesignation. The P&A and the designating official will have an opportunity to comment on the submissions of the Federal advocacy programs. The Assistant Secretary shall consider the comments of the Federal programs, the P&A and the designating

official in making his final decision on the appeal.

(f)(1) Within 30 days after the redesignation becomes effective under paragraph (d)(4) of this section, the designating official must submit an assurance to the Assistant Secretary that the newly designated agency that will administer and operate the State Protection and Advocacy System meets the requirements of the statute and the regulations.

(2) In the event that the agency administering and operating the State Protection and Advocacy System subject to redesignation does not exercise its rights to appeal within the period provided under paragraph (e)(1) of this section, the designating official must provide to the Assistant Secretary documentation that the agency was redesignated for good cause. Such documentation must clearly demonstrate that the Protection and Advocacy agency subject to redesignation was not redesignated for any actions or activities which were carried out under section 143 of the Act, this regulation or any other Federal advocacy program's legislation or regulations.

§ 1386.21 Requirements and authority of the State Protection and Advocacy System.

(a) In order for a State to receive Federal funding for Protection and Advocacy activities under this subpart, as well as for the State Council on Developmental Disabilities activities (subpart D of this part), the Protection and Advocacy System (P&A) must meet the requirements of Section 143 and 144 of the Act (42 U.S.C. 15043 and 42 U.S.C. 15044) and that system must be operational.

(b) Allotments must be used to supplement and not to supplant the level of non-Federal funds available in the State for activities under the Act, which shall include activities on behalf of individuals with developmental disabilities to remedy abuse, neglect, and violations of rights as well as information and referral activities.

(c) A P&A shall not implement a policy or practice restricting the remedies that may be sought on the behalf of individuals with developmental disabilities or compromising the authority of the P&A to pursue such remedies through litigation, legal action or other forms of advocacy. Under this requirement, States may not establish a policy or practice, which requires the P&A to: obtain the State's review or approval of the P&A's plans to undertake a particular advocacy initiative, including specific litigation (or to pursue litigation

rather than some other remedy or approach); refrain from representing individuals with particular types of concerns or legal claims, or refrain from otherwise pursuing a particular course of action designed to remedy a violation of rights, such as educating policymakers about the need for modification or adoption of laws or policies affecting the rights of individuals with developmental disabilities; restrict the manner of the P&A's investigation in a way that is inconsistent with the system's required authority under the DD Act; or similarly interfere with the P&A's exercise of such authority. The requirements of this paragraph shall not prevent P&As, including those functioning as agencies within State governments, from developing case or client acceptance criteria as part of the annual priorities identified by the P&A as described in section 1386.23(c) of this part. Clients must be informed at the time they apply for services of such criteria.

(d) A Protection and Advocacy System shall be free from hiring freezes, reductions in force, prohibitions on staff travel, or other policies, imposed by the State, to the extent that such policies would impact system program staff or functions funded with Federal funds, and would prevent the system from carrying out its mandates under the Act.

(e) A Protection and Advocacy System shall have sufficient staff, qualified by training and experience, to carry out the responsibilities of the system in accordance with the priorities of the system and requirements of the Act. These responsibilities include the investigation of allegations of abuse, neglect and representations of individuals with developmental disabilities regarding rights violations.

(f) A Protection and Advocacy System may exercise its authority under State law where the State authority exceeds the authority required by the Developmental Disabilities Assistance and Bill of Rights Act of 2000. However, State law must not diminish the required authority of the Protection and Advocacy System as set by the Act.

(g) Each Protection and Advocacy System that is a public system without a multimember governing or advisory board must establish an advisory council in order to provide a voice for individuals with developmental disabilities. The Advisory Council shall advise the Protection and Advocacy System on program policies and priorities. The Advisory Council shall be comprised of a majority of individuals with developmental disabilities who are eligible for services, or have received or are receiving

services or parents or family members (including those representing individuals with developmental disabilities who live in institutions and home and community based settings), guardians, advocates, or authorized representatives of such individuals.

(h) Prior to any Federal review of the State program, a 30-day notice and an opportunity for public comment must be published in the **Federal Register**. Reasonable effort shall be made by the appropriate Regional Office to seek comments through notification to major disability advocacy groups, the State Bar, disability law resources, the State Councils on Developmental Disabilities and the University Centers for Excellence in Developmental Disabilities Education, Research, and Service, for example, through newsletters and publication of those organizations. The findings of public comments may be consolidated if sufficiently similar issues are raised and they shall be included in the report of the onsite visit.

(i) Before the Protection and Advocacy System releases information to individuals not otherwise authorized to receive it, the Protection and Advocacy System must obtain written consent from the client requesting assistance, if competent, or his or her guardian.

§ 1386.22 Periodic reports: State Protection and Advocacy System.

(a) By January 1 of each year, each State Protection and Advocacy System shall submit to ADD, an Annual Program Performance Report. In order to be accepted, the Report must meet the requirements of Section 144(e) of the Act (42 U.S.C. 15044), the applicable regulation and include information on the System's program necessary for the Secretary to comply with section 105(1), (2), and (3) of the Act (42 U.S.C. 15005). The Report shall describe the activities, accomplishments, and expenditures of the system during the preceding fiscal year, including a description of the system's goals, the extent to which the goals were achieved, barriers to their achievement, the process used to obtain public input, the nature of such input, and how such input was used, the extent to which unserved or underserved individuals or groups, particularly from ethnic or racial groups or geographic regions (e.g., rural or urban areas), were the target of assistance or service, and other such information on the Protection and Advocacy System's activities requested by ADD. In addition, each System must report on its achievement of the measures of progress for the preceding

year pursuant to § 1385.5(a) (4) of this part.

(b) Financial status reports (standard form 269) must be submitted by the agency administering and operating the State Protection and Advocacy System semiannually.

(c) By January 1 of each year, the State Protection and Advocacy System shall submit to ADD, an Annual Statement of Goals and Priorities, (SGP), for the coming fiscal year as required under Section 143(a)(2)(C) of the Act (42 U.S.C. 15043). In order to be accepted by ADD, an SGP must meet the requirements of the Act and the applicable regulation, including § 1385.5(a)(3).

(1) The SGP is a description and explanation of the system's goals and priorities for its activities, selection criteria for its individual advocacy and training activities, and the outcomes it strives to accomplish. The SGP is developed through data driven strategic planning. For each goal in an area of emphasis the indicators of progress (measures of consumer satisfaction, improvement, and collaboration) will apply as provided under section 1385.5 of this part. If changes are made to the goals or the indicators of progress established for a year, the SGP must be amended to reflect those changes. The SGP must include a description of how the Protection and Advocacy System operates, and where applicable, how it coordinates the State Protection and Advocacy program for individuals with developmental disabilities with other Protection and Advocacy programs administered by the State Protection and Advocacy System. This description must include the System's processes for intake, internal and external referrals, and streamlining of advocacy services. If the System will be requesting or requiring fees or donations from clients as part of the intake process, the SGP must state that the system will be doing so. The description also must address collaboration, the reduction of duplication and overlap of services, the sharing of information on service needs, and the development of statements of goals and priorities for the various advocacy programs.

(2) Priorities as established through the SGP serve as the basis for the Protection and Advocacy System to determine which cases are selected in a given fiscal year. Protection and Advocacy Systems have the authority to turn down a request for assistance when it is outside the scope of the SGP, but they must inform individuals when this is the basis for turning them down.

(d) Each fiscal year, the Protection and Advocacy System shall:

(1) Obtain formal public input on its Statement of Goals and Priorities;

(2) At a minimum, provide for a broad distribution of the proposed Statement of Goals and Priorities for the next fiscal year in a manner accessible to individuals with developmental disabilities and their representatives, allowing at least 45 days from the date of distribution for comment;

(3) Provide to the State Councils on Developmental Disabilities and the University Centers for Excellence in Developmental Disabilities Education, Research and Service a copy of the proposed Statement of Goals and Priorities for comment concurrently with the public notice;

(4) Incorporate or address any comments received through public input and any input received from the State Councils on Developmental Disabilities and the University Centers for Excellence in Developmental Disabilities Education, Research and Service in the final Statement submitted; and

(5) Address how the Protection and Advocacy System; State Councils on Developmental Disabilities and University Centers for Excellence in Developmental Disabilities Education Research and Service will collaborate with each other and with other public and private entities.

§ 1386.23 Non-allowable costs for the State Protection and Advocacy System.

(a) Federal financial participation is not allowable for:

(1) Costs incurred for activities on behalf of individuals with developmental disabilities to solve problems not directly related to their disabilities and which are faced by the general populace. Such activities include but are not limited to: preparation of wills, divorce decrees, and real estate proceedings. Allowable costs in such cases would include the Protection and Advocacy System providing disability-related technical assistance information and referral to appropriate programs and services; and

(2) Costs not allowed under other applicable statutes, Departmental regulations and issuances of the Office of Management and Budget.

(b) Attorneys' fees are considered program income pursuant to part 74-Administration of Grants and part 92-Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments and must be added to the funds committed to the program and used to further the objectives of the program. This requirement shall apply to all attorneys' fees, including those earned by

contractors and those received after the project period in which they were earned.

§ 1386.24 Allowable litigation costs for the State Protection and Advocacy System.

Allotments may be used to pay the otherwise allowable costs incurred by a Protection and Advocacy System in bringing lawsuits in its own right to redress incidents of abuse or neglect, discrimination and other rights violations impacting on individuals with developmental disabilities to obtain access to records and when it appears on behalf of named plaintiffs or a class of plaintiff for such purposes.

Subpart C—Access to Records, Service Providers and Service Recipients

§ 1386.25 Access to records.

(a) Pursuant to sections 143(a)(2), (A)(i), (B), (I) and (J) of the Act, and subject to the provisions of this section, a Protection and Advocacy (P&A) System, and all of its authorized agents, shall have access to the records of individuals with developmental disabilities under the following circumstances:

(1) If authorized by an individual who is a client of the system, or who has requested assistance from the system, or by such individual's legal guardian, conservator or other legal representative.

(2) In the case of an individual, including an individual whose whereabouts are unknown, to whom all of the following conditions apply:

(i) The individual, due to his or her mental or physical condition, is unable to authorize the system to have access;

(ii) The individual does not have a legal guardian, conservator or other legal representative, or the individual's guardian is the State (or one of its political subdivisions); and

(iii) The individual has been the subject of a complaint to the P&A system about his or her status or treatment, or the P&A system has probable cause (which can be the result of monitoring or other activities including media reports and newspaper articles) to believe that such individual has been subject to abuse and neglect by any other individual or has subjected him or herself to self-abuse.

(3) In the case of an individual, who has a legal guardian, conservator, or other legal representative, about whom a complaint has been received by the system or, as a result of monitoring or other activities, the system has determined that there is probable cause to believe that the individual with

developmental disabilities has been subject to abuse or neglect by any other individual or has subjected him or herself to self-abuse, whenever the following conditions exist:

(i) The P&A system has made a good faith effort to contact the legal guardian, conservator, or other legal representative upon prompt receipt of the name and address of the legal guardian, conservator, or other legal representative;

(ii) The system has offered assistance to the legal guardian, conservator, or other legal representative to resolve the situation; and

(iii) The legal guardian, conservator, or other legal representative has failed or refused to act on behalf of the individual.

(b) Individual records to which P&A systems must have access under Section 143(a)(2), (A)(i), (B), (I) and (J) of the Act (whether written or in another medium, draft, preliminary or final, including handwritten notes, electronic files, photographs or video or audiotape records) shall include, but shall not be limited to:

(1) Individual records prepared or received in the course of providing intake, assessment, evaluation, education, training and other services, supports or assistance, including medical records, financial records, and monitoring and other reports prepared or received by a service provider. This includes records stored or maintained at sites other than the service provider.

(2) Reports prepared by a Federal, State or local governmental agency, or a private organization charged with investigating incidents of abuse or neglect, injury or death. The reports subject to this requirement include, but are not limited to, those prepared or maintained by agencies with responsibility for overseeing human services systems. The organizations whose reports are subject to this requirement include, but are not limited to, agencies in the foster care systems, developmental disabilities systems, and prison and jail systems, criminal and civil law enforcement agencies such as police departments, State and Federal licensing and certification agencies, and private accreditation organizations such as the Joint Commission on the Accreditation of Health Care Organizations. The reports subject to this requirement describe any or all of the following:

(i) The incidents of abuse, neglect, injury, and/or death;

(ii) The steps taken to investigate the incidents;

(iii) Reports and records, including personnel records, prepared or

maintained by the service provider in connection with such reports of incidents; or,

(iv) Supporting information that was relied upon in creating a report including all information and records that describe persons who were interviewed, physical and documentary evidence that was reviewed, and the related investigative findings; and

(3) Discharge planning records.

(c) The time period in which the P&A system must be given access to records of individuals with developmental disabilities under sections 143(a)(2)(A)(i), (B), (I), and (J) of the Act, and subject to the provisions of this section, varies depending on the following circumstances:

(1) If the P&A system determines that there is probable cause to believe that the health or safety of the individual with a developmental disability is in serious and immediate jeopardy, or in any case of the death of an individual with a developmental disability, access to the records of the individual with a developmental disability, as described in paragraph (b) of this section shall be provided (including the right to inspect and copy records as specified in paragraph (d) of this section) to the P&A system within 24 hours of receipt of the P&A system's written request for the records without the consent of another party. In the case of an inquiry regarding a death of an individual with a developmental disability, probable cause to believe the individual with a developmental disability's death resulted from abuse or neglect or any other specific cause is not required for the P&A system to obtain access to the records. Any individual who dies in a situation in which services, supports, or other assistance are, have been, or may customarily be provided to individuals with developmental disabilities shall, for purposes of the P&A system's obtaining access to the individual's records, be deemed an individual with a developmental disability.

(2) In all other cases, access to records of individuals with developmental disabilities shall be provided to the P&A system within three business days after the receipt of such a written request from the P&A system.

(d) A system shall be permitted to inspect and copy information and records, subject to a reasonable charge to offset duplicating costs. If the organization or agency having possession of the records copies them for the P&A system, it may not charge the P&A system an amount that would exceed the amount it customarily charged other non-profit or State government agencies for reproducing

documents. At its option, the P&A may make written notes when inspecting information and records, and may use its own photocopying equipment to obtain copies. If a party other than the P&A system performs the photocopying or other reproduction of records, it shall provide the photocopies or reproductions to the P&A system within the time frames specified in paragraph (c) of this section.

§ 1386.26 Denial or delay of access.

If a P&A system's access to service providers, programs, service recipients or records is denied or delayed beyond the deadlines specified in §§ 1386.25 and 1386.27 of this part, the P&A system shall be provided, within one business day after the expiration of such deadline with a written statement of reasons for the denial or delay. In the case of a denial for alleged lack of authorization, the name, address and telephone number of individual service recipients and legal guardians, conservators, or other legal representative will be included in the aforementioned response. All of the above information shall be provided whether or not the P&A has probable cause to suspect abuse or neglect, or has received a complaint.

§ 1386.27 Access to service providers and service recipients.

(a) Access to service providers and service recipients shall be extended to all authorized agents of a P&A system.

(b) A P&A system shall have reasonable unaccompanied access to public and private service providers, programs in the State, and to all areas of the service provider's premises which are used by service recipients or are accessible to them. Such access shall be provided without advance notice and made available immediately upon request. The P&A system shall have reasonable unaccompanied access to service recipients at all times necessary to conduct a full investigation of an incident of abuse or neglect. This authority shall include the opportunity to interview any service recipient, employee, or other persons, including the person thought to be the victim of such abuse, who might be reasonably believed by the system to have knowledge of the incident under investigation. The P&A may not be required to provide the name or other identifying information regarding the service recipient or staff with whom it plans to meet; neither may the P&A be required to justify or explain its interaction with such persons. Such access shall be afforded upon request, by the P&A system when:

(1) An incident is reported or a complaint is made to the P&A system;

(2) The P&A system determines that there is probable cause to believe that an incident has or may have occurred; or

(3) The P&A system determines that there is or may be imminent danger of serious abuse or neglect of an individual with a developmental disability.

(c) In addition to the access required under paragraph (b) of this section, a P&A system shall have reasonable unaccompanied access to service providers for routine circumstances. This includes areas which are used by service recipients and are accessible to service recipients at reasonable times which at a minimum shall include normal working hours and visiting hours. A P&A also shall be permitted to attend treatment planning meetings concerning individual service recipients with the consent of the individual or his or her guardian, conservator or other legal representative. Access to service providers shall be afforded immediately upon an oral or written request by the P&A system. Except where complying with the P&A's request would interfere with treatment or therapy to be provided, service providers shall provide access to individuals for the purpose covered by this paragraph within 24 hours of the system's making a request. If the P&A's access to an individual must be delayed beyond 24 hours to allow for the provision of treatment or therapy, the P&A shall receive access as soon as possible thereafter. Service recipients subject to the requirements in this paragraph include adults or minors who have legal guardians or conservators. P&A activities shall be conducted so as to minimize interference with service provider programs, respect service recipients' privacy interests, and honor a recipient's request to terminate an interview. This access is for the purpose of:

(1) Providing information, training, and referral for programs addressing the needs of individuals with developmental disabilities, and information and training about individual rights, and the protection and advocacy services available from the P&A system, including the name, address, and telephone number of the P&A system;

(2) Monitoring compliance with respect to the rights and safety of service recipients; and

(3) Inspecting, viewing and photographing all areas of a service provider's premises which are used by service recipients or are accessible to them.

(d) Unaccompanied access to service recipients shall include the opportunity to meet and communicate privately with individuals regularly, both formally and informally, by telephone, mail and in person.

§ 1386.28 Confidentiality of protection and advocacy systems records.

(a) Records maintained by the P&A system are the property of the P&A system which must protect them from loss, damage, tampering or use by unauthorized individuals. The P&A system must:

(1) Except as provided elsewhere in this section, keep confidential all records and information, including information contained in any automated electronic database pertaining to:

(i) Clients;

(ii) Individuals who have been provided general information or technical assistance on a particular matter;

(iii) The identity of individuals who report incidents of abuse or neglect, or who furnish information that forms the basis for a determination that probable cause exists; and

(iv) Names of individuals who have received services, supports or other assistance, and who provided information to the P&A for the record.

(2) Have written policies governing the access, storage, duplication and release of information from client records.

(3) Obtain written consent from the client, if competent, or from his or her legal representative; individuals who have been provided general information or technical assistance on a particular matter; and individuals who furnish reports or information that form the basis for a determination of probable cause, before releasing information concerning such individuals to individuals not otherwise authorized to receive it.

(b) Nothing in this subpart shall prevent the P&A system from issuing a public report of the results of an investigation which maintains the confidentiality of the individuals listed in paragraph (a)(1) of this section, or reporting the results of an investigation in a manner which maintains the confidentiality of such individuals, to responsible investigative or enforcement agencies should an investigation reveal information concerning the service provider, its staff, or employees warranting possible sanctions or corrective action. This information may be reported to agencies responsible for service provider licensing or accreditation, employee discipline,

employee licensing or certification, or criminal investigation or prosecution.

(c) Notwithstanding the confidentiality requirements of this section, the P&A may make a report to investigative or enforcement agencies, as described in paragraph (b), which reveals the identity of an individual service recipient, and information relating to his or her status or treatment:

(1) When the system has received a complaint that the individual has been or may be subject to abuse and neglect, or has probable cause (which can be the result of monitoring or other activities including media reports and newspaper articles) to believe that such individual has been or may be subject to abuse or neglect;

(2) When the system determines that there is probable cause to believe the health or safety of the individual is in serious and immediate jeopardy; or

(3) In any case of the death of an individual whom the system believes may have had a developmental disability.

Subpart D—Federal Assistance to State Councils on Developmental Disabilities

§ 1386.30 State plan requirements.

(a) In order to receive Federal funding under this subpart, each State Developmental Disabilities Council must prepare and submit a State plan which meets the requirements of Sections 124 and 125 of the Act (42 U.S.C. 15024 and 15025), and the applicable regulation. Development of the State plan and its periodic updating are the responsibility of the State Council on Developmental Disabilities. As provided in Section 124(d) of the Act, the Council shall provide opportunities for public input and review, and will consult with the Designated State Agency to determine that the plan is consistent with applicable State laws, and obtain appropriate State plan assurances.

(b) Failure to comply with the State plan requirements may result in the loss of Federal funds as described in Section 127 of the Act (42 U.S.C. 15027). The Secretary must provide reasonable notice and an opportunity for a hearing to the Council and the Designated State Agency before withholding any payments for planning, administration, and services.

(c) The State plan must be submitted through the Electronic Data Submission system which is used to collect quantifiable and qualifiable information from the State Councils on Developmental Disabilities. The plan must:

(1) Identify the agency or office in the State designated to support the Council in accordance with Section 124(c)(2) and 125(d). The Designated State Agency shall provide required assurances and support services requested from and negotiated with the Council.

(2) For a year covered by the State plan, include for each area of emphasis under which a goal or goals have been identified, the measures of progress (measures of consumer satisfaction, collaboration, and improvement) the Council has established or is required to apply pursuant to section 1385.5 of this part to measure its progress in furthering the purpose of the Developmental Disabilities Assistance and Bill of Rights Act through advocacy, capacity building, and systemic change activities.

(3) Provide for the establishment and maintenance of a Council in accordance with Section 125 and describe the membership of such Council. The non-State agency members of the Council shall be subject to term limits to ensure rotating membership.

(d) The State plan must be updated during the five-year period when substantive changes are contemplated in plan content, including changes under paragraph (c)(2).

(e)(1) The State plan may provide for funding projects to demonstrate new approaches to direct services that enhance the independence, productivity, and integration and inclusion into the community of individuals with developmental disabilities. Direct service demonstrations must be short-term, no longer than five years, and include a strategy to locate on-going funding from other sources. For each demonstration funded, the State plan must include an estimated period of the project's duration and a brief description of how the services will be continued without Federal developmental disabilities program funds. Council funds may not be used to fund on-going services that should be paid for by the State or other sources.

(2) The State plan may provide for funding of other demonstration projects or activities, including but not limited to outreach, training, technical assistance, supporting and educating communities, interagency collaboration and coordination, coordination with related councils, committees and programs, barrier elimination, systems design and redesign, coalition development and citizen participation, and informing policymakers. Awards for these demonstrations should be no longer than five years.

(f) The State plan must contain assurances that:

(1) The State will comply with all applicable Federal statutes and regulations in effect during the time that the State is receiving formula grant funding;

(2) The human rights of individuals with developmental disabilities will be protected consistent with Section 109 of the Act (42 U.S.C. 15009).

(3) Buildings used in connection with activities assisted under the plan must meet all applicable provisions of Federal and State laws pertaining to accessibility, fire, health and safety standards.

(4) The State Council on Developmental Disabilities shall follow the requirements of Section 125(c)(8), (9) and (10) of the Act regarding budgeting, staff hiring, supervision, and assignment. Budget expenditures must be consistent with applicable State laws and policies regarding grants, contracts, and accounting, and bookkeeping practices and procedures. In relation to staff hiring, the clause "consistent with State law" in Section 125(c)(9) means that the hiring of State Council on Developmental Disabilities staff must be done in accordance with State personnel policies and procedures except that a State shall not apply hiring freezes, reductions in force, prohibitions on staff travel, or other policies, to the extent that such policies would impact staff or functions funded with Federal funds, and would prevent the Council from carrying out its functions under the Act.

§ 1386.31 State plan submittal and approval.

(a) The Council shall issue a public notice about the availability of the proposed State plan or State plan amendment(s) for comment. The Notice shall be published in formats accessible to individuals with developmental disabilities and the general public (*e.g.*, tape, diskette, public forums, and newspapers) and shall provide a 45-day period for public review and comment. The Council shall take into account comments submitted within that period, and respond in the State plan to significant comments and suggestions. A summary of the Council's responses to State plan comments shall be submitted with the State plan and made available for public review. This document shall be made available in accessible formats upon request.

(b) The State plan or amendment must be submitted to ADD 45 days prior to the fiscal year for which it is applicable. The State plan or amendment must be

approved by the entity or individual authorized to do so under State law.

(c) Failure to submit an approvable State plan or amendment prior to the Federal fiscal year for which it is applicable may result in the loss of Federal financial participation. Plans received during a quarter of the Federal fiscal year are approved back to the first day of the quarter so costs incurred from that point forward are approvable. Costs resulting from obligations incurred during the period of the fiscal year for which an approved plan is not in effect are not eligible for Federal financial participation.

(d) The Commissioner must approve any State plan or plan amendment provided it meets the requirements of the Act and this regulation.

§ 1386.32 Periodic reports: Federal assistance to State Councils on Developmental Disabilities.

(a) The Governor or appropriate State financial officer must submit financial status reports (standard form 269) on the programs funded under this Subpart semiannually.

(b) By January 1 of each year, the State Council on Developmental Disabilities shall submit to ADD, an Annual Program Performance Report through the system established by ADD. In order to be accepted by ADD, reports must meet the requirements of Section 125(c)(7) of the Act (42 U.S.C. 15025) and the applicable regulations, include the information on its program necessary for the Secretary to comply with Section 105(1), (2), and (3) of the Act (42 U.S.C. 15005), and any other information requested by ADD. Each Report shall contain information about the progress made by the Council in achieving its goals including:

- (1) A description of the extent to which the goals were achieved;
- (2) A description of the strategies that contributed to achieving the goals;
- (3) To the extent to which the goals were not achieved, a description of factors that impeded the achievement;
- (4) Separate information on the self-advocacy goal described in Section 124(c)(4)(A)(ii) of the Act (42 U.S.C. 15024);

(5) As appropriate, an update on the results of the comprehensive review and analysis of the extent to which services, supports, and other assistance are available to individuals with developmental disabilities and their families, including the extent of unmet needs for services, supports, and other assistance for those individuals and their families, in the State as required in Section 124(c)(3) of the Act (42 U.S.C. 15024);

(6) Information on consumer satisfaction with Council supported or conducted activities;

(7) A description of the adequacy of health care and other services, supports, and assistance that individuals with developmental disabilities in Intermediate Care Facilities (Mental Retardation) receive;

(8) To the extent available, a description of the adequacy of health care and other services, supports, and assistance received by individuals with developmental disabilities served through home and community-based waivers (authorized under Section 1915(c) of the Social Security Act);

(9) An accounting of the funds paid to the State awarded under the DD Council program;

(10) A description of resources made available to carry out activities to assist individuals with developmental disabilities directly attributable to Council actions;

(11) A description of resources made available for such activities that are undertaken by the Council in collaboration with other entities; and

(12) A description of the method by which the Council will widely disseminate the annual report to affected constituencies and the general public and will assure that the report is available in accessible formats.

(c) Each Council must include in its Annual Program Performance Report information on its achievement of the measures of progress established pursuant to § 1385.5 for the year covered by the Report (OMB Clearance 0980-0172).

§ 1386.33 Protection of employee's interests.

(a) Based on Section 124(c)(5)(J) of the Act (42 U.S.C. 15024(c)(5)(J)), the State plan must assure fair and equitable arrangements to protect the interest of all institutional employees affected by actions under the plan to provide community living activities. The State must inform employees of the State's decision to provide for community living activities. Specific arrangements for the protection of affected employees must be developed through negotiations between the appropriate State authorities and employees or their representatives.

(b) Fair and equitable arrangements must include procedures that provide for the impartial resolution of disputes between the State and an employee concerning the interpretation, application, and enforcement of protection arrangements. To the maximum extent practicable, these

arrangements must include provisions for:

- (1) The preservation of rights and benefits;
- (2) Guaranteeing employment to employees affected by action under the plan to provide alternative community living arrangements; and
- (3) Employee training and retraining programs.

§ 1386.34 Designated State Agency.

(a) The Designated State Agency shall provide the required assurances and other support services as requested and negotiated by the Council. These include:

- (1) Provision of financial reporting and other services as provided under Section 125(d)(3)(D) of the Act; and
- (2) Information and direction, as appropriate, on procedures on the hiring, supervision, and assignment of staff in accordance with State law.

(b) If the State Council on Developmental Disabilities requests a review by the Governor (or State legislature, if applicable) of the Designated State Agency, the Council must provide documentation of the reason for change, and recommend a new preferred Designated State Agency by the Governor (or State legislature, if applicable).

(c) After the review is completed by the Governor (or State legislature, if applicable), and if no change is made, a majority of the non-State agency members of the Council may appeal to the Assistant Secretary for the Administration for Children and Families for a review of the Designated State Agency if the Council's independence as an advocate is not assured because of the actions or inactions of the Designated State agency.

(d) The following steps apply to the appeal of the Governor's (or State legislature, if applicable) designation of the Designated State Agency.

(1) Prior to an appeal to the Assistant Secretary, the State Council on Developmental Disabilities must give a 30 day written notice, by certified mail, to the Governor (or State legislature, if applicable) of the majority of non-State members' intention to appeal the designation of the Designated State Agency.

(2) The appeal must clearly identify the grounds for the claim that the Council's independence as an advocate is not assured because of the action or inactions of the Designated State Agency.

(3) Upon receipt of the appeal from the State Council on Developmental Disabilities, the Assistant Secretary will

notify the State Council on Developmental Disabilities and the Governor (or State legislature, if applicable), by certified mail, that the appeal has been received and will be acted upon within 60 days. The Governor (or State legislature, if applicable) shall within 10 working days from the receipt of the Assistant Secretary's notification provide written comments to the Assistant Secretary (with a copy sent by registered or certified mail to the Council) on the claims in the Council's appeal. Either party may request, and the Assistant Secretary may grant, an opportunity for an informal meeting with the Assistant Secretary at which representatives from both parties will present their views on the issues in the appeal. The meeting will be held within 20 working days of the submission of written comments by the Governor (or State legislature, if applicable). The Assistant Secretary will promptly notify the parties of the date and place of the meeting.

(4) The Assistant Secretary will review the issue(s) and provide a final written decision within 60 days following receipt of the appeal from the State Council on Developmental Disabilities. If the determination is made that the Designated State Agency should be redesignated, the Governor (or State legislature, if applicable) must provide written assurance of compliance within 45 days from receipt of the decision.

(5) Anytime during this appeals process the State Council on Developmental Disabilities may withdraw such request if resolution has been reached with the Governor (or State legislature, if applicable) on the Designated State Agency. The Governor (or State legislature, if applicable) must notify the Assistant Secretary in writing of such a decision.

(e) The Designated State Agency may authorize the Council to contract with State agencies other than the Designated State Agency to perform functions of the Designated State Agency.

§ 1386.35 Allowable and non-allowable costs for Federal Assistance to State Councils on Developmental Disabilities.

(a) Under this subpart, Federal funding is available for costs resulting from obligations incurred under the approved State plan for the necessary expenses of administering the plan, which may include the establishment and maintenance of the State Council, and all programs, projects, and activities carried out under the State plan.

(b) Expenditures which are not allowable for Federal financial participation are:

(1) Costs incurred by institutions or other residential or non-residential programs which do not comply with the Congressional findings with respect to the rights of individuals with developmental disabilities in Section 109 of the Act (42 U.S.C. 15009).

(2) Costs incurred for activities not provided for in the approved State plan; and

(3) Costs not allowed under other applicable statutes, Departmental regulations, or issuances of the Office of Management and Budget.

(c) Expenditure of funds that supplant State and local funds are not allowed. Supplanting occurs when State or local funds previously used to fund activities under the State plan are replaced by Federal funds for the same purpose.

However, supplanting does not occur if State or local funds are replaced with Federal funds for a particular activity or purpose in the approved State plan if the replaced State or local funds are then used for other activities or purposes in the approved State plan.

(d) For purposes of determining aggregate minimum State share of expenditures, there are three categories of expenditures:

(1) Expenditures for projects or activities undertaken directly by the Council and Council staff to implement State plan activities, as described in Section 126(a)(3) of the Act, require no non-Federal aggregate of the necessary costs of such activities.

(2) Expenditures for projects whose activities or products target individuals with developmental disabilities who live in urban or rural poverty areas, as determined by the Secretary, but not carried out directly by the Council and Council staff, as described in Section 126(a)(2) of the Act, shall have non-Federal funding of at least 10 percent in the aggregate of the necessary costs of such projects.

(3) All other projects not directly carried out by the Council and Council staff shall have non-Federal funding of at least 25 percent in the aggregate of the necessary costs of such projects.

(e) The Council may vary the non-Federal funding required on a project-by-project, activity-by-activity basis (both poverty and non-poverty activities), including requiring no non-Federal funding from particular projects or activities as the Council deems appropriate so long as the requirement for aggregate non-Federal funding is met.

§ 1386.36 Final disapproval of the State plan or plan amendments.

The Department will disapprove any State plan or plan amendment only after

the following procedures have been complied with:

(a) The State plan has been submitted to ADD Central Office for review. If after contacting the State on issues with the plan with no resolution, a detailed written analysis of the reasons for recommending disapproval shall be prepared and provided to the State Council and State Designated Agency.

(b) Once the Commissioner has determined that the State plan, in whole or in part, is not approvable, notice of this determination shall be sent to the State with appropriate references to the records, provisions of the statute and regulations, and all relevant interpretations of applicable laws and regulations. The notification of the decision must inform the State of its right to appeal in accordance with 45 CFR part 1386, subpart E.

(c) The Commissioner's decision has been forwarded to the State Council and its Designated State Agency by certified mail with a return receipt requested.

(d) A State has filed its request for a hearing with the Assistant Secretary within 21 days of the receipt of the decision. The request for a hearing must be sent by certified mail to the Assistant Secretary. The date of mailing the request is considered the date of filing if it is supported by independent evidence of mailing. Otherwise the date of receipt shall be considered the date of filing.

Subpart E—Practice and Procedure for Hearings Pertaining to State's Conformity and Compliance With Developmental Disabilities State Plans, Reports and Federal Requirements

General

§ 1386.80 Definitions.

For purposes of this Subpart:

Act. The term "Act" means the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 *et seq.*).

ADD. The term "ADD" means the Administration on Developmental Disabilities within the Administration for Children and Families.

Assistant Secretary. The term "Assistant Secretary" means the Assistant Secretary for Children and Families (ACF), Department of Health and Human Services.

Department. The term "Department" means the Department of Health and Human Services.

Payment or Allotment. The term "payment" or "allotment" means an amount provided under part B or C of the Developmental Disabilities Assistance and Bill of Rights Act of

2000. This term includes Federal funds provided under the Act irrespective of whether the State must match the Federal portion of the expenditure. This term shall include funds previously covered by the terms "Federal financial participation," "the State's total allotment," "further payments," "payments," "allotment" and "Federal funds."

Presiding officer. The term "presiding officer" means anyone designated by the Assistant Secretary to conduct any hearing held under this subpart. The term includes the Assistant Secretary if the Assistant Secretary presides over the hearing.

§ 1386.81 Scope of rules.

(a) The rules of procedures in this subpart govern the practice for hearings afforded by the Department to States pursuant to Sections 124, 127 and 143 of the Act (42 U.S.C. 15024, 15027 and 15043).

(b) Nothing in this part is intended to preclude or limit negotiations between the Department and the State, whether before, during, or after the hearing to resolve the issues that are, or otherwise would be, considered at the hearing. Negotiation and resolution of issues are not part of the hearing, and are not governed by the rules in this subpart, except as otherwise provided in this subpart.

§ 1386.82 Records to the public.

All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding are subject to public inspection.

§ 1386.83 Use of gender and number.

As used in this subpart, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing either gender may be applied to the other gender or to organizations.

§ 1386.84 Suspension of rules.

Upon notice to all parties, the Assistant Secretary may modify or waive any rule in this subpart, unless otherwise expressly provided, upon determination that no party will be unduly prejudiced and justice will be served.

§ 1386.85 Filing and service of papers.

(a) All papers in the proceedings must be filed with the designated individual in an original and two copies. Only the originals of exhibits and transcripts of testimony need be filed.

(b) Copies of papers in the proceedings must be served on all

parties by personal delivery or by mail. Service on the party's designated representative is deemed service upon the party.

Preliminary Matters—Notice and Parties

§ 1386.90 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing from the Assistant Secretary to the State Council on Developmental Disabilities and the Designated State Agency, or to the State Protection and Advocacy System or designating official. The notice must state the time and place for the hearing, and the issues that will be considered. The notice must be published in the **Federal Register**.

§ 1386.91 Time of hearing.

The hearing must be scheduled not less than 30 days, nor more than 60 days after the notice of the hearing is mailed to the State.

§ 1386.92 Place.

The hearing must be held on a date and at a time and place determined by the Assistant Secretary with due regard for convenience, and necessity of the parties or their representatives. The site of the hearing shall be accessible to individuals with disabilities.

§ 1386.93 Issues at hearing.

(a) Prior to a hearing, the Assistant Secretary may notify the State in writing of additional issues which will be considered at the hearing. That notice must be published in the **Federal Register**. If that notice is mailed to the State less than 20 days before the date of the hearing, the State or any other party, at its request, must be granted a postponement of the hearing to a date 20 days after the notice was mailed or such later date as may be agreed to by the Assistant Secretary.

(b) If any issue is resolved in whole or in part, but new or modified issues are presented, the hearing must proceed on the new or modified issues.

(c)(1) If at any time, whether prior to, during, or after the hearing, the Assistant Secretary finds that the State has come into compliance with Federal requirements on any issue in whole or in part, he or she must remove the issue from the proceedings in whole or in part as may be appropriate. If all issues are removed the Assistant Secretary must terminate the hearing.

(2) Prior to the removal of an issue, in whole or in part, from a hearing involving issues relating to the conformity with Federal requirements

under part B of the Act, of the State plan or the activities of the State's Protection and Advocacy System, the Assistant Secretary must provide all parties other than the Department and the State (see § 1386.94(b) of this part) with the statement of his or her intention to remove an issue from the hearing and the reasons for that decision. A copy of the proposed State plan provision or document explaining changes in the activities of the State's Protection and Advocacy System on which the State and the Assistant Secretary have settled must be sent to the parties. The parties must have an opportunity to submit in writing within 15 days their views as to, or any information bearing upon, the merits of the proposed provision and the merits of the reasons for removing the issue from the hearing.

(d) In hearings involving questions of noncompliance of a State's operation of its program under part B of the Act, with the State plan or with Federal requirements, or compliance of the State's Protection and Advocacy System with Federal requirements, the same procedure set forth in paragraph (c)(2) of this section must be followed with respect to any report or evidence resulting in a conclusion by the Assistant Secretary that a State has achieved compliance.

(e) The issues considered at the hearing must be limited to those issues of which the State is notified as provided in § 1386.90 and paragraph (a) of this section, and new or modified issues described in paragraph (b) of this section, and may not include issues or parts of issues removed from the proceedings pursuant to paragraph (c) of this section.

§ 1386.94 Request to participate in hearing.

(a) The Department, the State, the State Council on Developmental Disabilities, the Designated State Agency, and the State Protection and Advocacy System, as appropriate, are parties to the hearing without making a specific request to participate.

(b)(1) Other individuals or groups may be recognized as parties if the issues to be considered at the hearing have caused them injury and their interests are relevant to the issues in the hearing.

(2) Any individual or group wishing to participate as a party must file a petition with the designated individual within 15 days after notice of the hearing has been published in the **Federal Register**, and must serve a copy on each party of record at that time in accordance with § 1386.85(b) of this part. The petition must concisely state:

- (i) Petitioner's interest in the proceeding;
- (ii) Who will appear for petitioner;
- (iii) The issues the petitioner wishes to address; and
- (iv) Whether the petitioner intends to present witnesses.

(c)(1) Any interested person or organization wishing to participate as amicus curiae must file a petition with the designated individual before the commencement of the hearing. The petition must concisely state:

- (i) The petitioner's interest in the hearing;
- (ii) Who will represent the petitioner; and
- (iii) The issues on which the petitioner intends to present argument.

(2) The presiding officer may grant the petition if he or she finds that the petitioner has a legitimate interest in the proceedings and that such participation will not unduly delay the outcome and may contribute materially to the proper disposition of the issues.

(3) An amicus curiae may present a brief oral statement at the hearing at the point in the proceedings specified by the presiding officer. It may submit a written statement of position to the presiding officer prior to the beginning of a hearing and must serve a copy on each party. It also may submit a brief or written statement at such time as the parties submit briefs and must serve a copy on each party.

Hearing Procedures

§ 1386.100 Who presides.

(a) The presiding officer at a hearing must be the Assistant Secretary or someone designated by the Assistant Secretary.

(b) The designation of a presiding officer must be in writing. A copy of the designation must be served on all parties and amici curiae.

§ 1386.101 Authority of presiding officer.

(a) The presiding officer has the duty to conduct a fair hearing, avoid delay, maintain order, and make a record of the proceedings. The presiding officer has all powers necessary to accomplish these ends, including, but not limited to, the power to:

- (1) Change the date, time, and place of the hearing, upon notice to the parties. This includes the power to continue the hearing in whole or in part;
- (2) Hold conferences to settle or simplify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceedings;
- (3) Regulate participation of parties and amici curiae and require parties and

amici curiae to state their positions with respect to the issues in the proceeding;

(4) Administer oaths and affirmations;

(5) Rule on motions and other procedural items on matters pending before him or her, including issuance of protective orders or other relief to a party against whom discovery is sought;

(6) Regulate the course of the hearing and conduct of counsel therein;

(7) Examine witnesses;

(8) Receive, rule on, exclude, or limit evidence or discovery;

(9) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him or her;

(10) Make a final decision; and

(11) Take any action authorized by the rules in this subpart or 5 U.S.C. 551–559.

(b) The presiding officer does not have authority to compel the production of witnesses, papers, or other evidence by subpoena.

(c) If the presiding officer is a person other than the Assistant Secretary, he or she shall certify the entire record, including recommended findings and proposed decision, to the Assistant Secretary. His or her authority is to render a recommended decision with respect to program requirements which are to be considered at the hearing. In case of any noncompliance, he or she shall recommend whether payments or allotments should be withheld with respect to the entire State plan or the activities of the State's Protection and Advocacy System, or whether the payments or allotments should be withheld only with respect to those parts of the program affected by such noncompliance.

§ 1386.102 Rights of parties.

All parties may:

(a) Appear by counsel, or other authorized representative, in all hearing proceedings;

(b) Participate in any prehearing conference held by the presiding officer;

(c) Agree to stipulations of facts which will be made a part of the record;

(d) Make opening statements at the hearing;

(e) Present relevant evidence on the issues at the hearing;

(f) Present witnesses who then must be available for cross-examination by all other parties;

(g) Present oral arguments at the hearing; and

(h) Submit written briefs, proposed findings of fact, and proposed conclusions of law, after the hearing.

§ 1386.103 Discovery.

The Department and any party named in the Notice issued pursuant to

§ 1386.90 of this part has the right to conduct discovery (including depositions) against opposing parties as provided by the Federal Rules of Civil Procedure. There is no fixed rule on priority of discovery. Upon written motion, the presiding officer must promptly rule upon any objection to discovery action. The presiding officer also has the power to grant a protective order or relief to any party against whom discovery is sought and to restrict or control discovery so as to prevent undue delay in the conduct of the hearing. Upon the failure of any party to make discovery, the presiding officer may issue any order and impose any sanction other than contempt orders authorized by Rule 37 of the Federal Rules of Civil Procedure.

§ 1386.104 Evidentiary purpose.

The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather, it must be presented in statements, memoranda, or briefs, as directed by the presiding officer. Brief opening statements, which shall be limited to a statement of the party's position and what it intends to prove, may be made at hearings.

§ 1386.105 Evidence.

(a) *Testimony.* Testimony by witnesses at the hearing is given orally under oath or affirmation. Witnesses must be available at the hearing for cross-examination by all parties.

(b) *Stipulations and exhibits.* Two or more parties may agree to stipulations of fact. Such stipulations, or any exhibit proposed by any party, must be exchanged at the prehearing conference or at a different time prior to the hearing if the presiding officer requires it.

(c) *Rules of evidence.* Technical rules of evidence do not apply to hearings conducted pursuant to this subpart, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination are applied where reasonably necessary by the presiding officer. A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his or her direct examination. The presiding officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record is open to examination by the parties and opportunity must be given to refute facts and arguments advanced on either side of the issues.

§ 1386.106 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or rebellious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at the hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

§ 1386.107 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing is placed in the correspondence section of the docket of the proceeding. This material is not deemed part of the evidence or record in the hearing.

§ 1386.108 Official transcript.

The Department will designate the official reporter for all hearings. The official transcript of testimony taken, together with any stipulations, exhibits, briefs, or memoranda of law filed with them is filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance. Transcripts must be taken by stenotype machine and not be voice recording devices, unless otherwise agreed by all of the parties and the presiding officer.

§ 1386.109 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision, constitute the exclusive record for decision.

Posthearing Procedures, Decisions

§ 1386.110 Posthearing briefs.

The presiding officer must fix the time for filing posthearing briefs. This time may not exceed 30 days after termination of the hearing and receipt of the transcript. Briefs may contain proposed findings of fact and conclusions of law. If permitted, reply briefs may be filed no later than 15 days after filing of the posthearing briefs.

§ 1386.111 Decisions following hearing.

(a) If the Assistant Secretary is the presiding officer, he or she must issue a decision within 60 days after the time

for submission of posthearing briefs has expired.

(b)(1) If the presiding officer is a person designated by the Assistant Secretary, he or she must, within 30 days after the time for submission of posthearing briefs has expired, certify the entire record to the Assistant Secretary including the recommended findings and proposed decision.

The Assistant Secretary must serve a copy of the recommended findings and proposed decision upon all parties and amici.

(2) Any party may, within 20 days, file exceptions to the recommended findings and proposed decision and supporting brief or statement with the Assistant Secretary.

(3) The Assistant Secretary must review the recommended decision and, within 60 days of its issuance, issue his or her own decision.

(c) If the Assistant Secretary concludes:

(1) In the case of a hearing pursuant to Sections 124, 127, or 143 of the Act, that a State plan or the activities of the State's Protection and Advocacy System does not comply with Federal requirements, he or she shall also specify whether the State's payment or allotment for the fiscal year will not be authorized for the State or whether, in the exercise of his or her discretion, the payment or allotment will be limited to the parts of the State plan or the activities of the State's Protection and Advocacy System not affected by the noncompliance.

(2) In the case of a hearing pursuant to Section 127 of the Act that the State is not complying with the requirements of the State plan, he or she also must specify whether the State's payment or allotment will be made available to the State or whether, in the exercise of his or her discretion, the payment or allotment will be limited to the parts of the State plan not affected by such noncompliance. The Assistant Secretary may ask the parties for recommendations or briefs or may hold conferences of the parties on these questions.

(d) The decision of the Assistant Secretary under this section is the final decision of the Secretary and constitutes "final agency action" within the meaning of 5 U.S.C. 704 and the "Secretary's action" within the meaning of Section 128 of the Act (42 U.S.C. 15028). The Assistant Secretary's decision must be promptly served on all parties and amici.

§ 1386.112 Effective date of decision by the Assistant Secretary.

(a) If, in the case of a hearing pursuant to Section 124 of the Act, the Assistant Secretary concludes that a State plan does not comply with Federal requirements, and the decision provides that the payment or allotment will be authorized but limited to parts of the State plan not affected by such noncompliance, the decision must specify the effective date for the authorization of the payment or allotment.

(b) In the case of a hearing pursuant to Sections 127 or 143 of the Act, if the Assistant Secretary concludes that the State is not complying with the requirements of the State plan or if the activities of the State's Protection and Advocacy System do not comply with Federal requirements, the decision that further payments or allotments will not be made to the State, or will be limited to the parts of the State plan or activities of the State Protection and Advocacy System not affected, must specify the effective date for withholding payments or allotments.

(c) The effective date may not be earlier than the date of the decision of the Assistant Secretary and may not be later than the first day of the next calendar quarter.

(d) The provision of this section may not be waived pursuant to § 1386.84.

3. Revise part 1387 to read as follows.

PART 1387—PROJECTS OF NATIONAL SIGNIFICANCE**Section Contents**

Sec.

1387.1 General requirements.

Authority: 42 U.S.C. 15001 *et seq.*

§ 1387.1 General requirements.

(a) All projects funded under this part must be of national significance and serve or relate to individuals with developmental disabilities to comply with subtitle E of the Act, Sections 161–162 (42 U.S.C. 15081–15083).

(b) The requirements concerning format and content of the application, submittal procedures, eligible applicants, and final priority areas will be published in program announcements in the **Federal Register**.

(c) In general, Projects of National Significance provide technical assistance, collect data, demonstrate exemplary and innovative models, disseminate knowledge at the local and national levels, and otherwise meet the goals of Projects of National Significance Section 161 (42 U.S.C. 15081).

(d) Projects of National Significance may engage in one or more of the types of activities provided in Section 161(2) of the statute.

(e) In general, eligible applicants for PNS funding are public and private non-profit entities, 42 U.S.C. 15082, such as institutions of higher learning, State and local governments, and tribal governments. The program announcements will specifically state any further eligibility requirements for the priority areas in the fiscal year.

(f) Faith-based organizations are eligible to apply for PNS funding, providing that the faith-based organizations meet the specific eligibility criteria contained in the program announcement for the fiscal year.

4. Revise part 1388 to read as follows.

PART 1388—THE NATIONAL NETWORK OF UNIVERSITY CENTERS FOR EXCELLENCE IN DEVELOPMENTAL DISABILITIES EDUCATION, RESEARCH, AND SERVICE**Section Contents**

Sec.

1388.1 Purpose.

1388.2 Core functions.

1388.3 National Training Initiatives on Critical and Emerging Needs.

1388.4 Applications.

1388.5 Five-year plan and annual report.

Authority: 42 U.S.C. 15001 *et seq.*

§ 1388.1 Purpose.

(a) The Administration on Developmental Disabilities awards grants to eligible entities designated as Centers in each State to pay for the Federal share of the cost of the administration and operation of the Centers. Centers shall:

(1) Provide leadership in, advise Federal, State, and community policymakers about, and promote opportunities for individuals with developmental disabilities to exercise self-determination, be independent, be productive, and be integrated and included in all facets of community life.

(2) Be interdisciplinary education, research, and public service units of universities (as defined by the Secretary) or public or not-for-profit entities associated with universities that engage in core functions, described in § 1388.2 of this part, addressing, directly or indirectly, one or more of the areas of emphasis, as defined in § 1385.3.

(b) To conduct National Training Initiatives on Critical and Emerging Needs as described in § 1388.3.

§ 1388.2 Core functions.

The Centers described in § 1388.1(a)(1) and (2) must engage in the core functions referred to in § 1388.1(a)(2), which shall include—

(a) Provision of interdisciplinary pre-service preparation and continuing education of students and fellows, which may include the preparation and continuing education of leadership, direct service, clinical, or other personnel to strengthen and increase the capacity of States and communities to achieve the purpose of the DD Act of 2000.

(b) *Provision of community services.*

(1) That provide training or technical assistance for individuals with developmental disabilities, their families, professionals, paraprofessionals, policymakers, students, and other members of the community; and

(2) That may provide services, supports, and assistance for the persons listed in (b)(1) through demonstration and model activities.

(c) Conduct of research, which may include basic or applied research, evaluation, and the analysis of public policy in areas that affect or could affect, either positively or negatively, individuals with developmental disabilities and their families.

(d) Dissemination of information related to activities undertaken to address the purpose of the DD Act of 2000, especially dissemination of information that demonstrates that the network authorized under subtitle D is a national and international resource that includes specific substantive areas of expertise that may be accessed and applied in diverse settings and circumstances.

§ 1388.3 National Training Initiatives on Critical and Emerging Needs.

(a) Supplemental grant funds for National Training Initiatives (NTIs) on Critical and Emerging Needs will be reserved when each Center described in Section 152 of the DD Act has received a grant award of at least \$500,000, adjusted for inflation.

(b) The grants shall be awarded to Centers to pay for the Federal share of the cost of training initiatives related to the unmet needs of individuals with developmental disabilities and their families.

(c) The grants shall be awarded on a competitive basis, and for periods of not more than 5 years.

§ 1388.4 Applications.

(a) To be eligible to receive a grant under § 1388.1 for a Center, an entity shall submit to the Secretary, and obtain

approval of, an application at such time, in such manner, and containing such information, as the Secretary may require.

(b) Each application shall describe a five-year plan, that must include—

(1) Projected goal(s) related to one or more areas of emphasis described in § 1385.3 for each of the core functions.

(2) Measures of progress (measures of consumer satisfaction, improvement, and collaboration) it has established, pursuant to § 1385.5.

(c) The application shall contain or be supported by reasonable assurances that the entity designated as the Center will—

(1) Meet the measures of progress (measures of consumer satisfaction, improvement, and collaboration); and

(2) Address the projected goals, and carry out goal-related activities, based on data driven strategic planning and in a manner consistent with the objectives of subtitle D, that—

(i) Are developed in collaboration with the consumer advisory committee established pursuant to paragraph (5);

(ii) Are consistent with, and to the extent feasible complement and further, the Council goals contained in the State plan submitted under Section 124 of the DD Act of 2000 and the goals of the P&A System established under Section 143 of the DD Act of 2000; and

(iii) Will be reviewed and revised annually as necessary to address emerging trends and needs.

(3) Use the funds made available through the grant to supplement, and not supplant, the funds that would otherwise be made available for activities described in § 1388.1(a)(1) and (2) of this part.

(4) Protect, consistent with the policy specified in Section 101(c) of the DD Act of 2000 (U.S.C. 15001) (relating to rights of individuals with developmental disabilities), the legal and human rights of all individuals with developmental disabilities (especially those individuals under State guardianship who are involved in activities carried out under programs assisted under subtitle D).

(5) Establish a consumer advisory committee—

(i) Of which a majority of the members shall be individuals with developmental disabilities and family members of such individuals;

(ii) That is comprised of—

(A) Individuals with developmental disabilities and related disabilities;

(B) Family members of individuals with developmental disabilities;

(C) A representative of the State Protection and Advocacy System;

(D) A representative of the State Council on Developmental Disabilities;

(E) A representative of a self-advocacy organization described in Section 124(c)(4)(A)(ii)(I) of the DD Act of 2000 (42 U.S.C. § 15024(c)(4)(A)(ii)(I)); and

(F) Representatives of organizations that may include parent training and information centers assisted under Section 671 or 672 of the Individuals with Disabilities Education Act (20 U.S.C. 1471, 1472), entities carrying out activities authorized under Section 104 or 105 of the Assistive Technology Act of 1998 (29 U.S.C. 3003, 3004), relevant State agencies, and other community groups concerned with the welfare of individuals with developmental disabilities and their families.

(iii) That reflects the racial and ethnic diversity of the State;

(iv) That shall—

(A) Consult with the Director of the Center regarding the development of the five-year plan;

(B) Participate in an annual review of, and comment on, the progress of the Center in meeting the projected goals contained in the plan;

(C) Make recommendations to the Director of the Center regarding any proposed revisions of the plan that might be necessary; and

(v) Meet as often as necessary to carry out the role of the committee, but at a minimum twice during each grant year.

(6) To the extent possible, utilize the infrastructure and resources obtained through funds made available under the grant to leverage additional public and private funds to successfully achieve the projected goals developed in the five-year plan;

(7)(i) Have a director with appropriate academic credentials, demonstrated leadership, expertise regarding developmental disabilities, significant experience in managing grants and contracts, and the ability to leverage public and private funds; and

(ii) Allocate adequate staff time to carry out activities related to each of the core functions described in § 1388.2.

(8) Educate, and disseminate information related to the purpose of the DD Act of 2000 to the legislature of the State in which the Center is located, and to Members of Congress from such State.

(d)(1) All applications submitted under this section shall be subject to technical and qualitative review by peer review groups as described under § 1388.4(c)(2) of this part.

(2) Each peer review group shall include such individuals with disabilities and parents, guardians, or advocates of or for individuals with developmental disabilities, as are necessary to carry out this section.

(e)(1) The Federal share of the cost of administration or operation of a Center,

or the cost of carrying out a training initiative, supported by a grant made under this subtitle D may not be more than 75 percent of the necessary cost of such project, as determined by the Secretary.

(2) In the case of a project whose activities or products target individuals with developmental disabilities who live in an urban or rural poverty area, as determined by the Secretary, the Federal share of the cost of the project may not be more than 90 percent of the necessary costs of the project, as determined by the Secretary.

(3) For the purpose of determining the Federal share with respect to the project, expenditures on that project by a political subdivision of a State or by a public or private entity shall be subject to the provisions of 45 CFR part 93 New Restrictions on Lobbying (also see § 1385.9 Grants administration) and must be considered as an expenditure of the Center under subtitle D.

§ 1388.5 Five-year plan and annual report.

(a) As required by Section 154(a)(2) of the DD Act of 2000, (42 U.S.C. 15064), the application for core funding for a UCEDD shall describe a five-year plan, including a projected goal or goals related to one or more areas of emphasis for each of the core functions in Section 153(a)(2) of the DD Act of 2000 (42 U.S.C. 15063).

(1) For each area of emphasis under which a goal has been identified, the UCEDD must state in its application the measures of progress (consumer satisfaction, improvement and collaboration) it has established, pursuant to § 1385.5 of this part.

(2) If changes are made to the measures of progress established for a year, the five-year plan must be amended to reflect those changes.

(3) By July 31 of each year, a UCEDD shall submit an Annual Report, using the system established by ADD. In order to be accepted by ADD, an Annual Report must meet the requirements of Section 154(e) of the Act (42 U.S.C. 15064) and, the applicable regulations, and include the information necessary for the Secretary to comply with Section 105(1), (2), and (3) of the Act (42 U.S.C. 15005) and any other information requested by ADD. The Report shall include information on progress made in achieving the UCEDDs goals for the previous year, including:

(i) The extent to which the goals were achieved;

(ii) A description of the strategies that contributed to achieving the goals;

(iii) To the extent to which the goals were not achieved, a description of

factors that impeded the achievement; and

(iv) an accounting of the manner in which funds paid to the UCEDD for a fiscal year were expended.

(4) The Report also must include information on proposed revisions to the goals and a description of successful efforts to leverage funds, other than funds under the Act, to pursue goals consistent with the UCEDD program.

(5) Each UCEDD must include in its Annual Report information on its achievement of the measures of progress established in § 1385.5 of this part.

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Executive orders and proclamations **741-6000****The United States Government Manual** **741-6000**

Other Services

Electronic and on-line services (voice) **741-6020**Privacy Act Compilation **741-6064**Public Laws Update Service (numbers, dates, etc.) **741-6043**TTY for the deaf-and-hard-of-hearing **741-6086**

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FEDERAL REGISTER PAGES AND DATE, APRIL

17241-17880.....	1
17881-18148.....	2
18149-18432.....	3
18433-18700.....	4
18701-18942.....	7
18943-19138.....	8
19139-19388.....	9
19389-19742.....	10

CFR PARTS AFFECTED DURING APRIL

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:

7746 (See 8228).....18141
 7747 (See 8228).....18141
 7987 (See 8228).....18141
 8097 (See 8228).....18141
 8214 (See 8228).....18141
 8228.....18141
 8229.....18425
 8230.....18427
 8231.....18429
 8232.....18431
 8233.....19387

Executive Orders:

11651 (See
 Proclamation
 8228).....18141

Administrative Orders:

Presidential
 Determinations:
 No. 2008-15 of March
 19, 2008.....17241
 No. 2008-17 of March
 28, 2008.....17879
 No. 2008-16 of March
 24, 2008.....18147

Administrative Orders:

Presidential
 Determinations:
 No. 2008-15 of March
 19, 2008.....17241
 No. 2008-17 of March
 28, 2008.....17879
 No. 2008-16 of March
 24, 2008.....18147

19, 2008.....17241
 No. 2008-17 of March
 28, 2008.....17879
 No. 2008-16 of March
 24, 2008.....18147

5 CFR

630.....18943
 1201.....18149
 7401.....18944

7 CFR

1.....18433
 301.....18701
 457.....17243
 983.....18703

Proposed Rules:

301.....17930
 319.....17930
 1980.....19443

8 CFR

212.....18384
 214.....18944
 235.....18384
 274a.....18944

9 CFR

77.....19139
 94.....17881

10 CFR

Proposed Rules:

50.....19443
 431.....18858

12 CFR

268.....17885

14 CFR

39.....18433, 18706

61.....17243
 71.....17887, 17888, 18151,
 18436, 18437, 18438, 18439,
 18956, 18957, 19143
 97.....18152

Proposed Rules:

39.....17258, 17260, 17935,
 17937, 18220, 18461, 18719,
 18721, 18722, 18725, 19015,
 19017
 71.....18222, 19019, 19174

16 CFR

Proposed Rules:

303.....18727
 305.....17263

17 CFR

200.....17810
 239.....17810
 240.....17810

18 CFR

35.....17246
 158.....19389
 260.....19389

21 CFR

210.....18440
 211.....18440
 510.....18441
 520.....18441
 522.....17890
 526.....18441
 558.....18441, 18958, 19432

Proposed Rules:

1308.....19175

22 CFR

41.....18384
 53.....18384
 309.....18154

25 CFR

Proposed Rules:

26.....19179
 27.....19179

26 CFR

1.....18159, 18160, 18708,
 18709, 19350
 301.....18442, 19350
 602.....18709

Proposed Rules:

1.....18729, 19450, 19451
 31.....18729

30 CFR

756.....17247

Proposed Rules:

938.....17268

31 CFR	60.....18162	44 CFR	52.....19035
Proposed Rules:	61.....18162	62.....18182	53.....17945, 19035
103.....19452	62.....18968	64.....17928, 18188	1633.....18729
32 CFR	63.....17252, 18169, 18970	67.....18189, 18197, 19161	2133.....18730
Proposed Rules:	81.....17897	Proposed Rules:	
199.....17271	180.....17906, 17910, 17914, 17918, 19147, 19150, 19154	67.....18230, 18243, 18246	49 CFR
33 CFR	230.....19594	45 CFR	Proposed Rules:
117.....17249, 17250, 18960, 18961	264.....18970	801.....18715	171.....17818
165.....18961	266.....18970	Proposed Rules:	173.....17818
325.....19594	271.....17924, 18172	1385.....19708	174.....17818
332.....19594	Proposed Rules:	1386.....19708	179.....17818
Proposed Rules:	52.....17289, 17939, 18466, 19034	1387.....19708	383.....19282
165.....18222, 18225	62.....19035	1388.....19708	384.....19282
36 CFR	63.....17292, 17940, 18229, 18334	47 CFR	385.....19282
242.....18710, 19433	141.....19320	54.....19437	50 CFR
1253.....18160	271.....17944, 18229	101.....18443	17.....17782
Proposed Rules:	41 CFR	Proposed Rules:	100.....18710, 19433
1280.....18462	60-250.....18712	73.....18252	223.....18984
38 CFR	42 CFR	48 CFR	226.....19000
Proposed Rules:	422.....18176	Proposed Rules:	229.....19171
5.....19021	423.....18176, 18918	2.....17945	622.....18717
40 CFR	Proposed Rules:	9.....17945	648.....18215, 18443, 19439
49.....18161	431.....18676	13.....17945	665.....18450, 18717
52.....17890, 17893, 17896, 18963, 19144	440.....18676	17.....17945	679.....18219, 19172, 19442
	441.....18676	32.....19035	Proposed Rules:
		36.....17945	300.....18473
		42.....17945	622.....18253, 19040
		43.....19035	635.....18473
			648.....18483
			697.....18253

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT APRIL 10, 2008**COMMERCE DEPARTMENT
National Oceanic and Atmospheric Administration**

Fisheries of the Exclusive Economic Zone Off Alaska: Prohibited Species Bycatch Management; published 3-11-08

ENERGY DEPARTMENT**Federal Energy Regulatory Commission**

Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines; published 4-10-08

ENVIRONMENTAL PROTECTION AGENCY

Approval and Promulgation of Air Quality Implementation Plans:

Wisconsin; published 3-11-08

HEALTH AND HUMAN SERVICES DEPARTMENT**Food and Drug Administration**

New Animal Drugs For Use in Animal Feed; Zilpaterol; published 4-10-08

HOMELAND SECURITY DEPARTMENT**Coast Guard**

Drawbridge Operation Regulations:

Bonfouca Bayou, Slidell, LA.; published 3-11-08

Liberty Bayou, Slidell, LA.; published 3-11-08

Tchefuncta River, Madisonville, LA.; published 3-11-08

Final Rule:

Special Local Regulations Concerning Fireworks; published 3-11-08

TRANSPORTATION DEPARTMENT**Federal Aviation Administration**

Airworthiness Directives:

Avidyne Corporation Primary Flight Displays; published 3-26-08

Hawker Beechcraft Corporation Models B200, B200GT, B300, and

B300C Airplanes; published 4-7-08

Class E Airspace; published 2-21-08

Class E Airspace:

Black River Falls, WI; published 2-11-08

Lexington, OK; published 2-11-08

Class E Airspace; correction; published 2-4-08

Class E Airspace; Correction; published 2-21-08

Class E Airspace; Establishment:

Emporium, PA; published 1-30-08

Lewistown, PA; published 1-30-08

Marienville, PA; published 1-30-08

New Albany, MS; published 1-30-08

Class E Airspace; Proposed Establishment:

Huntsville, AR; published 4-9-08

Establishment of Class E Airspace

Wheatland, WY; published 1-8-08

Establishment of Class E Airspace; Huntsville, AR; published 2-15-08

Establishment of Class E Airspace; Lexington, OK; published 2-15-08

IFR Altitudes; Miscellaneous Amendments; published 3-18-08

Jet routes; published 10-10-07

Restricted Areas R-5303A etc.; Using Agencies Amendment; published 2-14-08

**TREASURY DEPARTMENT
Alcohol and Tobacco Tax and Trade Bureau**

Establishment of the Lehigh Valley Viticultural Area; published 3-11-08

Expansion of the Alexander Valley Viticultural Area; published 3-11-08

Expansion of the San Francisco Bay Viticultural Area; published 3-11-08

COMMENTS DUE NEXT WEEK**AGRICULTURE DEPARTMENT****Agricultural Marketing Service**

Increased Assessment Rate; Vidalia Onions Grown in Georgia; comments due by 4-17-08; published 3-18-08 [FR E8-05358]

AGRICULTURE DEPARTMENT**Animal and Plant Health Inspection Service**

Animal Welfare; Climatic and Environmental Conditions for Transportation of Warmblooded Animals Other Than Marine Mammals; comments due by 4-17-08; published 3-18-08 [FR E8-05394]

DEFENSE DEPARTMENT

Federal Acquisition Regulation:

Agency Information

Collection Activities;

Proposals, Submissions, and Approvals; comments due by 4-17-08; published 3-18-08 [FR E8-05396]

ENERGY DEPARTMENT

Energy Conservation Program:

Energy Conservation

Standards for General

Service Fluorescent

Lamps and Incandescent

Reflector Lamps;

comments due by 4-14-08; published 3-13-08 [FR E8-04018]

ENVIRONMENTAL PROTECTION AGENCY

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Revisions to Particulate Matter Rules; comments due by 4-14-08; published 3-14-08 [FR E8-05053]

Approval and Promulgation of Air Quality Implementation Plans:

Indiana; comments due by 4-17-08; published 3-18-08 [FR E8-05287]

Environmental Statements; Notice of Intent:

Coastal Nonpoint Pollution Control Programs; States and Territories—

Florida and South Carolina; Open for comments until further notice; published 2-11-08 [FR 08-00596]

In-Use Testing for Heavy-Duty Diesel Engines and Vehicles:

Emission Measurement

Accuracy Margins for

Portable Emission

Measurement Systems

and Program Revisions;

comments due by 4-14-08; published 3-13-08 [FR E8-04388]

Napropamide; Request to Voluntarily Amend to

Terminate Uses of

Napropamide Pesticide

Registrations; comments

due by 4-18-08; published 3-19-08 [FR E8-05294]

National Priorities List;

comments due by 4-18-08; published 3-19-08 [FR E8-05559]

Outer Continental Shelf Air Regulations Update to Include New York State Requirements; comments due by 4-14-08; published 3-14-08 [FR 08-01020]

FEDERAL DEPOSIT INSURANCE CORPORATION

Processing of Deposit

Accounts in the Event of an

Insured Depository

Institution Failure and Large-

Bank Deposit Insurance

Determination Modernization;

comments due by 4-14-08; published 1-14-08 [FR E8-00273]

GENERAL SERVICES ADMINISTRATION

Federal Acquisition Regulation:

Agency Information

Collection Activities;

Proposals, Submissions,

and Approvals; comments

due by 4-17-08; published

3-18-08 [FR E8-05396]

HEALTH AND HUMAN SERVICES DEPARTMENT**Centers for Medicare & Medicaid Services**

Medicaid Program:

Multiple Source Drug

Definition; comments due

by 4-14-08; published 3-

14-08 [FR 08-01022]

HEALTH AND HUMAN SERVICES DEPARTMENT**Patient Safety and Quality Improvement**

Improvement; comments

due by 4-14-08; published

2-12-08 [FR E8-02375]

HOMELAND SECURITY DEPARTMENT**Coast Guard**

Anchorage Regulations:

Boston Harbor, MA,

Weymouth Fore River;

comments due by 4-14-

08; published 2-14-08 [FR

E8-02692]

Stonington Maine, Deer

Island Thorofare,

Penobscot Bay, ME;

comments due by 4-14-

08; published 2-14-08 [FR

E8-02693]

HOMELAND SECURITY DEPARTMENT**Federal Emergency Management Agency**

Proposed Flood Elevation

Determinations; comments

due by 4-15-08; published

1-16-08 [FR E8-00725]

HOMELAND SECURITY DEPARTMENT**U.S. Citizenship and Immigration Services**

Changes to Requirements

Affecting H-2A

Nonimmigrants; comments due by 4-14-08; published 3-31-08 [FR E8-06605]

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

Real Estate Settlement Procedures Act Website Complaint Questionnaire; comments due by 4-17-08; published 3-18-08 [FR E8-05435]

LABOR DEPARTMENT Labor-Management Standards Office

Labor Organization Annual Financial Reports; comments due by 4-18-08; published 3-4-08 [FR E8-03853]

MANAGEMENT AND BUDGET OFFICE

Federal Procurement Policy Office

Cost Accounting Standards Board; Allocation of Home Office Expenses to Segments; comments due by 4-14-08; published 2-13-08 [FR E8-02666]

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Federal Acquisition Regulation: Agency Information Collection Activities; Proposals, Submissions, and Approvals; comments due by 4-17-08; published 3-18-08 [FR E8-05396]

OFFICE OF UNITED STATES TRADE REPRESENTATIVE Trade Representative, Office of United States

Freedom of Information Act; comments due by 4-14-08; published 2-14-08 [FR E8-02254]

POSTAL SERVICE

Letter-Size Booklets and Folded Self-Mailers;

comments due by 4-14-08; published 3-14-08 [FR E8-05094]

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; Proposed Rule Changes: NASDAQ Stock Market LLC; comments due by 4-16-08; published 3-26-08 [FR E8-06127]

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness Directives:

Agusta S.p.a. Model A109E and A119 Helicopters; comments due by 4-18-08; published 3-19-08 [FR E8-05495]

ATR Model ATR42 200, 300, 320, 500 Airplanes; and Model ATR72 101, 201, 102, 202, 211, 212, and 212A Airplanes; comments due by 4-14-08; published 3-13-08 [FR E8-05003]

BAE Systems (Operations) Limited (Jetstream) Model 4101 Airplanes; comments due by 4-14-08; published 3-13-08 [FR E8-05000]

Boeing Model 747 400, 747 400D, and 747 400F Series Airplanes; comments due by 4-14-08; published 3-13-08 [FR E8-05013]

Dassault Model Falcon 2000 Airplanes; comments due by 4-14-08; published 3-13-08 [FR E8-04999]

Dassault Model Falcon 2000EX Airplanes; comments due by 4-14-08; published 3-13-08 [FR E8-05006]

Dassault Model Falcon 2000EX and 900EX

Airplanes; comments due by 4-17-08; published 3-18-08 [FR E8-05371]

Dassault Model Mystere Falcon 20 C5, 20 D5, and 20 E5 Airplanes; comments due by 4-14-08; published 3-13-08 [FR E8-05016]

Dornier Model 328 100 Airplanes; comments due by 4-14-08; published 3-13-08 [FR E8-04996]

Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB etc.; comments due by 4-14-08; published 3-13-08 [FR E8-05002]

Gulfstream Aerospace LP Model Astra SPX and 1125 Westwind Astra Airplanes and Gulfstream 100 Airplanes; comments due by 4-14-08; published 3-14-08 [FR E8-05147]

Gulfstream Aerospace LP Model Galaxy Airplanes and Gulfstream 200 Airplanes; comments due by 4-14-08; published 3-13-08 [FR E8-05015]

Pilatus Aircraft Ltd. Models PC-12, PC-12/45, and PC-12/47 Airplanes; comments due by 4-14-08; published 3-13-08 [FR E8-05008]

Short Brothers Model SD3-60 Airplanes; comments due by 4-14-08; published 2-29-08 [FR E8-03825]

Establishment of Class D Airspace:

San Bernardino International Airport, San Bernardino, CA; comments due by 4-14-08; published 3-14-08 [FR E8-04941]

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current

session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202-741-6043. This list is also available online at <http://www.archives.gov/federal-register/laws.html>.

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S. 2733/P.L. 110-198

Higher Education Extension Act of 2008 (Mar. 24, 2008; 122 Stat. 656)

Last List March 18, 2008

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